

NO. 37082-4-II

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

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ELDER DEMOLITION,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND  
INDUSTRIES,

Respondent.

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DIVISION II  
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**BRIEF OF RESPONDENT**

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**ORIGINAL**

**TABLE OF CONTENTS**

I. Introduction ..... 1

II. Counterstatement of Issues..... 1

III. Counterstatement Of the Case ..... 3

    A. Facts ..... 3

        1. Circumstances prior to initiation of the Department’s inspection 3

        2. The Department’s inspection and follow-up..... 9

    B. Proceedings Below..... 13

IV. Argument..... 16

    A. Standard Of Review..... 16

    B. WISHA Must Be Liberally Construed To Further Worker Health  
    And Safety ..... 17

    C. The Department’s Interpretation of Rules Should Be Accorded  
    Deference. .... 18

        1. Elder affirmatively argued to the Superior Court that it  
        committed serious violations and therefore has waived that  
        argument..... 19

        2. Elder concedes in its Brief of Appellant that it committed a  
        serious violation..... 21

        3. Substantial evidence supports the Board’s finding 21 that Elder  
        had constructive knowledge of the lead violation..... 22

            a. Elder acted with complete disregard to its own written lead  
            program and the regulatory requirements of which it was fully  
            aware..... 23

            b. Project Manager Kackman knew that lead might be present at  
            the job site prior to starting torch cutting..... 25

            c. Project Manager Kackman’s knowledge is Elder’s knowledge  
            under RCW 49.17.180(6)..... 25

        4. Elder employees were exposed to lead concentrations above the  
        PEL ..... 29

    D. The Board Correctly Determined That The Violation Was  
    Willful.....31

1. Substantial evidence supports the Board’s finding 18 on willfulness .....	31
2. Willfulness includes plain indifference.....	32
3. Under the plain indifference test, actual knowledge is not required .....	34
4. Elder’s State Of Mind Was One Of Indifference.....	37
5. Elder’s actions constitute a willful violation.....	41
V. CONCLUSION .....	43

## TABLE OF AUTHORITIES

### Cases

<i>A.E. Staley Mfg. Co. v. Sec’y of Labor</i> , 295 F.3d 1341, 19 OSHC 1937, OSHD (1st Cir. 2002); (citing <i>Sec’y of Labor v. A.E. Staley Mfg. Co.</i> , 19 OSHC 1199, 1202, OSHD (2000), 2000 WL 1535899 (O.S.H.R.C.) .....	35, 36
<i>Aviation West Corp. v. Dep’t of Labor &amp; Indus.</i> , 138 Wn.2d 413, 980 P.2d 701 (1999).....	18
<i>BD Roofing, Inc. v. Dep’t of Labor &amp; Indus.</i> , 139 Wn. App. 98, 161 P.3d 387 (2007) .....	17
<i>Beaupre v. Pierce Cy.</i> , 161 Wn.2d 568, 166 P.3d 712 (2007).....	28
<i>Biermann v. City of Spokane</i> , 90 Wn. App. 816, 960 P.2d 434 (1998).....	16
<i>Brennan v. Occupational Safety &amp; Health Rev. Comm’n</i> , 511 F.2d 1139 (9 <sup>th</sup> Cir. 1975) .....	28
<i>Brock v. L.E. Myers Co.</i> , 818 F.2d 1270 (6 <sup>th</sup> Cir. 1987) .....	28
<i>Capital Elec. Line Builders of Kansas, Inc. v. Marshall</i> , 678 F.2d 128 (10 <sup>th</sup> Cir. 1982) .....	27, 28
<i>Fluor Daniel v. Occupational Safety &amp; Health Review Comm’n</i> , 295 F.3d 1232 (11 <sup>th</sup> Cir. 2002) .....	32, 33, 34
<i>Georgia Elec. Co. v. Marshall</i> , 595 F.2d 309 (5 <sup>th</sup> Cir. 1979) .....	32
<i>Horne Plumbing &amp; Heating Co. v. Occupational Safety &amp; Health Rev. Comm’n</i> , 528 F.2d 564 (5 <sup>th</sup> Cir. 1976) .....	27, 28
<i>In re Cam Constr.</i> , BIIA Dec., 90 W060 (1992), 1992 WL 52455 .....	34
<i>In re The Erection Co. (II)</i> , BIIA Dec., 88 W142 (1990), 1990 WL 255020 .....	32
<i>Inland Foundry v. Dep’t of Labor &amp; Indus.</i> , 106 Wn. App. 333, 24 P.3d 424 (2001).....	17, 18
<i>Kaiser Aluminum v. Pollution Control Hearings Bd.</i> , 33 Wn. App. 352, 654 P.2d 723 (1982).....	19
<i>Keen v. O’Rourke</i> , 48 Wn.2d 1, 290 P.2d 976 (1955).....	20
<i>L.R. Willson &amp; Sons v. Occupational Safety &amp; Health Review Comm’n</i> , 134 F.3d 1235 (4 <sup>th</sup> Cir. 1998) .....	26, 28

<i>Lee Cook Trucking &amp; Logging v. Dep't of Labor &amp; Indus.</i> , 109 Wn. App. 471, 36 P.3d 558 (2001) .....	18, 19
<i>Martinez Melgoza v. Dep't of Labor &amp; Indus.</i> , 125 Wn. App. 843, 106 P.3d 776, (2005), <i>review denied</i> , 155 Wn.2d 1015, 124 P.3d 304 (2005).....	17
<i>Pennsylvania. Power &amp; Light Co. v. Occupational Safety &amp; Health Review Comm'n</i> , 737 F.2d 350 (3d Cir. 1984).....	26, 28
<i>Stute v. P.B.M.C.</i> , 114 Wn.2d 454, 788 P.2d 545 (1990).....	17
<i>United States v. Dye Constr. Co.</i> , 510 F.2d 78 (10 <sup>th</sup> Cir. 1975) .....	34
<i>Washington Cedar &amp; Supply Co., Inc. v. Dep't of Labor &amp; Indus.</i> , 119 Wn. App. 906, 83 P.3d 1012 (2003).....	17, 22, 23, 28

**Statutes**

RCW 49.17 .....	32
RCW 49.17.010 .....	17
RCW 49.17.050(2).....	18
RCW 49.17.120(5).....	28
RCW 49.17.150 .....	16
RCW 49.17.150(1).....	16
RCW 49.17.180 .....	2, 22
RCW 49.17.180(1).....	3, 17, 21
RCW 49.17.180(6).....	passim

**Regulations**

WAC 296-155-17607(1).....	12, 30
WAC 296-155-17609(2)(e)(i).....	8
WAC 296-155-17623(1)(a) .....	13

**Rules**

CR 8(c).....	27, 28, 29
RAP 10.3(a)(4).....	21
RAP 2.5(a) .....	20

**Other Authorities**

<i>Sec'y of Labor v. A.P. O'Horo Co.</i> , 14 OSHC 2004, OSHD (1991), 1991 WL 25318 (O.S.H.R.C.).....	32
<i>Sec'y of Labor v. Anderson Excavating &amp; Wrecking Co.</i> , 17 OSHC 1890, OSHD (1995-1997), 1997 WL 37067 (O.S.H.R.C.): <i>aff'd</i> 131 F.3d 1254 (8th Cir. 1997) .....	32

<i>Sec'y of Labor v. Asbestos Textile Co., Inc.</i> , 12 BNA OSHC 1062, 1984-85 CCH OSHD 27,101, p. 34,948 (No. 79-3831, 1984) 1984 WL 34962 .....	37
<i>Sec'y of Labor v. Beta Constr. Co.</i> , 16 BNA OSHC 1435, 1993-95 CCH OSHD ¶ 30,239, pp. 41,652-53, 1993 WL 230104 (No. 91-102, 1993), <i>aff'd without published opinion</i> , 52 F.3d 1122 (D.C. Cir. 1995).....	37
<i>Sec'y of Labor v. Falcon Steel Co.</i> , 16 OHSC 1179, OSHD (1993), 1993 WL 155690 (O.S.H.R.C.).....	32, 34, 35
<i>Sec'y of Labor v. Gen. Motors Corp., Electro-Motive Div.</i> , 14 OHSC 2064, OSHD (1991), 1991 WL 41251 (O.S.H.R.C.) .....	33
<i>Sec'y of Labor v. Keco Indus., Inc.</i> , 13 BNA OSHC 1161, 1986-87 CCH OSHD ¶ 27,860, p. 36,478 (No. 81-263, 1987) 1987 WL 89096.....	37
<i>Sec'y of Labor v. Mobil Oil Corp.</i> , 11 BNA OSHC 1700, 1983-84 CCH OSHD ¶ 26,699, pp. 34,124-25 (No. 79-4802, 1983) 1983 WL 23910 .....	38
<i>Sec'y of Labor v. Stahl Roofing, Inc.</i> , 2002 O.S.H.D. (CCH) ¶ 32,646, p. 51, 218,19 O.S.H.Cas. (BNA) 2179, 2003 WL 440801 (February 21, 2003) at *2 .....	23

## **I. INTRODUCTION**

This case arises out of an inspection by the Department of Labor and Industries (Department) under the Washington Industrial Safety and Health Act (WISHA). The inspection revealed that workers of Elder Demolition (Elder) who were torch-cutting painted steel structures had been exposed to high levels of lead. Sampling results for airborne lead exposure for Elder employees conducting torch cutting were 31 times greater than the permissible exposure limit (PEL) allowable under WISHA. After the WISHA inspection began, Elder had its crew tested for blood lead levels. These tests showed dangerously high blood lead levels for some crew members, forcing Elder to remove them from work involving lead exposure until follow up testing indicated it was safe for them to return to work.

The Department cited Elder for serious and willful violations of WISHA's safety and health standards. Elder appealed to the Board of Industrial Insurance Appeals (Board). The Board found that Elder had committed serious and willful violations. Elder appealed to superior court, which affirmed the Board decision.

## **II. COUNTERSTATEMENT OF ISSUES**

1. Where Elder insisted before the trial court (a) that the only issue on appeal was whether the Department properly

classified the violations as willful; (b) that it “fully acknowledges that it did commit serious lead violations at this project and that it deserves the appropriate penalties because it did not treat this project as it should have as a lead project;” (c) that “they get the serious violation because they didn’t comply with the rules;” (d) that the record “absolutely hands down . . . supports the serious violation” with respect to Elder’s constructive knowledge (e) and that the Department “clearly proved each and every element of a serious violation”, is Elder now precluded from arguing the opposite and claiming that the Department failed to prove all elements of a serious violation?

2. Under RCW 49.17.180(6),<sup>1</sup> if an employer fails to protect its workers from a hazard such as lead that poses dire health risks, the employer’s violation is “serious.” A violation is not serious, however, if the employer “did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.” Where, among other things, Elder’s Project Manager waited a week - - while the firm’s workers were torch-cutting lead-painted steel structures without personal protective equipment - - to send a suspected lead-based paint sample for testing, is there substantial evidence to support the Board’s finding of fact that Elder had the requisite level of knowledge to support the WISHA violations that it received?
3. Air sampling, blood-level testing of workers, and testing of a paint sample all demonstrate that Elder’s workers were exposed to high levels of lead while torch-cutting steel structures without protective equipment. Is there substantial evidence to support the Board’s findings of fact 2-9 and 21 that Elder’s workers were exposed to lead hazard?

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<sup>1</sup> RCW 49.17.180 and other key statutes and regulations discussed in this brief are set forth in Appendix A to this brief.

4. RCW 49.17.180(1) classifies as the most egregious those violations “willfully” committed by an employer. “Willfully” is not defined by statute, but has been defined in case law to include an employer’s conscious disregard of or plain indifference to the safety and health of its employees. Where, among other things, Elder’s Project Manager waited a week - - while workers were torch-cutting lead-painted steel structures without personal protective equipment - - to send a paint sample that he (a) knew was required by law to be tested, and (b) strongly suspected contained lead, for testing, is there substantial evidence to support the Board’s finding of fact 18 that Elder’s violation was “willful,” and are the Board and superior court conclusions of law of willfulness supported by this finding?

### **III. COUNTERSTATEMENT OF THE CASE<sup>2</sup>**

#### **A. Facts**

##### **1. Circumstances prior to initiation of the Department’s inspection**

The Port of Kalama contracted with Hollinger Construction on September 14, 2004, for a Rail Receiving Upgrade Project that consisted of removing an old rail car tipping system and installing an upgraded system.<sup>3</sup> The project site is owned by the Port of Kalama; the operating company, United Harvest, LCC, uses the facility to run its grain-handling

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<sup>2</sup> The evidence in this case is in the Certified Appeal Board Record (CABR). Board testimony is cited as “Tr. [witness name] [date] [page number].” Board document page references are to the large Board-stamped number in the lower right corner of the page. Board exhibits will be cited simply as “Ex. [exhibit number] [page number].”

<sup>3</sup> Exhibit (Ex.) 23 at 1.

business.<sup>4</sup> Hollinger Construction entered into a subcontract with Elder in October 2004, to perform the demolition of the old rail car tipping equipment.<sup>5</sup> Elder's work included the demolition of existing steel rail tipper and other steel structures.<sup>6</sup> The demolition method for the steel structures was saw cutting and torch cutting.<sup>7</sup> According to Mr. Allan Kackman, Elder's Project Manager, Elder was to complete their scope of work within three weeks.<sup>8 9</sup>

Elder began work on October 11, 2004.<sup>10</sup> Project Manager Kackman testified that he attended a meeting with Rick Vroom, Hollinger Construction's project manager, and Mark Wilson, Manager of Planning for the Port of Kalama, on either Friday, October 8, 2004, or Monday, October 11, 2004.<sup>11</sup> According to Mr. Kackman, he requested a copy of the "hazardous material survey" for the job site. Mr. Wilson responded that there were no hazardous materials on site and that Mr. Wilson would write a letter to Mr. Kackman stating

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<sup>4</sup> Tr. Drapeau 5/30/06, at 20.

<sup>5</sup> Ex. 23 at 2.

<sup>6</sup> Ex. 23 at 12.

<sup>7</sup> Tr. Kackman 6/6/06, at 22; Tr. Malone 6/6/06, at 50. Torch cutting on materials coated with a lead-based paint creates lead fume, that when inhaled goes deep into the lungs, where it is transferred to the blood stream, and then distributed throughout the body, where it can cause a myriad of toxic effects. Tr. Christian, 6/7/06 at 13.

<sup>8</sup> Tr. Kackman 6/6/06, at 17.

<sup>9</sup> Tr. Wilson 6/2/06, at 16.

<sup>10</sup> Tr. Kackman 6/6/06, at 45.

<sup>11</sup> Tr. Kackman 6/6/06, at 17.

so.<sup>12</sup> Mr. Kackman admitted that he did not ask Mr. Wilson specifically about the possibility of lead.<sup>13</sup> Mr. Kackman testified that he never received the hazardous materials survey that he had requested, and never called or spoke to Mr. Wilson about lead.<sup>14</sup>

On Tuesday, October 12, Elder's foreman, Josh Malone, noticed some of the steel structures to be removed were painted.<sup>15</sup> Concerned that the paint might be lead-based, foreman Malone asked Elder's Hollinger whether the paint contained lead.<sup>16</sup> On October 12, 2004, Mr. Vroom responded that the contract was silent on the issue of lead-based paint present at the job site.<sup>17</sup> Mr. Vroom told Mr. Kackman that although he did not specifically know of the presence of lead paint, "if you believe lead paint is present, please have a sample taken and tested."<sup>18</sup> Later on the afternoon of October 12, 2004, Mr. Kackman sent an e-mail to Mr. Vroom stating:

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 alright with you, I will have Josh ask for this document and

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<sup>12</sup> Tr. Kackman 6/6/06, at 18.

<sup>13</sup> Tr. Kackman 6/6/06, at 18.

<sup>14</sup> Tr. Kackman 6/6/06, at 42.

<sup>15</sup> Tr. Malone 6/6/06, at 52.

<sup>16</sup> Tr. Malone 6/6/06, at 52; Ex. 10 at 1 (Ex. 10 is provided in Appendix B to this Brief of Respondent).

<sup>17</sup> Ex. 10 at 1.

<sup>18</sup> Ex. 10 at 1.

review it for information on the paint in the rail tipper. If this information does not exist or denotes the presence of lead paint we will proceed according to 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.<sup>19</sup>

Because he was unable to obtain a hazardous material survey for the work site, foreman Malone pulled a sample of the paint on October 12, 2004 and had it delivered to Mr. Kackman.<sup>20</sup> The paint sample reached Mr. Kackman's desk on October 13, 2004.<sup>21</sup>

Despite the fact that Elder knew that there might be lead-based paint at the job site but had not determined whether this was actually the case, Mr. Kackman told foreman Malone to have Elder employees continue performing the demolition work, including torch cutting.<sup>22</sup> Foreman Malone testified he called Mr. Kackman at least a few times a day up to and including Monday, October 18, 2004, to find out whether the paint sample had been tested and, if so, the results of the testing.<sup>23</sup> Mr. Kackman did not actually submit the sample to

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<sup>19</sup> Ex. 10 at 2.

<sup>20</sup> Tr. Malone 6/6/06, at 55, 56.

<sup>21</sup> Tr. Malone 6/6/06, at 53; Tr. Kackman 6/6/06, at 16.

<sup>22</sup> Tr. Malone 6/6/06, at 55.

<sup>23</sup> Tr. Malone 6/6/06, at 55.

the lab until October 19, 2004 – six days after it had been placed on his desk.<sup>24</sup>

Mr. Kackman had a somewhat hazy recollection of his handling of the paint sample. He testified that foreman Malone called him on Thursday, October 14, 2004, and asked Mr. Kackman if he had gotten the sample to the lab.<sup>25</sup> Mr. Kackman told foreman Malone, “No. I forgot. It’s still on my plans table.”<sup>26</sup> Mr. Kackman said he was out of the office most of the day on Thursday, October 14, 2004, but recalled he was driving when foreman Malone called, and he told foreman Malone he would take the sample to the lab tomorrow, which was Friday, October 15, 2004.<sup>27</sup> Mr. Kackman testified that he in fact got the sample to the lab on Monday, October 18, 2004, or “maybe” Friday, October 15, 2004.<sup>28</sup> But according to the chain of custody sheet from Jones Environmental Labs, they received the sample from Elder for the United Harvest, Rail Car Tipper project on Tuesday, October 19, 2004.<sup>29</sup>

During the week of October 11-15, 2004, Elder employees completed approximately one-fourth to one-third of

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<sup>24</sup> Ex. 25 at 2.

<sup>25</sup> Tr. Malone 6/6/06, at 23.

<sup>26</sup> Tr. Kackman 6/6/06, at 23.

<sup>27</sup> Tr. Kackman 6/6/06, at 23.

<sup>28</sup> Tr. Kackman 6/6/06, at 23.

<sup>29</sup> Ex. 25 at 2.

the work on the project.<sup>30</sup> A crew of five workers along with a working foreman was on site for up to eight hours per day.<sup>31</sup> Up to three workers were torch cutting at any one time during the first week, wearing respiratory protection “off and on.”<sup>32</sup> The respirators worn by Elder employees, however, were half mask respirators, which are not permitted under the worker safety rule for unknown airborne exposures to lead fume from torch cutting. WAC 296-155-17609(2)(e)(i).<sup>33</sup>

Elder employees were observed to have visible facial hair and, stubble,<sup>34</sup> which can prevent respiratory protection from properly functioning. Also, the employees wore personal clothing to work and took those clothes home – creating a risk that workers will inadvertently bring lead home to their families.<sup>35</sup> Foreman Malone testified that within one day after he discovered the steel surfaces were painted, a worker from United Harvest told him that the paint probably contained lead.<sup>36</sup> United Harvest employee, David Van Skike, testified that he approached Elder employees who he observed torch cutting without any respiratory protection and informed them

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<sup>30</sup> Tr. Malone 6/6/06, at 58; Tr. Kackman 6/6/06, at 45-46.

<sup>31</sup> Tr. Malone 6/6/06, at 50, 50, 51.

<sup>32</sup> Tr. Malone 6/6/06, at 50, 56; Tr. Brunson 6/2/06, at 7.

<sup>33</sup> Tr. Malone 6/6/06, at 57.

<sup>34</sup> Tr. Drapeau 5/30/06, at 33, 84.

<sup>35</sup> Tr. Malone 6/6/06, at 59; Tr. Brunson 6/2/06, at 9.

<sup>36</sup> Tr. Malone 6/6/06, at 54.

that he believed the paint contained lead-based on his prior experience at the facility.<sup>37</sup>

## **2. The Department's inspection and follow-up**

On Monday, October 18, 2004, Wendy Drapeau, Industrial Hygienist III with the Department's Division of Occupational Safety and Health (DOSH), opened an inspection of the rail car tipping demolition project.<sup>38</sup> Ms. Drapeau initiated the inspection because the Department had received a complaint from a worker at the facility.<sup>39</sup> Ms. Drapeau conducted an opening conference with the site foreman for Elder, foreman Malone.<sup>40</sup>

Ms. Drapeau learned that plasma torch cutting had been conducted on the rail car tipping system since October 12, 2004, and asked whether Elder knew if the paint on the steel structures in the rail car tipping system contained lead.<sup>41</sup> Malone replied no, explaining that a sample of the paint had been taken and given to Mr. Kackman.<sup>42</sup> Foreman Malone then called Mr. Kackman again to see if the sample had been analyzed yet, and then, at the direction of Ms. Drapeau, stopped

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<sup>37</sup> Tr. Van Skike 6/2/06, at 108, 109.

<sup>38</sup> Tr. Drapeau 5/30/06, at 18.

<sup>39</sup> Tr. Drapeau 5/30/06, at 18.

<sup>40</sup> Tr. Drapeau 5/30/06, at 20.

<sup>41</sup> Tr. Drapeau 5/30/06, at 21, 24.

<sup>42</sup> Tr. Drapeau 5/30/06, at 24.

operations.<sup>43</sup>

As part of her inspection on October 18, Ms. Drapeau used a field test kit consisting of a swab test that identifies the presence of lead by a color change.<sup>44</sup> This test showed that the paint on the steel structures already demolished and in the debris pile contained lead.<sup>45</sup> Ms. Drapeau then took samples of the different paints, primarily off-white and orange in color, which were taken to the DOSH lab for analysis for lead.<sup>46</sup> The results of the bulk paint chip samples were as follows:

**Sample 1** consisted of orange with light grey paint chip and contained 65.78 percent lead;

**Sample 2** consisted of orange and grey/beige paint chip and contained 89.69 percent lead;

**Sample 3** consisted of grey/beige paint chip and contained 52.69 percent lead.<sup>47</sup>

The paint chip sample taken by foreman Malone on October 12, 2004, delivered by the next morning to Mr. Kackman's desk, and finally delivered by Mr. Kackman to Jones Environmental

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<sup>43</sup> Tr. Drapeau 5/30/06, at 25.

<sup>44</sup> Tr. Drapeau 5/30/06, at 27.

<sup>45</sup> Tr. Drapeau 5/30/06, at 27.

<sup>46</sup> Tr. Drapeau 5/30/06, at 31, 32.

<sup>47</sup> Ex. 4 at 1; Ex. 7 at 1-3.

Labs on October 19, 2004, was described as red-brown paint and contained 28.4 percent lead.<sup>48</sup>

Ms. Drapeau returned to the Elder job site on October 22, 2004.<sup>49</sup> At this time Mr. Malone was going to continue torch cutting a pit area with greater protection from lead exposure than the before.<sup>50</sup> Elder employee, Will Bartow, assisted Mr. Malone, staying on top of the pit area<sup>51</sup> but did not personally conduct any torch cutting on this day.<sup>52</sup>

Ms. Drapeau conducted air monitoring during this operation as did a consultant hired by Elder.<sup>53</sup> Mr. Bartow's air sample results were 22 micrograms of lead per cubic meter ( $\mu\text{g}/\text{m}^3$ ) for an eight-hour time-weighted average (8-hr TWA).<sup>54</sup>

Ms. Drapeau testified that the air sampling pump worn by Mr. Malone stopped after 104 minutes into the first half of his work shift even though foreman Malone had worked longer, and the pump ran for 90 minutes during the second half of foreman Malone's shift, resulting in the total sampling time of 194 minutes.<sup>55</sup> Based on the total 194-minute sampling time, the 8-hour TWA air sample result for Malone was 1560

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<sup>48</sup> Tr. Malone 6/6/06, at 53; Tr. Kackman 6/6/06 at 16; Ex. 25 at 1-2

<sup>49</sup> Tr. Drapeau 5/30/06, at 45.

<sup>50</sup> Tr. Drapeau 5/30/06, at 45, 64.

<sup>51</sup> Tr. Drapeau 5/30/06, at 45, 64.

<sup>52</sup> Tr. Drapeau 5/30/06, at 45, 64.

<sup>53</sup> Tr. Drapeau 5/30/06, at 45.

<sup>54</sup> Ex. 1 at 1; Ex. 3 at 1.

<sup>55</sup> Tr. Drapeau 5/30/06, at 48; Ex. 1 at 1; Ex. 2 at 1.

$\mu\text{g}/\text{m}^3$ .<sup>56</sup> However, because Malone had actually worked torch cutting for a longer time during the first half of his shift, Ms. Drapeau calculated Mr. Malone's actual exposure to be  $2601 \mu\text{g}/\text{m}^3$  of lead for an 8-hr TWA.<sup>57</sup> Under WAC 296-155-17607(1), the Permissible Exposure Level (PEL) for lead is only  $50 \mu\text{g}/\text{m}^3$  for an 8-hr TWA. WAC 296-155-17607(1).

Foreman Malone and Mr. Bartow both testified that the work done on October 22, 2004, was the same as work conducted prior to Ms. Drapeau initiating her inspection on October 19, 2004.<sup>58</sup> The main difference was that on October 22, 2004, only foreman Malone was performing torch cutting operations, while three Elder's employees performed torch cutting from October 12, 2004 through the morning of October 18, 2004.<sup>59</sup>

Elder had the crew from the Port of Kalama job tested for blood lead levels.<sup>60</sup> The blood lead level test taken on Mr. Bartow on October 19, 2004, was positive with 62.6 of micrograms of lead per deciliter of blood ( $\mu\text{g}/\text{m}^3$  /dL).<sup>61</sup>

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<sup>56</sup> Tr. Drapeau 5/30/06, at 48; Ex. 1 at 1; Ex. 2 at 1.

<sup>57</sup> Tr. Drapeau 5/30/06, at 48, 79; Ex. 1 at 1.

<sup>58</sup> Tr. Malone 6/2/06, at 76; Tr. Bartow 6/2/06, at 122.

<sup>59</sup> Tr. Malone 6/2/06, at 77; Tr. Bartow, 6/2/06, at 122. However, even without the assumptions made to adjust Mr. Malone's air sampling results to  $2601 \mu\text{g}/\text{m}^3$  for an 8-hr TWA based on the total time he worked and was exposed to lead, Ms. Drapeau testified that an actual measured concentration of  $1560 \mu\text{g}/\text{m}^3$  for an 8-hr TWA would not change any citations or penalty calculations. Tr. Drapeau 6/2/06 at 141-142.

<sup>60</sup> Tr. Kackman 6/6/06, at 32.

<sup>61</sup> Ex. 59 at 1.

Mr. Bartow testified he continued to have his blood tested until his lead levels were sufficiently lowered for him to return to work.<sup>62</sup>

Elder employee Sean Brunson had initial and follow up blood testing and his family was also tested.<sup>63</sup> Mr. Brunson also went back for repeat follow-up blood lead tests.<sup>64</sup> Under WAC 296-155-17623(1)(a), an employer is required to remove an employee from work having an exposure to lead at or above the action level of 30  $\mu\text{g}/\text{m}^3$  on each occasion that a periodic and a follow-up blood sampling test conducted indicates that the employee's blood lead level is at or above 50  $\mu\text{g}/\text{dl}$ . WAC 296-155-17623(1)(a). Foreman Malone testified that based on his blood lead levels he was unable to continue to work at the Port of Kalama job site until his blood lead levels came down.<sup>65</sup>

## **B. Proceedings Below**

On April 1, 2005, the Department cited Elder for one willful violation of WISHA's worker safety and health standards (consisting of three code violations grouped<sup>66</sup> together), 14 serious violations (with some grouped violations),

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<sup>62</sup> Tr. Bartow 6/2/06, at 130, 131.

<sup>63</sup> Tr. Brunson 6/6/06, at 8.

<sup>64</sup> Tr. Brunson 6/6/06, at 9.

<sup>65</sup> Tr. Malone 6/6/06 at 60.

<sup>66</sup> See the Board's discussion of grouping at CABR 76-77 and the Board finding 20 that explains the grouping determination of the Board.

and five general violations.<sup>67</sup> The total penalties for the Citation were \$26,400.<sup>68</sup>

Elder appealed the Citation to the Board. After conducting hearings and considering pleadings filed by the parties, the Board's Industrial Appeals Judge (IAJ) affirmed the citation with some modifications in a Proposed Decision and Order.<sup>69</sup> In the analysis portion of the proposed decision, the IAJ explained in detail why it was the acts and omissions of Project Manager Kackman (not the company owner and not foreman Malone) that made the violation one of "willfulness."<sup>70</sup> And in a similarly detailed finding (number 18), the IAJ determined that citation Items 1-1a, 1-1b, and 1-1c were properly characterized as willful violations.<sup>71</sup> The final sentence of finding 18 found the following:

Acting through its project manager on the Port Of Kalama job, Elder Demolition willfully committed the violations cited by the Department at Item Nos. 1-1a, 1-1b, 1-1c in that those voluntary actions of Elder Demolition, Inc., were done with either an intentional disregard of or plain indifference to the requirement of the safety standards.<sup>72</sup>

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<sup>67</sup> Tr. Drapeau 5/30/06, at 59.

<sup>68</sup> CABR at 117. A copy of the Citation is provided in Appendix C to this Brief of Respondent.

<sup>69</sup> CABR at 59-85. A copy of the proposed decision - - adopted by the Board as its final decision - - is provided in Appendix D to this Brief of Respondent.)

<sup>70</sup> CABR at 72-74.

<sup>71</sup> CABR at 82 (finding 18), 84 (conclusion of law 5).

<sup>72</sup> CABR at 82.

The IAJ also made a detailed finding in support of a determination that the violation was a serious violation within the meaning of RCW 49.17.180(6), including a finding that “the employer knew or should have known of all violations” and that “there was substantial risk that death or serious physical harm could result” from the actions of the employer.<sup>73</sup>

The IAJ determined that the actions of the employer described in Items 2-1b, 2-2b, 2-2c, 2-8b, 2-13b, and 2-13 were “logically incorporated” in the affirmed citations under Items 2-1a, 2-2a, 2-8a, and 2-13b.<sup>74</sup> Therefore, the IAJ vacated Items 2-1b, 2-2b, 2-2c, 2-8b, 2-13b, and 2-13 as repetitive.<sup>75</sup> Also the IAJ determined the Department did not prove the violations in Items 2-7a, 2-7b, 2-7c, 2-7d, and 2-12, and thus vacated the citations under these items and the corresponding penalty of \$1,200.<sup>76</sup> The total penalty affirmed was \$25,200.<sup>77</sup>

Elder filed a Petition for Review of the Proposed Decision and Order with the Board.<sup>78</sup> The Board issued an Order Denying Petition for Review and adopted the Proposed Decision and Order as the final Decision and Order of the Board.<sup>79</sup>

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<sup>73</sup> CABR 83 (finding 21).

<sup>74</sup> CABR at 83-84.

<sup>75</sup> CABR at 83. That a violation is “incorporated” into another violation does not, of course, mean that it was not committed.

<sup>76</sup> CABR at 83-84.

<sup>77</sup> CABR at 83, 84.

<sup>78</sup> CABR at 3-29.

<sup>79</sup> CABR at 2.

The Employer appealed the Board's decision to Cowlitz County Superior Court.<sup>80</sup> Following a bench trial the Superior Court held that substantial evidence supported the Board's findings and that the Board's conclusions followed from those findings. The court therefore affirmed the Board decision in its entirety.<sup>81</sup>

The Employer appealed to this Court.

#### 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). The same review standard applies in this Court as in superior court. *Biermann v. City of Spokane*, 90 Wn. App. 816, 824, 960 P.2d 434 (1998) Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person that a finding is true. *Martinez*

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<sup>80</sup> CP 1-3.

<sup>81</sup> CP 129-139.

*Melgoza v. Dep't of Labor & Indus.*, 125 Wn. App. 843, 847-48, 106 P.3d 776, (2005), *review denied*, 155 Wn.2d 1015, 124 P.3d 304 (2005). A reviewing court will affirm the Board's conclusions of law if they are supported by the findings. *BD Roofing, Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 98, 106, 161 P.3d 387 (2007).

Elder's Brief of Appellant (AB) appears to raise legal issues regarding the test for employer knowledge under RCW 49.17.180(6) and the test for willfulness under RCW 49.17.180(1). 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).

When a Washington statute has the same purpose as its federal counterpart, we look to federal decisions to determine the appropriate construction of the statute. *Lee Cook Trucking & Logging v. Dep’t of Labor & Indus.*, 109 Wn. App. 471, 478, 36 P.3d 558 (2001). “When interpreting WISHA provisions, courts will also consider its federal counterpart, the Occupational Safety and Health Act (OSHA), and federal decisions interpreting OSHA.” *Inland Foundry Co., Inc. v. Dep’t of Labor & Indus.*, 106 Wn. App. 333, 336, 24 P.3d 424 (2001).

**C. The Department’s Interpretation of Rules Should Be Accorded Deference.**

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).

**1. Elder affirmatively argued to the Superior Court that it committed serious violations and therefore has waived that argument.**

Before the Superior Court, Elder stated it was not contesting the serious classification of the violations, only the willful classification.<sup>82</sup> In fact, it adamantly argued that the violations it committed *were* serious. For example, Elder began its oral argument by stating:

Let me start by saying that the employer fully acknowledges that it did commit serious lead violations at the project and that it deserves the appropriate penalties because it did not treat the project as it should have as a lead project.<sup>83</sup>

Elder continued to assert that they committed serious violations that “they get the serious violation because they didn’t comply with the rules”,<sup>84</sup> and that the record “absolutely

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<sup>82</sup> The Department filed a Supplemental Statement of Arrangements on April 11, 2008. The Verbatim Report of Proceeding (VRP) has been filed with the Cowlitz County Superior Court.

<sup>83</sup> VRP at 1.

<sup>84</sup> VRP at 5.

hands down . . . supports the serious violation” with respect to Elder’s constructive knowledge;<sup>85</sup> and that the Department “clearly proved each and every element of a serious violation.”<sup>86</sup>

Elder now argues that it committed no violations at all, willful *or* serious.<sup>87</sup> This Court should refuse to consider Elder’s contention that the Board erred in determining a serious violation because Elder’s claim of error was not raised by Elder in its superior court appeal. See generally RAP 2.5(a) (“The appellate court may refuse to review any claim of error which was not raised in the trial court.”) Moreover, where an assignment of error has been waived by an entry on the record, or by express waiver or abandonment in the brief or oral argument, such error generally will not be further considered. *Keen v. O’Rourke*, 48 Wn.2d 1, 5-6, 290 P.2d 976 (1955). (Where assignment of error was waived by counsel in oral argument in the Supreme Court, the Supreme Court would not consider it.). Elder cannot now argue the point that it expressly waived before the trial court.

Elder affirmatively argued before the superior court that it committed serious violations and that the record “absolutely

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<sup>85</sup> VRP at 9.

<sup>86</sup> VRP at 10.

<sup>87</sup> AB at 22-49.

hands down” supported this result. It now argues that it did *not* commit serious violations and, by extension, that the trial court would have erred if it had granted Elder the very relief that Elder was seeking. Because Elder argued before the trial court that the Department had “clearly proved each and every element of a serious violation” it should be precluded from now arguing the opposite.

**2. Elder concedes in its Brief of Appellant that it committed a serious violation**

Elder’s Brief of Appellant identifies as one of the issues a broad question of whether the evidence supports all elements of a “serious” violation under RCW 49.17.180(6).<sup>88</sup> And Elder devotes a section of argument to this question.<sup>89</sup> But in Elder’s discussion of the central issue in this case - - i.e., whether its WISHA violation was a willful one under RCW 49.17.180(1) - - Elder concedes that the Department established a serious violation, and that the only issue in this case is whether Elder’s acts and omissions were willful.<sup>90</sup> This is further evidence that

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<sup>88</sup> AB at 1. Elder does not, however, assign error to any pertinent finding of fact regarding the serious-violation question, and therefore Elder has waived any challenge to those findings. RAP 10.3(a)(4). Because the findings support the conclusions of law on the serious-violation question, Elder’s challenge on that issue should be denied based on its failure to assign error to any pertinent finding.

<sup>89</sup> AB 17-32.

<sup>90</sup> See AB 45 (“The Department’s [*sic*, Employer’s] constructive knowledge is sufficient to establish a serious violation . . .”); AB 48-49 (“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.”).

Elder has waived and/or conceded the issue of whether it possessed the requisite level of knowledge to establish a serious violation of WISHA's standards. The Department will nonetheless address RCW 49.17.180(6).

**3. Substantial evidence supports the Board's finding 21 that Elder had constructive knowledge of the lead violation**

To make a prima facie showing of a serious WISHA violation, the Department must prove that (1) the cited standard applies; (2) the requirements of the standard were not met; (3) employees were exposed to or had access to the violative condition; (4) the employer knew, or through the exercise of reasonable diligence, could have known of the violative condition; and (5) there is a substantial probability that death or serious physical harm could result from the violative condition. RCW 49.17.180(6); WAC 296-800-35024; *See also Washington Cedar & Supply Co., Inc. v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 914, 83 P.3d 1012 (2003).

Elder's argument regarding RCW 49.17.180 focuses primarily on the fourth element of the test, i.e., the "could have known" or "constructive knowledge" element.<sup>91</sup> Whether an employer was "reasonably diligent" under the "could have

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<sup>91</sup> *See* AB 23-32.

known” (or “constructive knowledge”) test requires an analysis of several factors, including a history of violations (*see Washington Cedar*, 119 Wn. App. at 916), as well as considerations such as the employer’s obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of the violations. *Sec’y of Labor v. Stahl Roofing, Inc.*, 2002 O.S.H.D. (CCH) ¶ 32,646, p. 51, 218,19 O.S.H.Cas. (BNA) 2179, 2003 WL 440801 (February 21, 2003) at \*2 . To meet the test for reasonable employer diligence, the employer must have work rules that reflect the requirements of the cited standard and that are clearly and effectively communicated to employees. *Id.* In the present case, Elder cannot prove that it acted in a reasonably diligent manner.

**a. Elder acted with complete disregard to its own written lead program and the regulatory requirements of which it was fully aware**

Prior to the Kalama job, Elder had a lead program referencing OSHA’s Lead in Construction Standard.<sup>92</sup> Project Manager Kackman was aware that paint sometimes contains lead, and had previously worked on projects that involved lead-

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<sup>92</sup> Ex. 16 at 4, 5 (Ex. 16 is provided in Appendix E to this Brief of Respondent).

based paint.<sup>93</sup> Additionally, Project Manager Kackman and foreman Malone received training on lead hazards.<sup>94</sup> Project Manager Kackman and foreman Malone were both familiar with the program.<sup>95</sup>

In Elder's lead program, one of the three activities prohibited under the policy was open flame torch burning of lead-based paint.<sup>96</sup> More specifically, the policy provided that use of a torch on paint is prohibited unless it is determined that lead *is not* present.<sup>97</sup> In what the Board's decision described as "complete nonsense,"<sup>98</sup> Project Manager Kackman "turn[ed] on its head the language of the prohibited practices portion of the firm's lead safety program" by testifying that Elder's lead program could be read as permitting torch cutting until it is determined that lead in fact *is* present.<sup>99</sup> The Board, in examining the testimony of Mr. Kackman, stated:

Mr. Kackman's stated understanding of the firm's lead safety policy is an open invitation to avoid making an inconvenient determination, perhaps even to delay a paint sample analysis. In Mr. Kackman's result oriented reasoning at the time of testimony, I find no cover for a manager at the project level in

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<sup>93</sup> Tr. Kackman 6/6/06, at 24.

<sup>94</sup> Tr. Kackman 6/6/06, at 23, 24; Tr. Malone 6/6/06, at 54.

<sup>95</sup> Tr. Kackman 6/6/06, at 25; Tr. Malone 6/6/06, at 64.

<sup>96</sup> Ex. 16 at 2, *see* Appendix E.

<sup>97</sup> Ex. 16 at 2, (emphasis added) *see* Appendix E.

<sup>98</sup> CABR at 74 (emphasis added).

<sup>99</sup> Tr. Kackman 6/6/06, at 22.

the demolition business.<sup>100</sup>

**b. Project Manager Kackman knew that lead might be present at the job site prior to starting torch cutting**

Project Manager Kackman's October 12, 2004 e-mail exchange with Rick Vroom shows that Mr. Kackman knew it was possible lead was present, knew this presented a serious hazard to Elder employees, and indeed knew the legal obligations of both Elder and Hollinger Construction to determine, if in fact, lead was present.<sup>101</sup> The Board stated, "in a moment of particular candor, Mr. Kackman acknowledges that as of his October 12, 2004 e-mail (cite omitted) that there was a suspicion of lead-based paint . . ." <sup>102</sup>

**c. Project Manager Kackman's knowledge is Elder's knowledge under RCW 49.17.180(6)**

Elder argues that Project Manager Kackman was a mere supervisor, and that a supervisor's knowledge is not by itself proof of the employer's knowledge for purposes of RCW 49.17.180(6).<sup>103</sup> Again, this is the precise opposite of the position that Elder took before the superior court, when it argued that Mr. Kackman's knowledge was "sufficient" to

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<sup>100</sup> CABR at 74.

<sup>101</sup> Ex. 10 at 2 (App. B).

<sup>102</sup> CABR at 73 (citing Tr. Kackman 6/2/06, at 15)

<sup>103</sup> AB 23-32.

support serious violations<sup>104</sup>. Elder relies on federal court decisions by the Ninth Circuit and several other federal circuit courts, as well as a decision of the Washington Board of Industrial Insurance Appeals.<sup>105</sup> Elder's argument is unpersuasive.

First, there is no disagreement that the Department has the burden of establishing actual or constructive knowledge to make a prima facie case for serious violation. Absent this burden on the Department, strict liability would be imposed on employers, which is contrary to the legislative intent. As set out above and as found by the Board and the trial court, the Department satisfied its burden.

Second, Elder appears to argue that actual or constructive knowledge cannot be established by proving knowledge of a supervisor. However, the Third, Fourth, Fifth, Ninth, and Tenth Circuits have all held that supervisor knowledge can be imputed to an employer where the supervisor's conduct was reasonably foreseeable and therefore preventable by the employer. *L.R. Willson & Sons v. Occupational Safety & Health Review Comm'n*, 134 F.3d 1235, 1240-41 (4th Cir. 1998); *Pennsylvania Power & Light Co. v. Occupational Safety & Health Review Comm'n*, 737 F.2d 350, 358 (3d Cir. 1984);

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<sup>104</sup> VRP at 8,10.

<sup>105</sup> AB 23-32.

*Capital Elec. Line Builders v. Marshall*, 678 F.2d 128, 130 (10th Cir. 1982); *Horne Plumbing & Heating Co. v. Occupational Safety and Health Review Comm'n*, 528 F.2d 564, 571 (5th Cir. 1976). As set out above, Mr. Kackman was well aware of the possibility of lead contamination at his project and that testing was required. As project manager responsible for operations, Mr. Kackman's conduct was foreseeable and preventable

Moreover, Elder's discussion of cases involving "rogue conduct" of supervisors appears to be a belated attempt to raise the affirmative defense of "unpreventable employee misconduct." Under that defense, an employer may not be cited for a WISHA violation if it can demonstrate:

- (i) A thorough safety program, including work rules, training, and equipment designed to prevent the violation;
- (ii) Adequate communication of these rules to employees;
- (iii) Steps to discover and correct violations of its safety rules; and
- (iv) Effective enforcement of its safety program as written in practice and not just in theory.

RCW 49.17.120(5).

Unpreventable employee misconduct is an affirmative defense. *Washington Cedar & Supply Co., Inc. v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 911, 83 P.3d 1012 (2003), *review denied*, 152 Wn.2d 1003 (2004). As such, it must be

affirmatively pleaded. CR 8(c) ; *see also, e.g., Beaupre v. Pierce Cy.*, 161 Wn.2d 568, 575-76, 166 P.3d 712 (2007) (“[u]nder CR 8(c) , parties must raise affirmative defenses or risk waiving them altogether . . . . Although CR 8(c) specifically delineates 20 affirmative defenses, parties must also affirmatively plead ‘any other matter constituting an avoidance or affirmative defense’” (citation omitted)).

Elder has never pled the affirmative defense of unpreventable employee misconduct; in fact, the firm stated that it was raising no affirmative defenses at all.<sup>106</sup> It therefore cannot raise the defense now, and cannot rely on cases addressing that defense.<sup>107</sup>

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<sup>106</sup> CABR at 60.

<sup>107</sup> These cases include *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1275-77 (6<sup>th</sup> Cir. 1987); *Pennsylvania Power & Light Co. v. Occupational Safety & Health Rev. Comm’n*, 737 F.2d 350, 354 (3<sup>rd</sup> Cir. 1984) (OSHA “does not impose strict liability on employers for isolated and idiosyncratic instances of employee misconduct”); *Brennan v. Occupational Safety & Health Rev. Comm’n*, 511 F.2d 1139, 1145 (9<sup>th</sup> Cir. 1975) (employer held not responsible for “deliberate employee misconduct”); and *Horne Plumbing & Heating Co. v. Occupational Safety & Health Rev. Comm’n*, 528 F.2d 564, 570-71, (5<sup>th</sup> Cir. 1976) (employer not responsible for “unforeseeable, implausible, and therefore unpreventable acts of his employees”).

Many of the cases that Elder cites are based on some Circuits’ view that an employer does not carry the burden of showing unpreventable employee misconduct. *E.g., Capital Elec. Line Builders of Kansas, Inc. v. Marshall*, 678 F.2d 128, 128 (10<sup>th</sup> Cir. 1982) (“the burden of disproving unpreventable employee misconduct rests with the Secretary of Labor”); *L.R. Willson and Sons, Inc. v. Occupational Safety & Health Rev. Comm’n*, 134 F.3d 1235, 1240-41 (4<sup>th</sup> Cir. 1998) (“[a]lthough some sister circuits have held that unpreventable employee misconduct ‘is an affirmative defense that an employer must plead and prove,’ this circuit and others clearly agree that such must be disproved by the Secretary in his case-in-chief” (footnotes omitted)).

Under Washington law unpreventable employee misconduct is an affirmative defense. *See* RCW 49.17.120(5) (employer “must show” elements of defense); *Washington Cedar*, 119 Wn. App. at 911. OSHA cases decided under a different standard have no bearing on the present appeal.

Furthermore, any attempts to escape liability for the citations by portraying Mr. Kackman as a rogue supervisor and whose misconduct was unpreventable rings hollow under this record. Mr. Kackman testified he found no violation of Elder's lead program by allowing torch-cutting to continue while the paint sample sat on his desk.<sup>108</sup> Mr. Elder also testified Mr. Kackman did not violate Elder's lead program, and Mr. Elder did not discipline Mr. Kackman in any way.<sup>109</sup> Elder certainly believes that it could have foreseen and prevented any "rogue conduct" by Mr. Kackman. Its claim is simply that there was no misconduct and that Mr. Kackman acted appropriately.

#### **4. Elder employees were exposed to lead concentrations above the PEL**

The Board found that Elder workers were exposed to lead hazard.<sup>110</sup> Elder argues that there is no support for purposes of RCW 49.17.180(6) for the Board's determination that Elder employees were exposed to a hazard.<sup>111</sup> There is overwhelming evidence, however, that torch cutting on the lead painted surfaces exposed Elder employees to lead at levels above the PEL.

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<sup>108</sup> TR Kackman at 21-22.

<sup>109</sup> TR Elder at 99.

<sup>110</sup> CABR 79-80 (findings 2-9); CABR 83 (finding 21).

<sup>111</sup> See AB 21-23.

The Board held that the air monitoring results from October 22, 2006, were “sufficiently elevated to make it probable” that Elder employees were exposed to lead concentrations above the PEL of 50  $\mu\text{g}/\text{m}^3$  for an 8-hr TWA.<sup>112</sup> In fact, even using the most conservative estimate of exposure of 1560  $\mu\text{g}/\text{m}^3$  for an 8-hr TWA, the air samples for Mr. Malone during torch cutting operations was more than *31 times* greater than the PEL of 50  $\mu\text{g}/\text{m}^3$  for an 8-hr TWA. WAC 296-155-17607(1).<sup>113</sup> Elder has never contested these figures.

Without citation to the record, Elder contends these results are not representative of the work conducted in the days prior to the WISHA inspection.<sup>114</sup> The testimony of both Mr. Malone and Mr. Bartow demonstrates, however, that the work done on October 22, 2004, was the same type of work as was conducted prior to the initiation of the WISHA inspection on October 19, 2004.<sup>115</sup> In fact, the testimony of Elder’s own employees was that the primary difference between the testing conditions and the work previously done at the job was that on October 22, 2004, only Mr. Malone was performing torch cutting operations, while three Elder Demolitions employees performed torch cutting from October 12, 2004 through the

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<sup>112</sup> CABR at 79.

<sup>113</sup> Tr. Drapeau, 5/3/06, at 48.

<sup>114</sup> See AB 9, 22.

<sup>115</sup> Tr. Malone 6/2/06, at 76; Tr. Bartow 6/2/06, at 122

morning of October 18, 2004. In other words, to the extent that Ms. Drapeau's results were "not representative" of the jobsite conditions, they *understated* the exposure of Elder's employees to lead.

In sum, given the paint chip bulk sample results, the air monitoring results, and the elevated blood lead levels in the employees, all of which were taken into account in the Board's analysis and findings, substantial evidence supports the Board's findings 2-9 and 21 that Elder employees were exposed to the serious, and long recognized hazard of lead.

**D. The Board Correctly Determined That The Violation Was Willful**

**1. Substantial evidence supports the Board's finding 18 on willfulness**

As explained *supra* Part III.B., the Board's decision includes detailed analysis, as well as a detailed finding (18), explaining the Board's determination that, while foreman Malone's acts and omissions do not justify a willfulness finding, Project Manager Kackman's acts and omissions do justify such a finding.<sup>116</sup> Substantial evidence supports that finding. Elder's attempt in its Brief of Appellant to avoid that

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<sup>116</sup> CABR at 72-74 (three pages of analysis); CABR at 82 (finding 18).

evidence by creating a new, more narrow legal standard for willfulness fails.

## **2. Willfulness includes plain indifference**

Chapter 49.17 RCW does not define what constitutes a willful violation. However, case law has defined the term to include, in its simplest form, “an intentional disregard of, or plain indifference to, OSHA requirements . . . .” *See, e.g., Fluor Daniel v. Occupational Safety & Health Review Comm’n*, 295 F.3d 1232, 1240 (11th Cir. 2002); *see also Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 317 (5th Cir. 1979). A willful violation is one “committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety.” *Sec’y of Labor v. Falcon Steel Co.*, 16 OHSC 1179, 1181, OSHD (1993), 1993 WL 155690 (O.S.H.R.C.); *Sec’y of Labor v. A.P. O’Horo Co.*, 14 OSHC 2004, 2012, OSHD (1991), 1991 WL 25318 (O.S.H.R.C.); *see also In re The Erection Co. (II)*, BIIA Dec., 88 W142 (1990), 1990 WL 255020. “A showing of evil or malicious intent is not necessary to establish willfulness.” *Sec’y of Labor v. Anderson Excavating & Wrecking Co.*, 17 OSHC 1890, 1891, OSHD (1995-1997), 1997 WL 37067 (O.S.H.R.C.); *aff’d* 131 F.3d 1254 (8th Cir. 1997).

A willful violation is differentiated from a non-willful

violation by an employer's heightened awareness of the illegality of the conduct or conditions and by a state of mind, *i.e.*, conscious disregard or plain indifference for the safety and health of employees. *Sec'y of Labor v. Gen. Motors Corp., Electro-Motive Div.*, 14 OHSC 2064, 2068, OSHD (1991), 1991 WL 41251 (O.S.H.R.C.). In order for a violation to be deemed "willful" the Department must prove either that:

(1) "[The] employer knew of an applicable standard or provision prohibiting the conduct or the condition and consciously disregarding the standard", or

(2) that, if the employer did not know of an applicable standard or provision's requirements, it exhibited such "reckless disregard for employee safety or the requirements of the law generally that one can infer that . . . the employer would not have cared that the conduct or conditions violated [the standard].

*Fluor Daniel*, 295 F.3d at 1240 (citing, *J.A.M. Builders, Inc. v. Herman*, 233 F.3d 1350, 1355 (11th Cir. 2000)).

A *failure to act* may, under some circumstances, constitute willful conduct. The failure to comply with a safety standard is "willful if done 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 Constr. Co.*, 510 F.2d 78, 81 (10<sup>th</sup> Cir. 1975).

A violation is not willful if an employer has made a good faith effort to comply with a standard or eliminate a hazard, even though the employer’s efforts were not entirely effective or complete. *Fluor Daniel*, 295 F.3d at 1240 (citing *Sec’y of Labor v. Williams Enterp., Inc.*, 13 OSHC 1249, 1256-57, OSHD (1986-87), 1987 WL 89134 (O.S.H.R.C.). However, “the test of good faith for these purposes is an objective one – whether the employer’s belief concerning a factual matter or concerning the interpretation of a standard was reasonable under the circumstances.” *Id.* (citing *Falcon Steel*, 16 OSHC at 1181; *Gen. Motors Corp., Electro-Motive Div.*, 14 OSHC at 2068). Further, although an employer takes some steps to address safety concerns, substitution of the employer’s judgment for the requirements of specific safety regulations and intentional disregard or plain indifference to the regulations supports a finding that the violation was willful. *In re Cam Constr.*, BIIA Dec., 90 W060 (1992), 1992 WL 52455.

**3. Under the plain indifference test, actual knowledge is not required**

Elder argues that the “plain indifference” test for willfulness requires, among other things, proof of actual employer knowledge, not just constructive knowledge.<sup>117</sup> Elder is mistaken.

As discussed above, a willful violation is one “committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety.” *Falcon Steel Co.*, 16 OSHC at 1181. The First Circuit Court of Appeals stated in a 2002 decision, “Under this definition, “plain indifference” to violations of the act is an alternative to “knowing or voluntary disregard” (also referred to as “conscious disregard”), and willfulness can be inferred from evidence of plain indifference without direct evidence that the employer knew of each individual violation.” *A.E. Staley Mfg. Co. v. Sec’y of Labor*, 295 F.3d 1341, 19 OSHC 1937, OSHD (1st Cir. 2002); (citing *Sec’y of Labor v. A.E. Staley Mfg. Co.*, 19 OSHC 1199, 1202, OSHD (2000), 2000 WL 1535899 (O.S.H.R.C.) (describing the “state of mind” required as “conscious disregard or plain indifference for the safety and health of employees”) (citing *Gen. Motors Corp., Electro-Motive Div.*, 14 OSHC at 2168).

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<sup>117</sup> AB at 35.

Additionally, as the Board and OSHA have long held, to require a finding of both “plain indifference” and an “intentional, knowing, or voluntary disregard” would make it difficult if not impossible to prove willfulness in cases where the employer is cited for failure to act rather than for acting affirmatively. *See A.E. Staley*, 295 F.3d at 1353.<sup>118</sup> The court observed that if, as Elder argues in its brief, requiring knowledge of specific conditions in cases where the citation is for failure to act rather than affirmatively acting would encourage employers to blindfold themselves to unsafe conditions as a means of avoiding responsibility for safety violations. *See A.E. Staley*, 295 F.3d at 1353.

The Board found that Elder suspected that lead-based paint was present at the work site – a fact that Elder does not dispute – and that Elder failed to test the material before demolition.<sup>119</sup> The Board stated, “in a moment of particular candor, Mr. Kackman acknowledges that as of his October 12, 2004 e-mail (cite omitted) that there was a suspicion of lead-based paint . . . .”<sup>120</sup> Mr. Kackman’s e-mails exchanged with Rick Vroom show that on October 12, 2004, *Mr. Kackman*

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<sup>118</sup> “As we pointed out at oral argument, under Staley’s formulation, a company could avoid liability for willful violations of OSHA standards by literally blindfolding its safety inspectors: because the inspectors could not see the unsafe conditions, the conditions could not be regarded as “voluntary.” *A.E. Staley*, 295 F.3d at 1353.

<sup>119</sup> CABR at 82.

<sup>120</sup> CABR at 73.

*knew it was possible lead was present, knew this presented a serious hazard to Elder employees, and indeed knew that both Elder and Hollinger Construction were legally obligated to determine, if in fact, lead was present.*<sup>121</sup> Despite this knowledge, Mr. Kackman allowed Elder's employees to continue their unprotected hazardous work while the paint chip that would have proven the presence of lead sat, untested, on his own desk.

#### **4. Elder's State Of Mind Was One Of Indifference**

Only if an employer's actions were objectively reasonable can their efforts to comply with a safety standard or to eliminate a hazard, even if unsuccessful, be sufficient to demonstrate that the employer's state of mind was not one of disregard or indifference. *Sec'y of Labor v. Beta Constr. Co.*, 16 BNA OSHC 1435, 1444-45, 1993-95 CCH OSHD ¶ 30,239, pp. 41,652-53, 1993 WL 230104 (No. 91-102, 1993), *aff'd without published opinion*, 52 F.3d 1122 (D.C. Cir. 1995) (citation omitted) *Sec'y of Labor v. Keco Indus., Inc.*, 13 BNA OSHC 1161, 1169, 1986-87 CCH OSHD ¶ 27,860, p. 36,478 (No. 81-263, 1987) 1987 WL 89096; *Sec'y of Labor v. Asbestos Textile Co., Inc.*, 12 BNA OSHC 1062, 1063, 1984-85 CCH OSHD 27,101, p. 34,948 (No. 79-3831, 1984) 1984 WL 34962;

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<sup>121</sup> Ex. 10 at 2, *see* Appendix B.

*Sec'y of Labor v. Mobil Oil Corp.*, 11 BNA OSHC 1700, 1701, 1983-84 CCH OSHD ¶ 26,699, pp. 34,124-25 (No. 79-4802, 1983) 1983 WL 23910. Given the severity of lead exposure and the knowledge that lead-based paint might have been present, Elder's failure to test the paint chip prior to allowing employees to perform torch cutting was unreasonable under any standard. Once Elder actually took the paint chip sample that its Project Manager had asked to be pulled to the lab, it received the results that same day.<sup>122</sup>

Elder argues in its brief that Mr. Kackman's "reliance" on representations made by the Port of Kalama (Mr. Wilson) and Hollinger Construction (Mr. Vroom) was reasonable.<sup>123</sup> Without citation to the record, Elder alleges that Mr. Kackman relied on "representations made by Mr. Wilson" and believed "that a letter would be coming from the Port that would show that lead was not present or involved in the project."<sup>124</sup>

According to Mr. Kackman, on Friday, October 8, 2004, or on Monday, October 11, 2004, Mr. Kackman, while meeting with Mr. Vroom and Mr. Wilson, requested a copy of the hazardous material survey for the job site.<sup>125</sup> Mr. Kackman testified that Mr. Wilson said there were "no hazardous

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<sup>122</sup> Ex. 25.

<sup>123</sup> AB 47.

<sup>124</sup> AB 47.

<sup>125</sup> Tr. Kackman 6/6/06, at 18.

materials on site” and Mr. Kackman did not ask Mr. Wilson specifically about the possibility of lead.<sup>126</sup>

The evidence belies Elder’s contention. If Mr. Kackman had been as confident in the verbal representation he received on October 8 or October 10 as Elder claims he was, why then did he send the e-mail on October 12, 2004 stating he would have Mr. Malone check if a hazardous material survey exists? Why would Mr. Kackman have had Malone pull a paint sample? And why, indeed, would Mr. Kackman have described the firm’s legal obligation to determine whether lead was present at the jobsite?

Moreover, Elder conveniently fails to mention in its brief that Mr. Wilson testified that *at no time* did he make any representations that lead was not present at the job site.<sup>127</sup> Mr. Wilson testified he did not know for certain who Mr. Kackman was and did not recall any conversations with anyone from Elder pertaining to lead.<sup>128</sup> In addition, during Mr. Wilson’s testimony, Elder never asked Mr. Wilson anything about a hazardous material survey or a “good faith” letter. Finally, Elder fails to mention the fact that a United

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<sup>126</sup> Tr. Kackman 6/6/06, at 18.

<sup>127</sup> Tr. Wilson 6/2/06, at 35.

<sup>129</sup> Tr. Kackman 6/6/06, at 28.

Harvest employee specifically told Elder that there probably *was* lead-based pain at the jobsite.

Elder also argues in its brief that the fact that liquidated damages were ultimately avoided by Elder somehow proves that the Department's inspector was wrong in attributing a financial motive to Elder's actions. Whether or not Elder was able to get a change order, extension of time to perform the scope of work, and avoid liquidated damages *after* lead was found at the jobsite is irrelevant to the firm's disregard of its workers' safety at the time it violated WISHA's standards. Mr. Kackman testified that Elder's original timeline for the project was three weeks, and that halting work for even one or two days would affect the schedule and result in lost production time.<sup>129</sup> This is substantial evidence that at the time of the inspection, there had been a consideration of the timeline.

In this case, the judgment of the inspector in assigning financial motive when issuing citation was only one fact of many considered by the IAJ. Ultimately, the IAJ determined the actions of the employer demonstrated willfulness and its decision does not rely at all on any avoidance of financial costs as evidence. Therefore, it is irrelevant whether or not Elder avoided liquidated damages; the fact remains that Elder knew

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<sup>129</sup> Tr. Kackman 6/6/06, at 28.

there might be lead at the project, knew it was obligated to determine whether this was the case, obtained a paint sample, and then failed to test the sample for nearly a week while its employees continued their hazardous work without protection.

#### **5. Elder's actions constitute a willful violation**

The Board found that Elder's actions cited under Items 1-1a, 1-1b, and 1-1c were voluntary, done with either intentional disregard or plain indifference to the requirements under the law, and thus, were willful.<sup>130</sup> The Board's analysis rightly concentrated on the actions and testimony of Mr. Kackman.<sup>131</sup>

First Project Manager Kackman testified that "I was informed there was no lead . . .", then he backtracked, saying that there was no mention of lead in the documentation, and finally he testified that he was instructed by Mr. Wilson that there were "no hazardous materials present in this project."<sup>132</sup> However, Mr. Kackman then testified that he never received a hazardous materials survey after October 12, and never called or spoke to Mark Wilson about information on lead, *all of which he knew were specifically required by both the*

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<sup>130</sup> CABR at 74.

<sup>131</sup> CABR at 74.

<sup>132</sup> Tr. Kackman 6/6/06, at 13.

*regulations and the company's own written lead program.*<sup>133</sup>

Mr. Kackman's testimony that he relied on Mr. Wilson's verbal assertion that there were no hazardous materials present is not objectively reasonable under the circumstances of this case.

Insisting that it was only a paint sample, and not a lead sample, Mr. Kackman testified that there was no reason to stop work while the sample he had directed Mr. Malone to obtain waited on Mr. Kackman's desk to be tested.<sup>134</sup> As a matter of fact, taking the paint chip sample to the lab was simply not a high priority for Mr. Kackman according to his own testimony.<sup>135</sup> However, when questioned as to why he intended to take the sample to the lab at all, Mr. Kackman testified he wanted to assure Elder's employees that they were safe, that he had questions in his mind and that he wanted reassurances for his own purposes.<sup>136</sup>

Mr. Kackman allowed torch cutting to continue and let the paint chip sample sit on his desk despite the following: the possibility of lead-based paint being brought up by Mr. Malone; the paint chip sample being taken by Mr. Malone at the direction of Mr. Kackman; Mr. Kackman's representation to Mr. Malone that he would take the sample to the lab; and

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<sup>133</sup> Tr. Kackman 6/6/06, at 42.

<sup>134</sup> Tr. Kackman 6/6/06, at 19, 20.

<sup>135</sup> Tr. Kackman 6/6/06, at 22.

<sup>136</sup> Tr. Kackman 6/6/06, at 25, 26.

Mr. Kackman's own e-mail statements. Mr. Kackman's actions were not only in opposition to Elder's own lead policy, and the requirements under WISHA safety rules, but also were contrary to his own representations to Hollinger, the Port of Kalama, and his own employees. The Board stated:

If Mr. Kackman had acted as he himself represented in his e-mail of that date [October 12, 2004], or with an intention to extract any safety value whatsoever from the prohibited practices portion of Elder Demolition's lead program, he would have stopped work on October 12, 2004.<sup>137</sup>

The Board's findings that Elder, through Mr. Kackman as Project Manager, acted with either plain indifference or intentional disregard to safety regulations and the safety of Elder's own employees and their families is overwhelmingly supported by the evidence. The willful characterization of the violations and the penalties assessed are justified.

## V. CONCLUSION

For the foregoing reasons this Court should affirm the decision of the superior court affirming the decision of the Board of Industrial Insurance Appeals.

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<sup>137</sup> CABR at 74.

RESPECTFULLY SUBMITTED this 21 day of  
April, 2008.

ROBERT M. MCKENNA  
Attorney General



MARGARET A. BREYSSE  
Assistant Attorney General  
WSBA No. 36273

1 **PROOF OF SERVICE**

2 I certify that I served a copy of this document on all parties or their counsel  
3 of record on the date below as follows:

4  US Mail Postage Prepaid via Consolidated Mail Service  
5 Aaron Owada  
6 AMS Law  
7 975 Carpenter Road  
8 N.E. Suite 201  
9 Olympia, WA 98516

10  ABC/Legal Messenger

11  State Campus Delivery

12  Hand delivered by \_\_\_\_\_

13 I certify under penalty of perjury under the laws of the state of Washington  
14 that the foregoing is true and correct.

15 DATED this 21st day of April, 2008, at Tumwater, Washington.

16 \_\_\_\_\_  
17 *Jerei Bargas*  
18 JEREI BARGABUS  
19 Legal Assistant

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STATE OF WASHINGTON  
BY [Signature]  
FILED  
COURT OF APPEALS  
DIVISION II

# **APPENDIX A**

**RCW 49.17.180**  
**Violations--Civil penalties**

(1) Except as provided in RCW 43.05.090, any employer who willfully or repeatedly violates the requirements of RCW 49.17.060, of any safety or health standard promulgated under the authority of this chapter, of any existing rule or regulation governing the conditions of employment promulgated by the department, or of any order issued granting a variance under RCW 49.17.080 or 49.17.090 may be assessed a civil penalty not to exceed seventy thousand dollars for each violation. A minimum penalty of five thousand dollars shall be assessed for a willful violation.

(2) Any employer who has received a citation for a serious violation of the requirements of RCW 49.17.060, of any safety or health standard promulgated under the authority of this chapter, of any existing rule or regulation governing the conditions of employment promulgated by the department, or of any order issued granting a variance under RCW 49.17.080 or 49.17.090 as determined in accordance with subsection (6) of this section, shall be assessed a civil penalty not to exceed seven thousand dollars for each such violation.

(3) Any employer who has received a citation for a violation of the requirements of RCW 49.17.060, of any safety or health standard promulgated under this chapter, of any existing rule or regulation governing the conditions of employment promulgated by the department, or of any order issued granting a variance under RCW 49.17.080 or 49.17.090, where such violation is specifically determined not to be of a serious nature as provided in subsection (6) of this section, may be assessed a civil penalty not to exceed seven thousand dollars for each such violation, unless such violation is determined to be de minimis.

...

(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.

(7) The director, or his authorized representatives, shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the number of affected employees of the employer being charged, the gravity of the violation, the size of the employer's business, the good faith of the employer, and the history of previous violations.

...

## **WAC 296-155-17607**

### **Permissible exposure limit**

(1) The employer shall assure that no employee is exposed to lead at concentrations greater than fifty micrograms per cubic meter of air ( $50 \mu\text{g}/\text{m}^3$ ) averaged over an 8-hour period.

(2) If an employee is exposed to lead for more than 8 hours in any work day the employees' allowable exposure, as a time weighted average (TWA) for that day, shall be reduced according to the following formula:

Allowable employee exposure (in  $\mu\text{g}/\text{m}^3$ ) = 400 divided by hours worked in the day.

(3) When respirators are used to limit employee exposure as required by this section and all the requirements of WAC 296-155-17611(1) and 296-155-17613 have been met, employee exposure may be considered to be at the level provided by the protection factor of the respirator for those periods the respirator is worn. Those periods may be averaged with exposure levels during periods when respirators are not worn to determine the employee's daily TWA exposure.

**WAC 296-155-17609**  
**Exposure assessment**

...

(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:

...

(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  $\mu\text{g}/\text{m}^3$  (50 x PEL), the employer shall treat the employee as if the employee were exposed to lead in excess of 2,500  $\mu\text{g}/\text{m}^3$  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  $\mu\text{g}/\text{m}^3$ , 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.

...

**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.

(iii) Where a final medical determination results in any recommended special protective measures for an employee, or limitations on an employee's exposure to lead, the employer shall implement and act consistent with the recommendation.

(c) Return of the employee to former job status.

(i) The employer shall return an employee to their former job status:

(A) For an employee removed due to a blood lead level at or above 50 µg/dl when two consecutive blood sampling tests indicate that the employee's blood lead level is at or below 40 µg/dl;

(B) For an employee removed due to a final medical determination, when a subsequent final medical determination results in a medical finding, determination, or opinion that the employee no longer has a detected medical condition which places the employee at increased risk of material impairment to health from exposure to lead.

...

# **APPENDIX B**

308075001

**Rick Vroom**

**From:** Rick Vroom  
**Sent:** Tuesday, October 12, 2004 1:44 PM  
**To:** 'Al Kackman'  
**Cc:** 'jeffelder@elderdemolition.com'  
**Subject:** RE: Copy

Thanks Al for your follow up. Two additional items:

1. I FEDEX'd your contract to Jeff via priority overnight; you should have in the morning; and
2. Josh contacted our Superintendent and asked if we were dealing with lead paint. I've reviewed the contract which appears to be silent on the lead paint issue other than to say that we are to "Conform to applicable regulatory procedures when discovering hazardous or contaminated materials." (02050-1.6.E).

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

If you believe lead paint is present, please have a sample taken and tested. If the results are positive, we will approach the Owner immediately.

**HOLLINGER CONSTRUCTION, INC.**

Richard A. (Rick) Vroom  
Project Controls Manager  
360.423.4850  
[rickv@hollingerconst.com](mailto:rickv@hollingerconst.com)

—Original Message—

**From:** Al Kackman [mailto:akackman@elderdemolition.com]  
**Sent:** Tuesday, October 12, 2004 10:15 AM  
**To:** Rick Vroom  
**Cc:** jeffelder@elderdemolition.com  
**Subject:** Copy

Rick,

Please copy me on all future correspondence with Elder Demolition regarding the United Harvest rail car tipper removal project as I am responsible for implementing the policies in the field. My contact information follows below. All of your concerns are being addressed today and will be fully implemented immediately. Thank you for your help with these issues. It is our mission to completely satisfy our clients. I apologize for any embarrassment we may have caused you and Hollinger Construction.

Allen Kackman  
Elder Demolition, Incorporated  
5635 SE 111th Avenue  
Portland, OR 97266  
503-760-6330 Phone  
503-760-2266 Fax  
503-544-5038 Cell

BOARD OF INDUSTRIAL INSURANCE APPEALS  
OLYMPIA, WASHINGTON

RECEIVED  
MAY 01 2006

BY:.....

Board of Industrial Insurance Appeals

In re: ELDER Demo

Docket No. 0560115

Exhibit No. 10

ADM. 5/30/06  REJ.  
Date

10/12/2004

225/423

308075001

**Rick Vroom**

**From:** Al Kackman [akackman@elderdemolition.com]

**Sent:** Tuesday, October 12, 2004 3:06 PM

**To:** Rick Vroom

**Cc:** jeffelder@elderdemolition.com

**Subject:** Hazardous Materials

Rick,

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.

Allen Kackman  
Elder Demolition, Incorporated  
5635 SE 111th Avenue  
Portland, OR 97266  
503-760-6330 Phone  
503-760-2266 Fax  
503-544-5038 Cell

10/12/2004

226/423

308075221

**Rick Vroom**

---

**From:** Rick Vroom  
**Sent:** Tuesday, October 12, 2004 1:54 PM  
**To:** 'markwilson@portofkalama.com'  
**Cc:** 'jeffelder@elderdemolition.com'; 'Al Kackman'  
**Subject:** Lead Paint?

Mark,

Are you aware of any lead paint issues on the Rail Receiving Upgrade? Our subcontractor has posed the question. Was any testing done?

I have advised our subcontractor that if and area is suspect to do a grab sample and have it tested. This may not be necessary pending your response.

Thanks,

**HOLLINGER CONSTRUCTION, INC.**

Richard A. (Rick) Vroom  
Project Controls Manager  
360.423.4850  
[rkv@hollingerconst.com](mailto:rkv@hollingerconst.com)

10/19/2004

227/423

308075001

**Rick Vroom**

**From:** Mark Wilson [markwilson@portofkalama.com]  
**Sent:** Tuesday, October 12, 2004 2:06 PM  
**To:** Rick Vroom  
**Subject:** Read: Lead Paint?



ATT01221.txt (338 B) ATT01222.txt (262 B)

Your message

**To:** markwilson@portofkalama.com  
**Cc:** jeffelder@elderdemolition.com; Al Kackman  
**Subject:** 10/12/2004 1:53 PM

was read on 10/12/2004 2:06 PM.

228/423

# **APPENDIX C**

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

Inspection Number: 308075001  
Inspection Dates: 10/18/2004-04/04/2005  
Issuance Date: 04/11/2005  
CSHO ID: C7983  
Optional Inspection Nbr: H20435558



### Citation and Notification of Penalty

Company Name: ELDER DEMOLITION INC  
Inspection Site: 400 Toteff Rd. United Harvest LLC, Kalama, WA 98625

#### Citation 1 Item 1a Type of Violation: **Willful**

Annual medical evaluations are required for workers who are exposed to lead for 30 days or more per year and for whom a blood sampling test conducted at any time during the preceding 12 months indicated a blood lead level at or above 40 5g/dl. Medical evaluations must be provided 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 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.

296-155-17607(1)

The employer did not prevent employees from being exposed to lead at concentrations greater than fifty micrograms per cubic meter of air (50 ug/m<sup>3</sup>) averaged over an 8-hour period. In this case 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 1st week of demolition at United Harvest LLC located in Kalama, Wa. On 10/22/04 the lead exposure for the torch cutter was evaluated by the department and found to be 2600 ug/m<sup>3</sup> lead 8-hour TWA. This is 52 times higher than the permissible exposure limit. Blood lead testing revealed workers had elevated blood lead levels ranging from 41 to 71 micrograms of lead per deciliter of red blood (ug/dl) with three workers at the level requiring medical removal.

This violation was corrected at the time of inspection.

Date By Which Violation Must be Abated:	10/18/2004
Proposed Penalty:	\$ 18000.00

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

Inspection Number: 308075001  
Inspection Dates: 10/18/2004 - 04/04/2005  
Issuance Date: 04/11/2005  
CSHO ID: C7983  
Optional Inspection Nbr: H20435558



**Citation and Notification of Penalty**

Company Name: ELDER DEMOLITION INC  
Inspection Site: 400 Toteff Rd. United Harvest LLC, Kalama, WA 98625

**Citation 1 Item 1b Type of Violation: Willful**

296-155-17609(1)(a)

The employer did not initially determine if any employee may be exposed to lead at or above the action level of 30 ug/m3 of lead in air while workers were using oxygen plasma cutting torches to cut out old rail car tipper equipment at the United Harvest LLC grain handling facility in Kalama, WA. from 10/12/04 to 10/18/04.

Message: WAC 296-155-17609 requires the employer to conduct additional monitoring 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.

This violation was corrected at the time of inspection.

**Date By Which Violation Must be Abated: 10/18/2004**

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

Inspection Number: 308075001  
Inspection Dates: 10/18/2004 - 04/04/2005  
Issuance Date: 04/11/2005  
CSHO ID: C7983  
Optional Inspection Nbr: H20435558



### Citation and Notification of Penalty

Company Name: ELDER DEMOLITION INC  
Inspection Site: 400 Toteff Rd. United Harvest LLC, Kalama, WA 98625

#### Citation 1 Item 1c Type of Violation: **Willful**

296-155-775(9)

The employer did not ensure that before demolition begins that a determination be made as to the presence of asbestos, hazardous materials, hazardous chemicals, gases, explosives, flammable materials, or similarly dangerous substances at the work site. When the presence of any such substance is apparent or suspected, testing and removal or purging shall be performed and the hazard eliminated before demolition is started. Removal of such substances shall be in accordance with the requirements of chapters 296-62 and 296-65 WAC. In this instance the demolition contractor did not know if the paint contained lead and did not evaluate a sample for lead or, remove the paint prior to starting the demolition. A crew of five workers using two oxygen plasma cutting torches burned several hundred lineal feet of lead based-paint without using personal protective equipment and safe work practices at the United Harvest LLC rail car tipper system from 10/12/04 to 10/18/04. 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 with three at the level requiring medical removal.

This violation was corrected at the time of inspection.

The violations above 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.

**Date By Which Violation Must be Abated: 10/18/2004**

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

Inspection Number: 308075001  
Inspection Dates: 10/18/2004-04/04/2005  
Issuance Date: 04/11/2005  
CSHO ID: C7983  
Optional Inspection Nbr: H20435558



**Citation and Notification of Penalty**

Company Name: ELDER DEMOLITION INC  
Inspection Site: 400 Toteff Rd. United Harvest LLC, Kalama, WA 98625

**Citation 2 Item 1a** Type of Violation: **Serious**

296-155-17609(2)(e)(i)

The employer did not ensure that until an employee exposure assessment and actual employee exposure is determined as required by this section, interim protection for employees performing the tasks described in (a) through (d) of this subsection included appropriate respiratory protection in accordance with WAC 296-155-17613. Workers conducting torch cutting on surfaces coated with a lead-based paint must be treated as though exposed to lead at concentrations greater than 2500 ug/m3 and must be provided appropriate respiratory protection, including, at a minimum half-face supplied air respirators operated in positive pressure mode. In this instance from 10/12/04 to 10/18/04 five workers used two oxygen plasma cutting torches to cut equipment coated with a bright orange or, dull white paint at United Harvest LLC in Kalama, while not wearing any respirators or, wearing half-face air filtering respirators. When a paint sample was evaluated for lead content on 10/19/04 it was found to contain at least 28 percent lead.

This violation was corrected at the time of inspection.

Date By Which Violation Must be Abated:	10/18/2004
Proposed Penalty:	\$ 600.00

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

Inspection Number: 308075001  
Inspection Dates: 10/18/2004-04/04/2005  
Issuance Date: 04/11/2005  
CSHO ID: C7983  
Optional Inspection Nbr: H20435558



### Citation and Notification of Penalty

Company Name: ELDER DEMOLITION INC  
Inspection Site: 400 Toteff Rd. United Harvest LLC, Kalama, WA 98625

#### Citation 2 Item 1b Type of Violation: **Serious**

296-155-17613(3)(a)

The employer did not ensure that workers torch cutting lead-based paint use at a minimum a half-face supplied air respirator operated in positive pressure mode. The employer must select the appropriate respirator or combination of respirators from Table I of this section. In this instance the crew torch cutting steel painted with lead-based paint were provided half-face negative air purifying respirators as optional use.

Message: Department samples collected from the salvage pile showed lead contents of 53, 66 and 90 percent. The foreman monitored while torch cutting in the pit area was found to be exposed to approximately 2600 ug/m3 lead for an 8-hour TWA on 10/22/04. Exposures during the first week could have been much higher. The lead concentration in air on 10/22 for samples of 90 to 104 minutes in length ranged from 3675 to 4076 ug/m3.

The violations above 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.

This violation was corrected at the time of inspection.

**Date By Which Violation Must be Abated: 10/18/2004**

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

Inspection Number: 308075001  
Inspection Dates: 10/18/2004-04/04/2005  
Issuance Date: 04/11/2005  
CSHO ID: C7983  
Optional Inspection Nbr: H20435558



**Citation and Notification of Penalty**

Company Name: ELDER DEMOLITION INC  
Inspection Site: 400 Toteff Rd. United Harvest LLC, Kalama, WA 98625

**Citation 2 Item 2a Type of Violation: **Serious****

296-155-17609(2)(e)(ii)

The employer did not ensure that appropriate personal protective clothing was provided to employees performing the trigger task of torch burning until employee exposure assessment as required by this section determines the actual employee exposure is below the PEL. Appropriate personal protective clothing and equipment must be provided in accordance with WAC 296-155-17615. In this instance workers wearing their personal clothing, torch burned lead-based paint during the demolition of the old rail car tipper equipment at United Harvest LLC in Kalama, Wa. from 10/12 to 10/18/04.

This violation was corrected at the time of inspection.

Date By Which Violation Must be Abated:	10/18/2004
Proposed Penalty:	\$ 600.00

**Citation 2 Item 2b Type of Violation: **Serious****

296-155-17615(1)(a)

The employer did not ensure that coveralls or similar full-body work clothing was provided and used where an employee is exposed to lead above the PEL without regard to the use of respirators, where employees are exposed to lead compounds which may cause skin or eye irritation (e.g., lead arsenate, lead azide), and as protection for employees performing tasks as specified in WAC 296-155-17609(2). The employer must provide at no cost to the employee and assure that the employee uses appropriate protective work clothing and equipment that prevents contamination of the employee and the employee's garments. On 10/18/04 the crew torch cutting lead painted rail car tipper equipment at United Harvest LLC in Kalama, Wa. wore their personal clothing and did not use coveralls or similar full-body work clothing.

This violation was corrected at the time of inspection.

Date By Which Violation Must be Abated:	10/18/2004
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Department of Labor & Industries  
WISHA SERVICES DIVISION  
PO Box 44604  
Olympia, WA 98504-4604

Inspection Number: 308075001  
Inspection Dates: 10/18/2004 - 04/04/2005  
Issuance Date: 04/11/2005  
CSHO ID: C7983  
Optional Inspection Nbr: H20435558



**Citation and Notification of Penalty**

Company Name: ELDER DEMOLITION INC  
Inspection Site: 400 Toteff Rd. United Harvest LLC, Kalama, WA 98625

**Citation 2 Item 2c Type of Violation: **Serious****

296-155-17615(1)(b)

The employer did not ensure gloves, hats, and shoes or disposable shoe coverlets were provided and used where an employee is exposed to lead above the PEL without regard to the use of respirators, where employees are exposed to lead compounds which may cause skin or eye irritation (e.g., lead arsenate, lead azide), and as protection for employees performing tasks as specified in WAC 296-155-17609(2). The employer shall provide at no cost to the employee and assure that the employee uses appropriate protective work clothing and equipment that prevents contamination of the employee and the employee's garments. In this instance workers so exposed to lead above the permissible exposure limit were not required to use shoe or boot covers.

This violation was corrected at the time of inspection.

The violations above 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.

**Date By Which Violation Must be Abated: 10/18/2004**

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

Inspection Number: 308075001  
Inspection Dates: 10/18/2004 - 04/04/2005  
Issuance Date: 04/11/2005  
CSHO ID: C7983  
Optional Inspection Nbr: H20435558



**Citation and Notification of Penalty**

Company Name: ELDER DEMOLITION INC  
Inspection Site: 400 Toteff Rd. United Harvest LLC, Kalama, WA 98625

**Citation 2 Item 3 Type of Violation: Serious**

296-155-17611(1)

The employer did not implement engineering and work practice controls, including administrative controls, to reduce and maintain employee exposure to lead to or below the permissible exposure limit to the extent that such controls are feasible. Wherever all feasible engineering and work practices controls that can be instituted are not sufficient to reduce employee exposure to or below the permissible exposure limit prescribed in WAC 296-155-17607, the employer shall nonetheless use them to reduce employee exposure to the lowest feasible level and shall supplement them by the use of respiratory protection that complies with the requirements of WAC 296-155-17613. The crew torch cut steel painted with lead-based paint and did not implement any engineering and work practice controls to reduce employee exposure to or below the permissible limit of 50 ug/m3 8-hour TWA. In this case five workers developed serious blood lead levels, ranging from 41 to 71 ug/dl with three workers at levels requiring medical removal, after torch burning for five days on paint containing from 28 to 90 percent lead at United Harvest LLC in Kalama, WA.

This violation was corrected at the time of inspection.

Date By Which Violation Must be Abated:	10/18/2004
Proposed Penalty:	\$ 600.00

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

Inspection Number: 308075001  
Inspection Dates: 10/18/2004-04/04/2005  
Issuance Date: 04/11/2005  
CSHO ID: C7983  
Optional Inspection Nbr: H20435558



**Citation and Notification of Penalty**

Company Name: ELDER DEMOLITION INC  
Inspection Site: 400 Toteff Rd. United Harvest LLC, Kalama, WA 98625

**Citation 2 Item 4 Type of Violation: Serious**

296-155-17611(2)(c)

The employer did not ensure that a competent person, conduct frequent and regular inspections of job sites, materials, and equipment. A competent person means one who is capable of identifying existing and predictable lead hazards in the surroundings or working conditions and who has authorization to take prompt corrective measures to eliminate them. The competent persons on site: did not determine that lead was present before torch burning lead-based paint; did not assess each job and nearby workers for exposure to lead in air; allowed use of half-face respirators contrary to trigger task activity for torch burning; did not implement required work practices including hand washing with warm water and soap, showering and changing work clothes before leaving the work site, and did not ensure that lunchrooms, shower rooms and change areas were provided.

Date By Which Violation Must be Abated:	05/14/2005
Proposed Penalty:	\$ 600.00

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

Inspection Number: 308075001  
Inspection Dates: 10/18/2004 - 04/04/2005  
Issuance Date: 04/11/2005  
CSHO ID: C7983  
Optional Inspection Nbr: H20435558



### Citation and Notification of Penalty

Company Name: ELDER DEMOLITION INC  
Inspection Site: 400 Toteff Rd. United Harvest LLC, Kalama, WA 98625

### Citation 2 Item 5a Type of Violation: **Serious**

296-155-17609(2)(e)(vi)

The employer did not ensure that specific lead hazard training and respiratory protection training were provided to workers performing tasks as described in (a) through (d) of this subsection, until an employee exposure assessment determines actual employee exposures to lead to be below permissible exposure limits. 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 must be provided.

In this instance workers torch cut steel painted with suspected lead-based paint for five days without taking the precautions required for this trigger task activity, consequently all five workers developed serious blood lead levels ranging from 41 to 71 ug/dl. The company compliance plan prohibits torch cutting on painted surfaces that contain lead but addresses only manual removal methods.

Date By Which Violation Must be Abated	05/14/2005
Proposed Penalty	\$ 600.00

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

Inspection Number: 308075001  
Inspection Dates: 10/18/2004 - 04/04/2005  
Issuance Date: 04/11/2005  
CSHO ID: C7983  
Optional Inspection Nbr: H20435558



**Citation and Notification of Penalty**

Company Name: ELDER DEMOLITION INC  
Inspection Site: 400 Toteff Rd. United Harvest LLC, Kalama, WA 98625

**Citation 2 Item 5b Type of Violation: Serious**

296-800-17030

The employer did not ensure that employees were provided with effective information on hazardous chemicals in their work area at the time of their initial job assignment or, whenever a new physical or health hazard related to chemical exposure is introduced. Effective information about hazardous chemicals means employee training must include: steps employees can take to protect themselves from the chemical hazards in the workplace, including specific procedures implemented by the employer; methods and observations used to detect the presence/or release of a hazardous chemical in the work area; visual appearance or odor of hazardous chemicals when being released; physical and health hazards of the chemicals in the work area, including the likely physical symptoms or effects of overexposure.

Specific procedures may include:

- Appropriate work practices
- Engineering controls
- Emergency procedures
- Personal protective equipment to be used

In this case workers were exposed to lead while torch burning lead for 5 days with inadequate work practices, no protective clothing, and inadequate respirators for exposures to lead that were documented to be 2600ug/m<sup>3</sup> 8-hr TWA.

The violations above 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.

Date By Which Violation Must be Abated: 05/14/2005

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

Inspection Number: 308075001  
Inspection Dates: 10/18/2004-04/04/2005  
Issuance Date: 04/11/2005  
CSHO ID: C7983  
Optional Inspection Nbr: H20435558



**Citation and Notification of Penalty**

Company Name: ELDER DEMOLITION INC  
Inspection Site: 400 Toteff Rd. United Harvest LLC, Kalama, WA 98625

**Citation 2 Item 6** Type of Violation:  **Serious**

296-155-17619(3)(a)

The employer did not ensure that shower facilities are provided for use by workers exposed to lead above the permissible exposure limit of 50 ug/m<sup>3</sup> for an 8-hour time-weighted average. In this instance five workers torch burning lead-based paint at United Harvest LLC in Kalama, Wa. were not provided and required to use shower facilities.

This violation was corrected at the time of inspection.

Date By Which Violation Must be Abated:	10/18/2004
Proposed Penalty:	\$ 600.00

**Citation 2 Item 7a** Type of Violation:  **Serious**

296-155-17609(2)(e)(iv)

The employer did not ensure that hand washing facilities were provided in accordance with WAC 296-155-17619(5) for workers performing the trigger task of torch cutting lead painted steel until an employee exposure assessment determines actual employee exposure to be less than PEL of 50 ug/m<sup>3</sup> for an 8-hour TWA.

Message:

The employer is required to assume the trigger task of torch cutting may result in an exposure of greater than 2500 ug/m<sup>3</sup>. In this case a worker torch cutting on 10/22/04 was found to have a lead exposure of 2600 ug/m<sup>3</sup> 8-hr TWA.

This violation was corrected at the time of inspection.

Date By Which Violation Must be Abated:	10/18/2004
Proposed Penalty:	\$ 600.00

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

Inspection Number: 308075001  
Inspection Dates: 10/18/2004 - 04/04/2005  
Issuance Date: 04/11/2005  
CSHO ID: C7983  
Optional Inspection Nbr: H20435558



**Citation and Notification of Penalty**

Company Name: ELDER DEMOLITION INC  
Inspection Site: 400 Toteff Rd. United Harvest LLC, Kalama, WA 98625

**Citation 2 Item 7b Type of Violation: **Serious****

296-155-17619(5)(a)

The employer did not ensure that adequate hand washing facilities were provided and used by employees exposed to lead in accordance with WAC 296-155-140 while demolishing the old rail car tipper equipment at United Harvest LLC in Kalama, Wa.

This violation was corrected at the time of inspection.

**Date By Which Violation Must be Abated:** 10/18/2004

**Citation 2 Item 7c Type of Violation: **Serious****

296-155-140(2)(a)

The employer did not ensure that clean, tepid wash water, between 70 and 100 degrees Fahrenheit, was provided at all construction sites. During the inspection on 10/18/04 it was found that the crew torch burning lead-based paint at the rail car pit had been provided a hand washing unit in the portable toilet located by the job trailer but the water was not heated.

Situation not believed to exist any longer. However, if this violation is identified again during future inspections, it may result in repeat or failure to abate violations which may include penalties.

**Date By Which Violation Must be Abated:** 10/18/2004

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

Inspection Number: 308075001  
Inspection Dates: 10/18/2004 - 04/04/2005  
Issuance Date: 04/11/2005  
CSHO ID: C7983  
Optional Inspection Nbr: H20435558



**Citation and Notification of Penalty**

Company Name: ELDER DEMOLITION INC  
Inspection Site: 400 Toteff Rd. United Harvest LLC, Kalama, WA 98625

**Citation 2 Item 7d Type of Violation: **Serious****

296-155-140(5)(c)(ii)

The employer did not ensure that washing facilities are as close as practical to the highest concentration of employees and at all sites they are located within 200 feet horizontally of all employees. In this instance the employer provided a hand washing unit however, was located by the job shack more than 200 feet from the demolition site.

This violation was corrected at the time of inspection.

The violations above 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.

**Date By Which Violation Must be Abated: 10/18/2004**

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

Inspection Number: 308075001  
Inspection Dates: 10/18/2004 - 04/04/2005  
Issuance Date: 04/11/2005  
CSHO ID: C7983  
Optional Inspection Nbr: H20435558



**Citation and Notification of Penalty**

Company Name: ELDER DEMOLITION INC  
Inspection Site: 400 Toteff Rd. United Harvest LLC, Kalama, WA 98625

**Citation 2 Item 8a** Type of Violation: **Serious**

296-155-17609(2)(e)(iii)

The employer did not ensure that change areas were provided until employee exposure assessment as required by this section is performed and actual employee exposure is determined to be less than the PEL. The employer shall provide to employees performing the tasks described in (a) through (d) of this subsection with interim protection including, change areas as described in WAC 296-155-17619(2). In this instance the company had not assessed the hazard until five days into the project and had not provided a change area based on the trigger task performed. A hazard assessment on 10/22/04 revealed the torch cutter was exposed to lead at approximately, 2600 ug/m3 8-hr TWA.

Situation not believed to exist any longer. However, if this violation is identified again during future inspections, it may result in repeat or failure to abate violations which may include penalties.

Date By Which Violation Must be Abated:	10/18/2004
Proposed Penalty:	\$ 600.00

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

Inspection Number: 308075001  
Inspection Dates: 10/18/2004 - 04/04/2005  
Issuance Date: 04/11/2005  
CSHO ID: C7983  
Optional Inspection Nbr: H20435558



### Citation and Notification of Penalty

Company Name: ELDER DEMOLITION INC  
Inspection Site: 400 Toteff Rd. United Harvest LLC, Kalama, WA 98625

#### Citation 2 Item 8b Type of Violation: **Serious**

296-155-17619(2)(a)

The employer did not 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. Clean change areas were not provided the workers to prevent contamination of work and street clothes.

Message: WAC 296-155-17619(2)(a) Requires that change areas are equipped with separate storage facilities for protective work clothing and equipment and for street clothes to prevent cross-contamination.

Situation not believed to exist any longer. However, if this violation is identified again during future inspections, it may result in repeat or failure to abate violations which may include penalties.

The violations above 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.

Date By Which Violation Must be Abated: 10/18/2004

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

Inspection Number: 308075001  
Inspection Dates: 10/18/2004-04/04/2005  
Issuance Date: 04/11/2005  
CSHO ID: C7983  
Optional Inspection Nbr: H20435558



### Citation and Notification of Penalty

Company Name: ELDER DEMOLITION INC  
Inspection Site: 400 Toteff Rd. United Harvest LLC, Kalama, WA 98625

#### Citation 2 Item 9 Type of Violation: **Serious**

296-155-17619(2)(c)

The employer did not ensure that employees do not leave the workplace wearing any protective clothing or equipment that is required to be worn during the work shift. In this instance the demolition crew operating two oxygen plasma cutting torches from 10/12 to 10/18/04 did not change out of contaminated work clothing prior to leaving the job site.

This violation was corrected at the time of inspection.

Date By Which Violation Must be Abated:	10/18/2004
Proposed Penalty:	\$ 600.00

#### Citation 2 Item 10 Type of Violation: **Serious**

296-842-18005

The employer did not ensure sealing problems with tight-fitting respirators, were prevented by not allowing workers to use a respirator when facial hair such as stubble, moustaches, sideburns, or beards comes between the face and the sealing surface of the respirator or, interferes with valve function inside the respirator. On 10/18/04 several workers with 2-3 days of facial hair, or stubble had been using half-face respirators while torch burning lead-based paint with oxygen plasma cutting torches.

**Message:**

Also be sure that corrective glasses or personal protective equipment (PPE) do not interfere with the face piece seal. Examples of PPE include safety glasses, goggles, face shields, clothing, and hard hats.

This violation was corrected at the time of inspection.

Date By Which Violation Must be Abated:	10/18/2004
Proposed Penalty:	\$ 600.00

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

Inspection Number: 308075001  
Inspection Dates: 10/18/2004 - 04/04/2005  
Issuance Date: 04/11/2005  
CSHO ID: C7983  
Optional Inspection Nbr: H20435558



### Citation and Notification of Penalty

Company Name: ELDER DEMOLITION INC  
Inspection Site: 400 Toteff Rd. United Harvest LLC, Kalama, WA 98625

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### Citation 2 Item 11 Type of Violation: **Serious**

296-155-17611(2)(a)

The employer did not establish and implement all elements of a written lead compliance program to achieve compliance with WAC 296-155-17607. The deficiencies include but are not limited to:

- i) There was not 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;
- ii) There was not 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;
- iii) There was not a report of the technology considered in meeting the PEL;
- iv) There was no air monitoring data which documents the source of lead emissions;
- v) There was not a detailed schedule for implementation of the program, including documentation such as copies of purchase orders for equipment, construction contracts, etc.;
- vi) There was not a work practice program which includes under requirements in WAC 296-155-17615 (protective work clothing and equipment), 296-155-17617 (housekeeping), and 296-155-17619 (hygiene facilities and practices), and incorporates other relevant work practices such as those specified in subsection (5) of this section;
- vii) There was not an administrative control schedule required by subsection (4) of this section, if applicable;

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

Inspection Number: 308075001  
Inspection Dates: 10/18/2004 - 04/04/2005  
Issuance Date: 04/11/2005  
CSHO ID: C7983  
Optional Inspection Nbr: H20435558



**Citation and Notification of Penalty**

Company Name: ELDER DEMOLITION INC  
Inspection Site: 400 Toteff Rd. United Harvest LLC, Kalama, WA 98625

**Message:**

The compliance program must be revised and updated at least every 6 months to reflect the current status of the program. When ventilation is used to control lead exposure, the employer shall evaluate the mechanical performance of the system in controlling exposure as necessary to maintain its effectiveness. If administrative controls are used as a means of reducing employees TWA exposure to lead, the employer shall establish and implement a job rotation schedule which includes: name or identification number of each affected employee; duration and exposure levels at each job or work station where each affected employee is located; and any other information which may be useful in assessing the reliability of administrative controls to reduce exposure to lead and the employer shall ensure that, to the extent relevant, employees follow good work practices such as described in Appendix B, WAC 296-155-17652.

**Additional abatement documentation required.**

Date By Which Violation Must be Abated:	05/14/2005
Proposed Penalty:	\$ 600.00

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

Inspection Number: 308075001  
Inspection Dates: 10/18/2004-04/04/2005  
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CSHO ID: C7983  
Optional Inspection Nbr: H20435558



### Citation and Notification of Penalty

Company Name: ELDER DEMOLITION INC  
Inspection Site: 400 Toteff Rd. United Harvest LLC, Kalama, WA 98625

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#### Citation 2 Item 12 Type of Violation: **Serious**

296-155-17617(1)

The employer did not ensure that all surfaces are maintained as free as practicable of accumulations of lead. There were no controls used for the first five days of the demolition in which lead-based paint containing from 30 to 90 percent lead was torch cut using two oxygen plasma cutting torches. Wipe tests show lead contamination on the door handles into the building and men's restroom and hand railings.

Message: Be aware that clean-up of floors and other surfaces where lead accumulates must be cleaned by vacuuming or other methods that minimize the likelihood of lead becoming airborne.

This violation was corrected at the time of inspection.

Date By Which Violation Must be Abated:	10/18/2004
Proposed Penalty:	\$ 600.00

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

Inspection Number: 308075001  
Inspection Dates: 10/18/2004-04/04/2005  
Issuance Date: 04/11/2005  
CSHO ID: C7983  
Optional Inspection Nbr: H20435558



**Citation and Notification of Penalty**

Company Name: ELDER DEMOLITION INC  
Inspection Site: 400 Toteff Rd. United Harvest LLC, Kalama, WA 98625

**Citation 2 Item 13a Type of Violation: **Serious****

296-155-17609(2)(e)(v)

The employer did not provide biological monitoring or, blood sampling and analysis for lead and zinc protoporphyrin levels for workers performing trigger task activities such as torch burning of lead-based paint until the employer has performed an employee exposure assessment and determines the actual employee exposure to be less than the PEL. In this instance workers were not provided initial biological monitoring during the first five days of the project torch during which two plasma torches were used to cut steel painted with a lead-based paint. When the blood testing was done all had elevated bls from 41 to 71 ug/m3 with three at the level requiring medical removal.

Message: Tracking a worker's blood lead and ZPP level is a good way to determine if your lead compliance program is effective.

This violation was corrected at the time of inspection.

Date By Which Violation Must be Abated:	10/18/2004
Proposed Penalty:	\$ 600.00

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

Inspection Number: 308075001  
Inspection Dates: 10/18/2004 - 04/04/2005  
Issuance Date: 04/11/2005  
CSHO ID: C7983  
Optional Inspection Nbr: H20435558



**Citation and Notification of Penalty**

Company Name: ELDER DEMOLITION INC  
Inspection Site: 400 Toteff Rd. United Harvest LLC, Kalama, WA 98625

**Citation 2 Item 13b Type of Violation: Serious**

296-155-17621(1)(a)

The employer did not 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. In this instance the crew using two oxygen plasma cutting torches cut on painted surfaces that had not been tested for the lead content. The torch cutting continued for 5 days until a complaint filed with the department was investigated. The company intended for the crew to continue torch cutting until the demolition was completed, estimated to be another week. The biological monitoring conducted on the sixth day revealed all workers had absorbed significant amounts of lead with three workers at the level requiring medical removal.

This violation was corrected at the time of inspection.

**Date By Which Violation Must be Abated: 10/18/2004**

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

Inspection Number: 308075001  
Inspection Dates: 10/18/2004 - 04/04/2005  
Issuance Date: 04/11/2005  
CSHO ID: C7983  
Optional Inspection Nbr: H20435558



### Citation and Notification of Penalty

Company Name: ELDER DEMOLITION INC  
Inspection Site: 400 Toteff Rd. United Harvest LLC, Kalama, WA 98625

### Citation 2 Item 13c Type of Violation: **Serious**

155-17621(2)(a)

The employer did not make available biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels for each employee: covered by subsection (1)(a) which includes employees occupationally exposed on any day to lead at or above the action level; and by subsection (1)(b) which includes all employees who are or may be exposed to lead by the employer at or above the action level for more than 30 days in any consecutive 12 months. In this case workers were exposed to lead from torch burning for up to five days at the United Harvest grain facility before being offered blood lead testing. The five workers tested were all found to be above 40 ug/dl with three exposures greater than 50 ug/dl.

**Message:**

- Retesting is required for any worker who has exposure to lead at or above the action level for 30 days in any consecutive 12 months. Rate of retesting is every two months for six months and then every 6 months thereafter.
- Retesting is required every two months for any worker for whom a blood sampling test conducted at any time during the preceding 12 months indicated a blood lead level at or above 40 5g/dl. This continues until two consecutive tests are below 40 ug/dl.
- Retesting is required monthly for any worker who is removed from exposure to lead due to an elevated blood lead level at least monthly during the removal period.

**Message:**

-Follow-up blood sampling tests are required within two weeks, whenever, the results of a blood lead level test indicate that an employee's blood lead level equals or exceeds 50ug/dl, the limit for medical removal under WAC 296-155-17623 (1)(a).

This violation was corrected at the time of inspection.

The violations above 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.

**Date By Which Violation Must be Abated:** 10/18/2004

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

Inspection Number: 308075001  
Inspection Dates: 10/18/2004 - 04/04/2005  
Issuance Date: 04/11/2005  
CSHO ID: C7983  
Optional Inspection Nbr: H20435558



### Citation and Notification of Penalty

Company Name: ELDER DEMOLITION INC  
Inspection Site: 400 Toteff Rd. United Harvest LLC, Kalama, WA 98625

### Citation 2 Item 14 Type of Violation: **Serious**

296-842-12005(1)

The employer worksite-specific written respiratory protection program did not address all the applicable elements as listed in Table 3 in the standard. The written program was not specific. Deficiencies include but are not limited to:

Procedures for respirator selection

- A list specifying the appropriate respirator for each respiratory hazard in your workplace
- Procedures for issuing the proper type of respirator, if appropriate

Respiratory hazards encountered during:

Routine activities

Infrequent activities, for example, bi-monthly cleaning of equipment

Reasonably foreseeable emergencies, for example, rescue, spill response, or escape situations

- Proper use of respirators, for example, how to put on or remove respirators, and use limitations

Respirator use procedures for:

- Routine activities

- Infrequent activities

- Reasonably foreseeable emergencies

- Procedures and schedules for respirator maintenance covering:

Cleaning and disinfecting

Storage

Inspection and repair

When to discard respirators

- A cartridge or canister change schedule if air-purifying respirators are selected for use against gas or vapor contaminants and an end-of-service-life-indicator (ESLI) isn't available. In addition, provide:

The data and other information you relied on to calculate change schedule values (for example, highest contaminant concentration estimates, duration of employee respirator use, expected maximum humidity levels, user breathing rates, and safety factors).

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

Inspection Number: 308075001  
Inspection Dates: 10/18/2004-04/04/2005  
Issuance Date: 04/11/2005  
CSHO ID: C7983  
Optional Inspection Nbr: H20435558



**Citation and Notification of Penalty**

Company Name: ELDER DEMOLITION INC  
Inspection Site: 400 Toteff Rd. United Harvest LLC, Kalama, WA 98625

Procedures to ensure a safe air quantity and quality if atmosphere-supplying respirators (air-line or SCBA) are selected.  
Procedures for evaluating program effectiveness on a regular basis

Date By Which Violation Must be Abated:	05/14/2005
Proposed Penalty:	\$ 600.00

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

Inspection Number: 308075001  
Inspection Dates: 10/18/2004-04/04/2005  
Issuance Date: 04/11/2005  
CSHO ID: C7983  
Optional Inspection Nbr: H20435558



### Citation and Notification of Penalty

Company Name: ELDER DEMOLITION INC  
Inspection Site: 400 Toteff Rd. United Harvest LLC, Kalama, WA 98625

#### Citation 3 Item 1 Type of Violation: **General**

296-155-17627(2)(a)

The employer did not post the following warning sign in the work area where an employees exposure to lead is above the PEL.

WARNING  
LEAD WORK AREA  
POISON  
NO SMOKING OR EATING

In this instance the only signs posted by the company warned others to stay out of the area.

Situation not believed to exist any longer. However, if this violation is identified again during future inspections, it may result in repeat or failure to abate violations which may include penalties.

Date By Which Violation Must be Abated:	10/18/2004
Proposed Penalty:	\$ 0.00

#### Citation 3 Item 2 Type of Violation: **General**

296-155-17611(2)(d)

The employer did not have a written lead compliance program available at the work site. During the initial inspection it was determined that the company written lead compliance program was not at the United Harvest LLC demolition job in Kalama, Wa.

This violation was corrected at the time of inspection.

Date By Which Violation Must be Abated:	10/18/2004
Proposed Penalty:	\$ 0.00

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

Inspection Number: 308075001  
Inspection Dates: 10/18/2004-04/04/2005  
Issuance Date: 04/11/2005  
CSHO ID: C7983  
Optional Inspection Nbr: H20435558



**Citation and Notification of Penalty**

Company Name: ELDER DEMOLITION INC  
Inspection Site: 400 Toteff Rd. United Harvest LLC, Kalama, WA 98625

**Citation 3 Item 3 Type of Violation: General**

296-842-14005

The employer did not provide each worker required to use a respirator, or each worker voluntarily using a respirator other than a dust mask, a medical evaluation before use of the respirator. The medical evaluations must be provided for employees at no cost to them. The process is outlined in WAC 296-842-14005 (Steps 1 through 7). In this instance medical evaluations addressing respirator use had not been provided for two of the crew assigned to use respirators at the United Harvest LLC demolition project.

MESSAGE: The employer must maintain employee confidentiality during examination or questionnaire administration: do not view employee's answers on the questionnaire; do not act in a manner that may be considered a breach of confidentiality.

This violation was corrected at the time of inspection.

Date By Which Violation Must be Abated:	10/18/2004
Proposed Penalty:	\$ 0.00

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

Inspection Number: 308075001  
Inspection Dates: 10/18/2004 - 04/04/2005  
Issuance Date: 04/11/2005  
CSHO ID: C7983  
Optional Inspection Nbr: H20435558



**Citation and Notification of Penalty**

Company Name: ELDER DEMOLITION INC  
Inspection Site: 400 Toteff Rd. United Harvest LLC, Kalama, WA 98625

**Citation 3 Item 4 Type of Violation: General**

296-842-15005

The employer did not ensure that employees required to use a negative or positive pressure tight-fitting face piece respirator pass an appropriate qualitative fit test or quantitative fit test before assigned duties requiring a respirator are performed and at least annually thereafter. Fit testing must occur prior to initial use of the respirator; whenever a different respirator face piece (size, style, model or make) is used; at least annually thereafter; and whenever the employee reports to you or your licensed healthcare provider observes changes in the employee's physical condition that could affect respirator fit. Such conditions include, but are not limited to, facial scarring, dental changes, cosmetic surgery, or an obvious change in body weight. In this case the employer had not provided annual respirator fit-tests.

This violation was corrected at the time of inspection.

Date By Which Violation Must be Abated:	10/18/2004
Proposed Penalty:	\$ 0.00

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

Inspection Number: 308075001  
Inspection Dates: 10/18/2004-04/04/2005  
Issuance Date: 04/11/2005  
CSHO ID: C7983  
Optional Inspection Nbr: H20435558



**Citation and Notification of Penalty**

Company Name: ELDER DEMOLITION INC  
Inspection Site: 400 Toteff Rd. United Harvest LLC, Kalama, WA 98625

**Citation 3 Item 5 Type of Violation: General**

296-155-120(2)

The employer did not ensure that all leaders, supervisors or persons in direct charge of one or more employees have a valid first-aid certificate. In this instance the foreman did not have a valid first-aid certificate while supervising a crew of 4-5 workers during the demolition of the rail car tipper equipment at the United Harvest LLC jobsite on 10/18/04.

Note: The requirement that all crew leaders, supervisors or person in direct charge of one or more employees (subsection (3) of this section) applies even if other first-aid trained person(s) are available. In emergencies, crew leaders will be permitted to work up to thirty days without having the required certificate, providing an employee in the crew or another crew leaders in the immediate work area has the necessary certificate.

This violation was corrected at the time of inspection.

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:	10/18/2004
Proposed Penalty:	\$ 0.00

Michael D. Wood  
Acting 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](http://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.

Department of Labor & Industries  
WISHA SERVICES DIVISION  
Management Services / Accounting  
P.O. Box 44835  
Olympia, WA 98504-4835



To:  
ELDER DEMOLITION INC  
6400 SE 101st Ave Suite 201  
Portland, OR 97266

Inspection Site:  
400 Toteff Rd. United Harvest LLC  
Kalama, WA 98625

Inspection Date(s): 10/18/2004-04/04/2005  
Issuance Date: 04/11/2005  
Optional Report #: H20435558  
Reporting I.D.: 1055340  
U.B.I. #: 601792319  
CSHO: C7983

## INVOICE

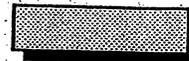
### Summary of Penalties for Inspection Number 308075001

Citation 1, Willful	= \$	18000.00
Citation 2, Serious	= \$	8400.00
Citation 3, General	= \$	0.00
<b>TOTAL PROPOSED PENALTIES</b>	<b>= \$</b>	<b>26400.00</b>

This is an invoice for penalties owed the Department of Labor and Industries. Payment is due within 15 days unless appealed. See appeal rights on "Notice of Rights and Duties Regarding This Citation" enclosed with the Citation and Notification.

To ensure proper credit, please return a copy of this invoice with your payment. Make checks payable to the Department of Labor and Industries and mail to the above address.

Please indicate amount paid:



# **APPENDIX D**

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON

1 IN RE: ELDER DEMOLITION INC ) DOCKET NO. 05 W0115  
2 )  
3 CITATION & NOTICE NO. 308075001 ) PROPOSED DECISION AND ORDER

4 INDUSTRIAL APPEALS JUDGE: Richard J. Mackey

5 APPEARANCES:

6 Employer, Elder Demolition, Inc., by  
7 AMS Consulting, Inc., per  
8 Aaron K. Owada

9 Employees of Elder Demolition, Inc.,  
10 None

11 Department of Labor and Industries, by  
12 The Office of the Attorney General, per  
13 Margaret A. Breysse, Assistant

14 The employer, Elder Demolition, Inc., filed an appeal with the Department of Labor and  
15 Industries' Safety Division on May 5, 2005. The Department transmitted the appeal to the Board of  
16 Industrial Insurance Appeals on May 23, 2005. The employer appeals Citation and Notice No.  
17 308075001 issued by the Department on April 11, 2005. The Citation and Notice is **AFFIRMED AS**  
18 **MODIFIED.**

19 **PROCEDURAL AND EVIDENTIARY MATTERS**

20 The deposition of Richard Wilfong, Jr., taken May 22, 2006, is published. The objection to  
21 hearsay made on page 10, line 4, is sustained, and the following is stricken: Page 10, line 2,  
22 through page 10, line 11. Based on the presence of previously unobjected to hearsay in the record  
23 regarding the same matter, and the representations of the Assistant Attorney General that the  
24 hearsay is not offered for the truth of the matter, the other hearsay and foundation objections are all  
25 overruled. All other objections are overruled and motions denied.

26 In consideration of the testimony of Mr. Wilfong regarding when the Port of Kalama grain  
27 handling facility was constructed, my ruling sustaining a lack of foundation objection at hearing  
28 during the testimony of Cheryl Christian (6/7/06 Tr. at 40-42) is set aside, the objection is overruled,  
29 and the testimony is made part of the body of evidence considered in this decision.

30 In offering the stipulation of testimony of Richardo Gonzales during the hearing on June 7,  
31 2006, the employer renewed a previously stated hearsay objection regarding blood test results.  
2 Because the stipulation does not include evidence indicating that the employer had adopted as its  
own statement the blood test result data shown to Mr. Gonzales, the employer's objection is

1 sustained, and that portion only of the stipulation which includes the information that the result was  
2 41.4 micrograms per deciliter is stricken. See 6/7/06 Tr. at 5.

3 The excellent post hearing briefs submitted by both parties have been fully considered in this  
4 Proposed Decision and Order.

5 **ISSUES**

- 6 1. Whether Elder Demolition, Inc., committed the violations cited by the  
7 Department.  
8 2. Whether the violations cited as willful were voluntary actions done either  
9 with an intentional disregard of or plain indifference to the requirements  
10 of the statute.  
11 3. Whether the violations cited as serious were committed with employer  
12 knowledge of the hazardous conduct or condition, and there existed a  
13 substantial probability that death or physical harm could result from the  
14 violations.  
15 4. Whether the penalty assessed for each violation is appropriate.  
16 5. Whether the total penalty assessed is appropriate.

17 **EVIDENCE PRESENTED**

18 Wendy Drapeau, an industrial hygienist in the Division of Occupational Safety and Health for  
19 the Department of Labor and Industries, was called as a witness by the Department. On receipt of  
20 a complaint, Ms. Drapeau visited a worksite of Elder Demolition, Inc., at the Port of Kalama on  
21 October 18, 2004. The worksite is a railcar tipping system which is part of a grain facility operated  
22 by United Harvest, LLC. Hollinger Construction received a contract to upgrade the system, and had  
23 hired Elder Demolition, Inc., to remove the existing tipping equipment. When she arrived,  
24 Ms. Drapeau observed employees of Elder Demolition and their foreman, Josh Malone, returning  
25 from a lunch break, and she observed a pile of debris from work done by that employer since  
26 October 12, 2004, with an oxygen plasma torch to cut and remove the railcar tipping system  
27 (Exhibit Nos. 27, 28 and 29). Josh Malone informed Ms. Drapeau that he did not know whether  
28 paint on the structure they had been cutting contained lead, that on October 12, 2004, he had sent  
29 a paint sample to his manager and immediate supervisor, Al Kackman, for analysis, and that  
30 thereafter he called Mr. Kackman at least four or five times seeking to learn the results of the test.

31 On October 18, 2004, Ms. Drapeau observed employees of Elder Demolition who were  
returning from their lunch break were wearing clothing in which they had previously been working  
(see the clothing shown in photos at Exhibit Nos. 32 and 34), and no provision had been made for  
disposable clothing or a change area to keep contaminated clothing at the worksite. A Hollinger

1 Construction trailer, which Ms. Drapeau was informed could be used as a change area, had not  
2 been used for that purpose.

3 Ms. Drapeau testified that on October 18, 2004, she did not observe any engineering  
4 controls in place to reduce the hazard to employees, and that although the workers had wet down  
5 the surface before cutting, she is not aware of that having any limiting effect on the occurrence of  
6 lead in the air from torch cutting. She states Josh Malone thought the normal ventilation in the  
7 worksite would be helpful, but Ms. Drapeau observed no means by which to direct the air away  
8 from workers. On October 18, 2004, Ms. Drapeau also learned that the use of respirators had been  
9 made optional for the workers, and she observed that Mr. Malone and another worker, Gene  
10 Enyard, had significant facial hair that she believes would break the seal of a respirator (Exhibit  
11 Nos. 32, 33, 34 and 35). Mr. Malone informed Ms. Drapeau that he had torch cut for at least an  
12 hour that day but had not used a respirator. Mr. Malone agreed to stop the job until they were in  
13 compliance with the trigger tasks required by the construction standard for torch cutting painted  
14 surfaces that may contain lead.

15 Based on non-compliance with the elements of the lead in construction standard,  
16 Ms. Drapeau believes the employer did not have on the jobsite a competent person who can  
17 identify the hazards and take corrective measures. She also described in her testimony the  
18 deficiencies she found in the employer's written lead compliance program, and Ms. Drapeau states  
19 the document was not present at the worksite on October 18, 2004. In addition, Ms. Drapeau found  
20 no procedures in place to minimize the accumulation of lead on other surfaces.

21 Ms. Drapeau states the employer is obligated to ensure workers have training in lead  
22 hazards and in respirator use and selection. She states the records she received indicate that  
23 some employees of Elder Demolition on that job but not everyone in the crew had received training  
24 in lead hazard (see also Exhibit Nos. 20 and 21). Ms. Drapeau did not name the untrained crew  
25 members. Ms. Drapeau also states that the crew was performing trigger task activities (activities  
26 that may disturb lead – particularly burning it) without supplied air respirators, and that they lacked  
27 knowledge of the lead levels to support downgrading to the half face respirators she found on her  
28 inspection. Ms. Drapeau testified there is no obligation to document hazard communication training  
29 but, she states, the training has to be effective and so she cited the employer for its hazard  
30 communication program (Item No. 2-5(b)). Ms. Drapeau also found the employer had failed to  
31 completely develop a written respirator protection program, that two workers had not received a  
32 medical evaluation/approval to use respirators, and that one worker was six months past due for a

1 respirator fit test. In addition, while the employer had cordoned off the work area and posted a sign  
2 stating "Do not enter, controlled access," the signs lacked information required by the safety  
3 standards, including: Warning; lead work area; poison; no smoking or eating.

4 Ms. Drapeau found no shower facilities for workers exposed to lead above 50 micrograms  
5 per cubic meter on an 8-hour time-weighted average, and was told by some that they did not  
6 shower. Ms. Drapeau testified she found the workers had been using a restroom operated by  
7 United Harvest that was not a restricted area, so they were contaminating the other worker's hand  
8 washing and toilet facilities. She states the water was not heated, and that it was at a toilet far  
9 away from their worksite.

10 Ms. Drapeau used a field test kit on October 18, 2004, to determine whether paint on  
11 materials in the debris pile contained lead, and obtained an indication that lead was present when  
12 the test chemical device turned a pink color (Exhibit Nos. 30 and 31). She also took paint chip  
13 samples and surface-wipe samples from the work area and the restroom that the foreman said they  
14 had used, and these were sent to a lab for analysis. Ms. Drapeau understands the laboratory test  
15 results of the paint samples that she took on October 18, 2004 (Exhibit Nos. 4 and 7), the surface  
16 wipe samples she took on October 18, 2004 (Exhibit Nos. 8 and 9), and the sample taken  
17 October 12, 2004, by Josh Malone and submitted to the lab by Al Kackman on October 19, 2004,  
18 (Exhibit No. 25) were all positive for the presence of lead. Ms. Drapeau testified that the outer door  
19 to the restroom area used by the workers is located nearby the place where they were torch cutting,  
20 and she believes the lead residue shown by the surface wipe tests are the result of contact by the  
21 contaminated Elder Demolition workers as well as air-borne lead particles from the torch cutting  
22 outside the door. Ms. Drapeau acknowledges that the laboratory results establish only the  
23 presence of lead residue, not when the lead was deposited on the tested surface.

24 On October 22, 2004, Ms. Drapeau returned to the work site and tested the air while Josh  
25 Malone conducted torch cutting and he and another worker, Will Bartow, wore air sampling devices  
26 she provided. Ms. Drapeau understands the laboratory results of these tests were positive for  
27 airborne lead (Exhibit Nos. 1, 2, 3, 5 and 6). Ms. Drapeau expects that the exposure of the workers  
28 while torch cutting for longer hours during the period October 12 to 18, 2004, would have been  
29 greater than that revealed by the test on October 22, 2004, which itself produced time weighted  
30 average exposures in excess of the permissible exposure limit. Ms. Drapeau described the  
31 calculation of the time-weighted average exposure over 50 times greater than the permissible  
2 exposure limit under the safety standards.

1 Ms. Drapeau asked the employer to provide her with the medical records of the employees  
2 who had been exposed to lead on that job, and received the records of five employees. She asked  
3 whether biological monitoring of employees for lead exposure had been done prior to work  
4 commencing and after some work had been performed, and found these had not been done for all  
5 workers. Ms. Drapeau understands Josh Malone had been tested a few months prior at another  
6 job. She also states that while Josh Malone was the foreman on the worksite, his first aid card had  
7 expired.

8 Ms. Drapeau acknowledges that neither the contract between the Port of Kalama and  
9 Hollinger Construction nor the demolition plans (Exhibit No. 24), address the removal of any  
10 lead-based paint, and she is not aware of the Port advising the general contractor that the project  
11 would involve lead-based paint. She understands that the demolition plan (Exhibit No. 24) advises  
12 that a hazard survey had not been done. Ms. Drapeau also states the general contractor was to  
13 complete the entire project by the end of December 2004, and the subcontractor (Elder Demolition)  
14 estimated their work would take three weeks, a time frame that did not include lead abatement.  
15 She acknowledges that the contract (Exhibit No. 22) allows a request for additional funds and time  
16 to perform work beyond the original scope of work. Ms. Drapeau also does not know if any  
17 hazardous material survey results were provided to Elder Demolition before October 2004.  
18 Ms. Drapeau recalls a conversation with Al Kackman in which he indicated he thought the tipper  
19 may contain lead, but did not know. She believes he had no actual lab results, and thus had no  
20 actual knowledge of the presence of lead, but she states he should have known.

21 Ms. Drapeau cited Elder Demolition for the violations alleged in the Citation and Notice which  
22 is under appeal here. In her testimony she describes the hazards associated with the violations,  
23 including the probability that death or physical harm could result where serious violations (including  
24 all violations characterized as either willful or serious) are alleged.

25 Ms. Drapeau believes the actions cited at Items Nos. 1-1a, b and c are willful violations  
26 because the employer was aware of the requirements of law, but was indifferent to compliance. In  
27 this regard, Ms. Drapeau states she was told by Josh Malone that during the first week of their work  
28 he had called Al Kackman four or five times at least to find out the results of testing the sample he  
29 had submitted on the first day of their work, and the sample was not actually submitted to the lab  
30 until October 19, 2004, the day after Ms. Drapeau opened her inspection. She also was told by  
31 Josh Malone that Al Kackman had advised him to proceed with the work. Further, in the course of  
32 her inspection, Ms. Drapeau received from Hollinger Construction a copy of e-mail correspondence

1 in which Al Kackman addresses his understanding of the employer's obligations regarding the  
2 presence of lead on that job (Exhibit No. 10). Ms. Drapeau testified that when she interviewed Al  
3 Kackman in the course of her inspection he said, "We took a sample. I had Josh take a sample.  
4 Josh did not get the sample analyzed. Well, ultimately, I guess the fault lies with me." 6/2/06 Tr. at  
5 143. Mr. Kackman did not say that he (Al Kackman) was the one who had not submitted the  
6 sample.

7 In her testimony Ms. Drapeau described the penalty calculations, including allowance made  
8 for employer good faith (allowed in part because the employer allowed the job to be shut down and  
9 thereafter did the right things to come into compliance), history, and size in computing the penalties.

10 Jeff Dean, who was a job superintendent for Hollinger Construction on a City of Kalama  
11 waste treatment plant project in October 2004, was called as a witness by the Department.  
12 Mr. Dean occasionally visited and to some extent was overseer for the Port of Kalama site where  
13 Elder Demolition had a contract to remove the old railcar dumping system, but he never saw the  
14 subcontract, nor was he privy to contracts between the Port of Kalama and Hollinger Construction.  
15 He states that other than occasionally coming and going, there were no Hollinger Construction  
16 people on the Port site while Elder Demolition was working. As of October 12, 2004, he never  
17 heard the subject of lead come up.

18 Mark Wilson, who was manager of planning for the Port of Kalama in October 2004, was  
19 called as a witness by the Department. Mr. Wilson managed the railcar system removal and  
20 construction project for the Port. He testified that the Port had grant money from the State  
21 amounting to 50 percent of the cost of the project, and needed to use the grant money within a  
22 year, with the result that the project needed to be finished in the first few months of 2005. The  
23 project started in October 2004. He states Hollinger Construction was the general contractor hired  
24 by the Port for the project, and Hollinger Construction used Elder Demolition as a subcontractor to  
25 remove the existing railcar unloading equipment. That equipment had to be removed before the  
26 new system could be constructed in the same location. Mr. Wilson states that as part of his duties  
27 he reviewed the demolition plan prepared by the project engineers (Exhibit No. 24), and was not  
28 aware of any mention of lead-based paint in the plan. Mr. Wilson testified that on October 12,  
29 2004, he received a phone call and an e-mail raising a question of the presence of lead-based paint  
30 on the railcar demolition project, and met with Rick Vroom of Hollinger Construction at the project  
31 site that day to discuss the concern. Mr. Wilson is not certain he knows who Al Kackman is, and  
32 does not recall speaking to him. Mr. Wilson states he was present during torch cutting operations

1 but did not request that the project be shut down. He states he was not aware that lead was  
2 present, but was expecting test results to make a determination. 6/2/06 Tr. at 37. He states he has  
3 not had training or experience with lead paint abatement. Mr. Wilson testified he was informed by  
4 the contractor that they had a suspicion, they were dealing with the issue, and that the work was  
5 going to proceed, and he assumed that was the correct response to the situation. 6/2/06 Tr. at 39.

6 Mr. Wilson received from Hollinger Construction a letter dated October 22, 2004 (Exhibit No.  
7 11). Mr. Wilson testified he made no statement regarding whether lead was present or not present  
8 prior to the arrival of the L&I inspector at the job site. Mr. Wilson testified that after lead was  
9 discovered in the project, a change order to the contract was approved to provide a lead abatement  
10 contractor, time was added to the completion date to allow for the lead abatement, and Elder  
11 Demolition was not penalized or charged liquidated damages because of the lead.

12 David Van Skike, who is a grain handler employed by United Harvest, was called as a  
13 witness by the Department. Mr. Van Skike testified that in October 2004 he observed workers  
14 cutting up the old car tipper system, and he states the smoke was tunneling up to the main floor of  
15 the grain elevator where he was working. Mr. Van Skike watched orange paint being burned off  
16 with torches. Two to four days after the work began he informed demolition workers of his belief  
17 that the orange paint contained lead, and then he was told to leave the area. Mr. Van Skike did not  
18 see anyone wearing respiratory protection. Mr. Van Skike called a Washington State Hotline and  
19 reported the matter. Mr. Van Skike recalls that three or four years previous there was a fire that  
20 burned a tank, and he believes the area around the fire site was cleaned to dispose of lead residue.

21 William Bartow, who occasionally performs work for Elder Demolition, was called as a  
22 witness by the Department. Mr. Bartow worked for Elder Demolition at the Port of Kalama in  
23 October 2004 as part of a six- or seven-member crew torching steel. He testified that in the week  
24 before the L&I inspector came, there would be about four persons cutting all at once, and he did not  
25 observe any other workers wearing respirators. Before the L&I inspector came, Mr. Bartow heard  
26 nothing about the presence of lead, and thought they were just cutting regular steel. Mr. Bartow  
27 considers Josh Malone to be big on safety issues. Mr. Bartow described participating in the air  
28 sample testing done October 22, 2004. He also testified that after the inspector found lead, the  
29 work was shut down and the workers had their blood drawn to check lead levels. When the blood  
30 test results came in, the safety coordinator for Elder Demolition, Travis Stone, provided the report to  
31 Mr. Bartow (Exhibit No. 59). When the employer later resumed torch cutting, Mr. Bartow worked as

1 a spotter and in clean-up, and did not do torch cutting because he had not been trained and  
2 certified in the use of a full-face mask respirator.

3 Sean Brunson, an employee of Elder Demolition, was called as a witness by the  
4 Department. Mr. Brunson states that in October 2004 he worked on the Port of Kalama job cutting  
5 steel with a torch. He was part of a crew of five, under Josh Malone as foreman. Al Kackman was  
6 in charge of the project for Elder Demolition. Mr. Brunson did not know anything about the  
7 presence of lead when they started the job, did not wear a respirator, and performed his work in  
8 jeans, sweatshirt, and T-shirt that he also wore home. Mr. Brunson and his family later took blood  
9 tests, and Mr. Brunson was informed by the employer that they all had lead in their blood.  
10 Mr. Brunson states Elder Demolition has a safety program, and he believes the employer is safety  
11 conscious and cares about the health and safety of all its employees.

12 Allen Kackman, who is employed by Elder Demolition as a project manager and resides in  
13 Vancouver, was called as a witness by the Department. His own duties as project manager do not  
14 normally include the actual demolition work; however, he has been in the field when necessary.  
15 Mr. Kackman was the project manager for Elder Demolition for the Port of Kalama job where that  
16 firm was a subcontractor for Hollinger Construction. Mr. Kackman testified that prior to the  
17 October 12, 2004 start of work, he was told by Mark Wilson of the Port of Kalama that there were  
18 no hazardous materials present in the project. 6/2/06 Tr. at 13. Mr. Kackman also states there was  
19 no mention of hazardous materials in the contract documents. Mr. Kackman recalls meeting at the  
20 Port of Kalama job site with Mark Wilson and "Jeff," the Hollinger Construction superintendent. He  
21 believes the meeting occurred on Friday, October 8, 2004, or the following Monday, October 11,  
22 2004, the day he says Elder Demolition started demolition work. Mr. Kackman testified he asked  
23 for a copy of the hazardous materials survey and did not receive it. Rather, he states, he was  
24 notified by Mark Wilson that there were no hazardous materials on site, and that Mr. Wilson would  
25 write him a letter stating so. Mr. Kackman did not specifically ask about lead, and states he had no  
26 conversation with Mr. Wilson regarding the presence or suspicion of lead prior to the start of the  
27 project.

28 In commenting upon the e-mail correspondence of October 12, 2004, at Exhibit No. 10,  
29 Mr. Kackman acknowledges that there then was a suspicion of the presence of lead-based paint  
30 and that, "we needed to have some testing done, if I recall." 6/2/06 Tr. at 15. Mr. Kackman thinks  
31 that a sample of the suspected lead-based paint was taken the next day, Wednesday, October 13,  
2004, by a member of the Elder Demolition crew. The sample was sent to his office, for transfer to

1 the lab. Mr. Kackman testified he does not know when he received it, but he speculates he would  
2 have noticed having it sometime Thursday or Friday morning. Mr. Kackman states it was a paint  
3 sample, not a lead sample, and "We had no reason to suspect that lead was present. Therefore,  
4 we had no reason to stop work." 6/6/06 Tr. at 19-20. Regarding the reason for analyzing the  
5 sample, Mr. Kackman states he had questions in his own mind, and wanted the reassurance. He  
6 also states he had no way to justify stopping work to his client, and even stopping a day or two  
7 would be a loss of those days of production. Mr. Kackman states he intended to get the sample to  
8 the lab, but admits that during that first week he made no attempt to do so. Mr. Kackman cites as  
9 reasons for the delay his assumption there is no lead there so it was not a high priority, that the  
10 safety coordinator who would normally take care of something like that for him was not in the office,  
11 and that Mr. Kackman had several projects going on at any one time and was in and out of the  
12 office. 6/6/06 Tr. at 22-23. Mr. Kackman recalls that on Thursday (or, he later states, on Thursday  
13 or Friday) while he was traveling he received a call from Josh asking whether he got the sample to  
14 the lab. Mr. Kackman promised to do it the following day, but he does not recall whether the  
15 sample went to the lab on Friday or the following Monday. Mr. Kackman acknowledges that there  
16 possibly were other times that Josh called him about the sample. Mr. Kackman also testified that  
17 after October 12, 2004, he was waiting for the letter from Mark Wilson, he but never received a  
18 hazardous material survey and never called Mr. Wilson to ask about lead.

19 Mr. Kackman acknowledges that Elder Demolition had a lead program in place prior to this  
20 job, and that he had received awareness training in the program. He states that as the company  
21 was not under the impression there were hazardous materials present at the site, the activities  
22 listed as prohibited, in the second main paragraph of page two of the policy (Exhibit No. 16), could  
23 take place without violating Elder Demolition's lead program. Mr. Kackman testified that he did not  
24 believe lead was present in the paint, so he did not believe the lead in construction standard  
25 applied, and he did not think it was necessary to treat the paint as if it were a trigger task when  
26 Elder Demolition first began to torch cut on the paint. He states that because he did not realize that  
27 the lead standards applied to the situation, he did not substitute his judgment for that of any lead  
28 regulation or standards. He now understands that he has to either treat the paint as if it contained  
29 lead or wait until a good faith survey is provided in writing. He states he did not understand that  
30 when he was working with the Port on this project.

31 Josh Malone, who was formerly employed by Elder Demolition and was its foreman for the  
32 Port of Kalama job in October 2004, was called as a witness by the Department. Mr. Malone

1 testified he understood they would be cutting bare, not painted steel, but states it was covered in  
2 dust and dirt and he could not see if there was paint on it. Mr. Malone states he had five workers,  
3 including himself, on that job, and that during the first week three were conducting torch cutting. He  
4 recalls that the schedule was tight, with a lot of work to be done in something like two weeks. He  
5 states that in the first week they worked 8-hour days. Mr. Malone states there was paint on part of  
6 the structure, but not all of it, and that they had torn out quite a bit before he came across the paint.  
7 He testified he looked at the paint and could not tell if it contained lead or not, but made the  
8 assumption that it could. He then called Al Kackman and let him know that they had found paint  
9 and needed to send it in for testing. Mr. Malone states that Mr. Kackman agreed and said he would  
10 get it tested. Mr. Malone states that on direction from Mr. Kackman, they kept working. The same  
11 day he spoke to Mr. Kackman, Mr. Malone pulled a sample and gave it to their delivery person, who  
12 hauls equipment back and forth, to give to Mr. Kackman. Mr. Malone understands that  
13 Mr. Kackman did not expect there to be lead on this job. Mr. Malone also recalls that the same day  
14 he found the paint, or the next day, one of the railroad workers at the Port grain facility spoke to him  
15 about the paint.

16  
17 Mr. Malone states he had previously worked on two or three jobs for Elder Demolition that  
18 involved lead-based paint and had received training on it. He testified that quite a few days after  
19 turning in the sample, and sometime after the arrival of the WISHA inspector, he got the paint  
20 sample test results. He also states he inquired into the status of the sample by calling  
21 Mr. Kackman at least a few times a day until the job was shut down, and that about a quarter of the  
22 work had been done at the time the WISHA inspector arrived. Mr. Malone believes that Al  
23 Kackman is very safety conscious, but Mr. Malone also believes that testing the paint sample  
24 should have been a priority.

25 Mr. Malone testified that during the first week all five on the crew wore respirators off and on,  
26 but he believes he could not enforce it unless he knew what he was dealing with because if the lead  
27 count (parts per million) in the air is real low it is not a necessity to have respirators, especially with  
28 the amount of wind they had coming through the tunnel at the work site. He states their respirators  
29 were half-mask with cartridges to filter out lead, that he has been trained in the use of a respirator,  
30 and that he had charts that showed what cartridges were appropriate. Mr. Malone also states he  
31 understood at the start of the job that while torch cutting where there was a question whether the  
32 paint contained lead, supplied air respiratory protection was needed. Mr. Malone does not recall  
33 any air sampling being done on this job prior to the WISHA inspector arriving. He also states they

1 wore their personal work clothes on the job, took them home at the end of shift, and laundered  
2 them themselves.

3 After Wendy Drapeau used a swab test on a piece of debris they had cut and found the  
4 presence of lead in the paint, Mr. Malone spoke with J. D. Elder and was informed that if he  
5 (Mr. Malone) feels it is unsafe he is allowed to shut down the job. Mr. Malone had not previously  
6 believed he had that authority, and testified that if he had known that previously he probably would  
7 have shut down the job the day he found the paint. 6/2/06 Tr. at 68-70.

8 Mr. Malone described his participation in the air quality testing done by Ms. Drapeau the  
9 second time she came to the jobsite. He states the weather changed there all the time, so the wind  
10 conditions were probably not the same as when they previously were cutting.

11 Mr. Malone testified that after the arrival of the WISHA inspector his blood was tested, and  
12 Mr. Malone was subsequently told by either J. D. Elder or Al Kackman that he had to stay off the  
13 job until his lead level went down. Mr. Malone identifies himself as the man in the photo at Exhibit  
14 No. 33, and states the man shown at Exhibit No. 34 is Gerald, another employee of Elder  
15 Demolition.

16 J. D. Elder, the president and sole owner of Elder Demolition, was called as a witness by the  
17 Department. Mr. Elder described his experience in the contracting field, and the responsibilities of  
18 his project managers in supervising jobs. At the time of the Port of Kalama job, the firm had 40 to  
19 60 employees, and performed 150 to 180 demolition projects of all sizes per year. He states that  
20 prior to the Port of Kalama job all new employees, including project managers, received the 2-hour  
21 training course provided by Associated General Contractors regarding awareness of asbestos and  
22 lead in construction, and they have been sending Al Kackman and the firm's safety director, Travis  
23 Stone, to safety summits or conventions, and monthly safety meetings held in the Portland area.  
24 Prior to the Port of Kalama job Elder Demolition had a written lead program in place (Exhibit No.  
25 16). They had previously performed some jobs involving lead-based paint, there had been air  
26 monitoring for lead on some of those jobs, and once or twice they had taken blood levels prior to  
27 the start of lead projects. Mr. Elder believes that the representations of the Port of Kalama and  
28 Hollinger Construction that there were no hazardous materials present on the Port job were a way  
29 of determining lead was not present for purposes of compliance with the firm's policy at Exhibit  
30 No. 16. He did not believe the lead standards applied to the job, and did not substitute his own  
31 judgment for the standards. Mr. Elder now understands that if paint is suspect either it must be  
32

1 treated as if it contained lead, or a good faith survey must be done before torch cutting can take  
2 place. Mr. Elder has not disciplined Mr. Kackman.

3 Mr. Elder states his first involvement in the Port of Kalama job, where Al Kackman was  
4 project manager, occurred when Josh called him stating that WISHA is onsite and they are being  
5 shut down. Mr. Elder was not aware that a sample had been taken. He is aware that after the job  
6 shut down, the firm sent employees to have their blood tested. He believes the results were shared  
7 with the employees, and that all employees that were on that project were kept away from any  
8 project that potentially could have lead on it. Mr. Elder testified that the subcontract on the Port job  
9 (Exhibit No. 23) contains clauses that would allow for an extension of completion time and additional  
10 funds upon the discovery of hazardous material that needed abatement and the firm received the  
11 benefit of these, so there was no economic incentive not to treat the matter as a hazardous  
12 materials project.

13 In addition, at the hearing on June 7, 2006, the parties stipulated that if Mr. Richardo  
14 Gonzales were called to testify, he would state that he was an employee of Elder Demolition who  
15 worked as a torch cutter on the Port of Kalama job, that his blood sample was taken on October 19,  
16 2004, and that he was shown the result of the blood test.

17 Cheryl Christian, a certified industrial hygienist employed by the Department of Labor and  
18 Industries, was called as a witness by the Department. Ms. Christian described the hazards  
19 associated with lead exposure, and testified that any hot work such as cutting and welding a  
20 material coated with lead-based paint creates a lead fume. She testified that lead has a low  
21 permissible exposure limit of 50 micrograms per cubic meter in the air. Ms. Christian states that  
22 lead check swabs that will confirm the presence of lead by red or pink color are widely available in  
23 hardware stores, although the accuracy is good only to one-half percent or 5,000 parts per million.  
24 Ms. Christian states that if a lead check swab came up positive, or while waiting for a sample to be  
25 analyzed by a lab, or if you even suspected you had lead-based paint, you would be required to  
26 implement the presumed exposure precautions for lead in construction standards until a  
27 confirmation was obtained.

28 Ms. Christian described the employee protection requirements, including clothing, change  
29 and washing facilities, and respiratory protection which varies according to the job performed as set  
30 out in WAC 296-155-17613, Table 1 (included at Exhibit No. 60). She pointed out that when  
31 welding, cutting, or torch burning, there is a presumed exposure level of at least 2,500 micrograms  
per cubic meter, and that the respiratory protection at Table 1 is a full-face respirator with supplied

1 air when the exposure is not in excess of 2,500 micrograms per cubic meter. Ms. Christian testified  
2 that the permissible exposure limit for lead in air is 50 micrograms per cubic meter time-weighted  
3 over 8 hours, but that the action level for remedial steps is 30 micrograms per cubic meter in air  
4 time-weighted over 8 hours. She described air monitoring requirements and the mathematics  
5 involved in determining the 8-hour time-weighted average on Exhibit No. 2, and testified that the  
6 result (1560 micrograms per cubic meter over an 8-hour time-weighted average) would require the  
7 used of one of the respirators permitted by Table 1 of the cited standard. Ms. Christian testified that  
8 half-mask respirators with a high efficiency particulate air filter (HEPA) would not have provided  
9 adequate protection; however, a half mask respirator with supplied air would have been sufficient in  
10 the first week of the work. Ms. Christian also described the biological monitoring and air monitoring  
11 requirements, and the training requirements under the lead standards. Ms. Christian states it is  
12 very common to find lead in paint on steel structures constructed in the era of 1962.

13 Richard Wilfong, Jr., who is employed by Cenex Harvest, and has worked for 36 years (since  
14 1970) at the grain elevator at the Port of Kalama, was called as a witness by the Department.  
15 Mr. Wilfong understands that the grain elevators, railcar tipper, and silo tanks were built in the  
16 period 1962 to 1964. He believes the whole facility has lead-based paint. He described the  
17 burning and subsequent clean-up with demolition of silo 803 that caught fire in 1990. Mr. Wilfong  
18 testified he worked on the main floor, 30 feet from where the workers in 2004 were cutting up the  
19 railcar tipper. He states there were two doors, 30 feet apart, separating the area where he worked  
20 from the demolition of the railcar tipper. He did not observe the demolition workers use respirators.  
21 Mr. Wilfong states that the demolition workers used the main floor area where he worked for their  
22 lunch breaks. He states that after the cutting had been going on for about a week, but before the  
23 WISHA inspector shut down the job, he told two of the demolition workers he saw in the lunch area  
24 that the metal they were cutting has lead-based paint on it. Mr. Wilfong also testified that the  
25 bathroom was only 20 feet away from where they were burning the leaded paint, and that they left  
26 the doors open and smoke would fill the lower part of the elevator.

27 Both the Department and the employer rested their case based upon the evidence  
28 developed through the witnesses called by the Department.

### 29 DECISION

30 In appeals under the Washington Industrial Safety and Health Act, the Department of Labor  
31 and Industries has the burden of proving the existence of violations cited and the appropriateness  
of the penalties assessed. *In re Olympia Glass Co.*, BIIA Dec., 95 W445 (1996).

1 The evidence establishes that the employer committed the actions cited at Item Nos. 1-1a,  
2 1-1b, and 1-1c. The Department has characterized these as willful violations of  
3 WAC 296-155-17607(1), WAC 296-155-17609(1)(a), and WAC 296-155-775(9), respectively. In  
4 order to establish that a Washington Industrial Safety and Health Act violation is willful, the  
5 Department must demonstrate that it involved voluntary action, done either with an intentional  
6 disregard of or plain indifference to the requirements of the statute. *In re The Erection*  
7 *Company (II)*, BIIA Dec., 88 W142 (1990). In this regard it is necessary to examine the actions of  
8 three employees of Elder Demolition in supervisory positions over the work done on the Port of  
9 Kalama project.

10 There is no evidence that J. D. Elder, the owner/president of the firm, ever visited the  
11 worksite at the Port of Kalama, or that he was otherwise involved in the performance of the work  
12 except to approve the subcontract on behalf of Elder Demolition, Inc. (Exhibit No. 23). Although he  
13 misunderstood the requirements of the lead in construction safety standards, the record here does  
14 not establish that an act or omission of Mr. Elder directly led to any violation cited by the  
15 Department.

16 Josh Malone, the worksite foreman, was designated by the employer as the competent  
17 person on the worksite for dealing with safety matters (Exhibit No. 26). Mr. Malone had received  
18 some training regarding recognition of hazards and use of respirators, and had some prior  
19 experience working with lead-based paint. Yet, it is clear from Mr. Malone's testimony, as well as  
20 that of Ms. Drapeau, that Mr. Malone did not understand the safety standards regarding use of  
21 respirators. For example, he tells us (incorrectly) that half-face cartridge-filter (not supplied air)  
22 respirators could be used in some circumstances where lead was being burned, and also (correctly)  
23 that supplied air was necessary for the work. In addition, Mr. Malone did not require that any  
24 respirator be continually used, with the result that respirators were used only occasionally while  
25 torch cutting was being performed from October 11 or 12, 2004, until the work was stopped when  
26 Ms. Drapeau arrived on October 18, 2004. No initial air or biological monitoring was done, nor was  
27 any done as the project progressed until the arrival of Ms. Drapeau and the stoppage of work.  
28 Also, as the on-site supervisor, it is Mr. Malone who must be faulted for allowing crew members,  
29 including himself, to have on the job on October 18, 2004, (at least), facial hair sufficient to prevent  
30 a seal around any respirator. However, very early in the work on October 12, 2004, Mr. Malone  
31 found paint on steel they were cutting, and he immediately notified his superior, Al Kackman, then  
32 Mr. Malone took a sample of the paint and sent it the same day by company messenger to

1 Mr. Kackman. I am convinced, too, that it was the immediate action of Mr. Malone that led to the  
2 on-site meeting of Mr. Wilson, Mr. Vroom, and Mr. Kackman, representing the facility owner, the  
3 general contractor, and the subcontractor, Elder Demolition, to discuss the matter. Thereafter, by  
4 multiple daily phone calls (evidence not refuted by the employer and, at least in part, even  
5 acknowledged by Mr. Kackman) Mr. Malone tried to obtain from Mr. Kackman the analysis of the  
6 paint sample Mr. Malone took on October 12, 2004. It is through no lack of diligence by Mr. Malone  
7 that the analysis of the sample was not obtained until October 19, 2004. Also, Mr. Malone  
8 reasonably (although, perhaps incorrectly) believed prior to October 18, 2004, that he lacked  
9 authority to stop work pending receipt of that analysis. On the record made here, while Mr. Malone  
10 is involved in a number of serious violations and may not have been in all respects the perfectly  
11 trained competent person, the willful characterization of Citation Item Nos. 1-1a, 1-1b, and 1-1c is  
12 not proven by examining Mr. Malone's acts or omissions.

13 In fact, the issue of whether the Department has carried its burden of proof of willful  
14 violations in the present case necessarily brings us to the actions of the project manager, Al  
15 Kackman. In Al Kackman, there resided together as of October 12, 2004, (1) knowledge that paint  
16 covered the steel that his crew was torch-cutting as related by Josh Malone, (2) sufficient, even if  
17 imperfect, knowledge of the lead in construction standards to prevent the violations from having  
18 occurred in that he understood that before work began he must have a hazardous material survey  
19 (which he knew he had not received) or have a paint sample analyzed himself (Exhibit No. 10).  
20 Further, despite his protestations of good faith reliance upon representations of the general  
21 contractor or the facility owner, as of October 12, 2004, and as of the on-site meeting of Mr. Wilson,  
22 Mr. Vroom, and Mr. Kackman (which Mr. Kackman's testimony indicates may have occurred even  
23 shortly before October 12), Mr. Kackman knew or should have known that he presently had no  
24 good faith representation from the general contractor or the site owner of the absence of lead. In  
25 addition, Mr. Kackman had at all times (3) responsibility for managing the entire project which  
26 necessarily includes responsibility for preventing safety violations, and (4) authority to initiate all  
27 actions necessary to avoid the violations. In short, as of October 12, 2004, Mr. Kackman had the  
28 requisite factual and safety-standard knowledge, responsibility, and authority to compel that he stop  
29 the work and ensure the safety of his employees. Yet, he did not do so.

30 In a moment of particular candor, Mr. Kackman acknowledges that as of his October 12,  
31 2004 e-mail (Exhibit No. 10) there was a suspicion of the presence of lead-based paint (6/2/06 Tr.  
32 at 15), yet, inconsistently, he also testifies that all he had was a paint sample not a lead sample, so

1 "We had no reason to suspect that lead was present." 6/2/06 Tr. at 19-20. Mr. Kackman also  
2 seeks cover in the less-than-artful language of the prohibited work practices paragraph of the  
3 then-existing (October 12, 2004) Elder Demolition written lead policy (Exhibit No. 16, at 2).  
4 Nonetheless, as poorly worded as that portion of the policy may be, a manager having any concern  
5 with safety ought to recognize that the only logical interpretation was to prohibit the torch burning of  
6 paint until it is determined that lead is not present. It is complete nonsense for a manager at  
7 Mr. Kackman's level in the firm to turn on its head the language of the prohibited practices portion  
8 of the firm's lead safety program and represent, as he did in testimony, that he thought torch  
9 burning paint is permitted until it is determined lead is present. Mr. Kackman's stated  
10 understanding of the firm's lead safety policy is an open invitation to avoid making an inconvenient  
11 determination, perhaps even to delay a paint sample analysis. In Mr. Kackman's result-oriented  
12 reasoning at the time of testimony, I find no cover for a manager with responsibility at the project  
13 level in the demolition business. If Mr. Kackman had acted as he himself represented in his e-mail  
14 of that date, or with an intention to extract any safety value whatsoever from the prohibited  
15 practices portion of Elder Demolition's lead program, he would have stopped the work on  
16 October 12, 2004.

17 Mr. Kackman not only did not stop the work pending analysis of the sample taken by  
18 Mr. Malone on October 12, 2004, he let a week go by before he sent the paint sample to the lab—a  
19 week in which he was repeatedly reminded by phone calls from his site-foreman of the need to  
20 have the sample analyzed. To explain his inaction with the paint sample, Mr. Kackman first told  
21 Ms. Drapeau that it was Josh Malone who had not sent the sample to the lab, then testified at  
22 hearing in this matter that the delay arose in part because his safety director was not in the office to  
23 handle the matter that sat on Mr. Kackman's planning desk. Mr. Kackman also states he was a  
24 busy man.

25 In consideration of the foregoing, I am persuaded that acting through its project manager on  
26 the Port of Kalama job, the employer willfully committed the violations cited by the Department at  
27 Item Nos. 1-1a, 1-1b, and 1-1c, in that those voluntary actions of Elder Demolition, Inc., were done  
28 either with an intentional disregard of or plain indifference to the requirements of the safety  
29 standards and the statute.

30 In testimony seemingly supporting her conclusion (and citation) that Elder Demolition is  
31 responsible for lead contamination found by a surface wipe test she performed on the outer door for  
32 access to the rest room, Ms. Drapeau has testified that that door was just outside and nearby the

1 torch cutting work area, yet she has also cited the employer for not providing a wash facility within  
2 200 feet of the work area (Item No. 2-7d). Mr. Wilfong has testified that a restroom at the elevator  
3 where he works was within 20 feet of where the demolition work was taking place, and there is no  
4 indication in the record that the Elder Demolition workers did not use this nearby facility. To the  
5 contrary, since Mr. Wilfong tells us the Elder Demolition workers ate in the elevator facility, it is quite  
6 likely they also used that restroom. Indeed, having taken surface wipe samples inside the  
7 restroom, Ms. Drapeau, too, must believe they did use it. On this evidence, and since the  
8 permanent grain elevator restroom probably was set up for hand washing, I am not persuaded that  
9 the employer has failed to provide a hand wash facility within the required distance. For the same  
10 reasons, the citations at Item Nos. 2-7a and 2-7b for failure to provide a hand wash facility at the  
11 trigger task level and after known exposure, and the citation at Item 2-7c which ignores the water in  
12 the elevator restroom and faults the employer for the temperature of the water at a separate  
13 portable restroom, is not proven. Therefore, I am vacating the citations at Item Nos. 2-7a, b, c,  
14 and d.

15 The Department has cited the employer with contaminating the doors and wash room at the  
16 grain facility based upon the results of the surface wipe tests conducted by Ms. Drapeau and found  
17 by lab analysis to be positive for lead residue (Item No. 2-12). However, Mr. Wilfong has told us the  
18 entire grain facility, including elevator and storage silos, is painted with lead-based paint, and that a  
19 fire destroyed one of the silos, burning that paint. Although it occurred some time ago, the record  
20 makes clear that the fire was a significant event that may be expected to have left a wide spread  
21 lead residue. Also, the record here is silent regarding whether the surfaces from which the wipe  
22 samples were taken were or were not painted. This is a matter of some significance in a facility that  
23 should be expected to be widely contaminated by paint before Elder Demolition even arrived on the  
24 scene. Finally, Ms. Drapeau acknowledges that the laboratory results of the wipe test samples  
25 establish only the presence of lead residue, not when the lead was deposited on the tested  
26 surfaces. In consideration of the foregoing, I conclude that the citation at Item No. 2-12 is not  
27 proven and must be vacated.

28 While the employer's safety plan for this job (Exhibit No. 16) designates Josh Malone as the  
29 competent person on the worksite, that designation is not sufficient of itself to establish that he is  
30 indeed a competent person. Mr. Malone did not have initial air sampling and biological monitoring  
31 done, had little knowledge of the proper respirators to use, and either failed to appreciate or failed  
32 to comply with the need to avoid facial hair that would defeat the seal of respirators. It is also not

1 clear that he understood he possessed the authority to shut down the job for safety violations at the  
2 trigger task threshold. These indicate that regardless of the designation of competent person in the  
3 safety plan, Mr. Malone was either not trained or empowered to satisfy the standards. Thus, the  
4 citation at Item No. 2-4 is proven.

5 All the actions of the employer cited by the Department, except those cited as general  
6 violations, are considered by the Department to be serious. To be serious, within the meaning of  
7 RCW 49.17.180(6), there must be substantial probability that death or serious physical harm could  
8 result from a violation.

9 Both at hearing and in its post hearing brief, the employer contends the Department has  
10 improperly cited it for multiple violations arising from the same facts. In a prior case where an  
11 employer on an asbestos removal project had been cited for failing to provide adequate shower  
12 facilities and also for failure to require workers to shower, the Board has determined that one of the  
13 citations must be vacated because the inadequate or absent shower necessarily resulted in  
14 workers' failure to shower. In its analysis of the case, the Board used a three-part test examining  
15 whether (1) the violations allegedly committed by the employer arose out of the same incident;  
16 (2) the violations address the same hazard; and, (3) the violation of the first standard logically  
17 incorporates a violation of the second standard. *In re Walkenhauer & Associates, Inc.*, BIIA Dec.,  
18 91 W088 (1993). The relevant citations are addressed as follows:

19 a. It is clear that the actions of the employer cited at Item 2-1b in failing to ensure workers  
20 used at a minimum a half face supplied air respirator is incorporated in the violation cited at Item  
21 No. 2-1a, regarding failure to use appropriate respirators until employee exposure is determined.  
22 Accordingly, Item No. 2-1b must be vacated.

23 b. On the facts of this case, the citation at Item No. 2-2a, for failure to ensure that proper  
24 personal protective clothing was provided during initial trigger task activity, logically includes the  
25 failure to ensure that coveralls were provided and used (Item No. 2-2b), and includes the failure to  
26 ensure that gloves, hats and shoes or disposable shoe covers were provided when workers are  
27 exposed to lead above the permissible exposure level. Accordingly, the citations at Item Nos. 2-2b  
28 and 2-2c must be vacated.

29 c. The employer's positions regarding a factual relationship between Item Nos. 2-6 and 2-7b,  
30 and Item Nos. 2-7a and 2-7b, are rendered moot by the vacation of all portions of Item 2-7.

1 d. On the particular facts of this case where no exposure assessment was done, the citations  
2 at Item 2-8a and 2-8b are both logically included in the failure to provide change areas for workers  
3 performing trigger task activities. Accordingly, Item No. 2-8b must be vacated.

4 e. The failure to provide a clean change area for employees (Item No. 2-8a) is not logically  
5 the same violation as failure to ensure that employees did not leave the workplace wearing  
6 protective clothing required to be worn during the work shift (Item No. 2-9).

7 f. A facial hair obstruction to obtaining a safe seal on any respirator (Item No. 2-10) is not  
8 logically included in the violation founded on failure to use appropriate respirators, so I find no merit  
9 in the employer's argument that Item No. 2-10 should be vacated.

10 g. However, the actions of the employer cited at Item Nos. 2-13b and 2-13c regarding failure  
11 to make biological monitoring results available to employees, is incorporated in the violation cited at  
12 Item No. 2-13a, regarding failure to make biological monitoring for workers performing trigger tasks  
13 for lead. Accordingly, Item Nos. 2-13b and 2-13c must be vacated.

14 When the Department has grouped multiple items in a violation, the vacation of one item  
15 does not necessarily result in elimination of the penalty. If the remaining item or items supports a  
16 penalty, the penalty will be assessed. *In re Tom Whitney Construction*, BIIA Dec., 01 W0262  
17 (2002). In each case here where I have determined to vacate citations on the ground that the facts  
18 supporting the vacated citation are included in other citations, I am persuaded that the remaining  
19 citations are established to be serious by the evidence of record, and that the remaining item or  
20 items supports the penalty. Accordingly, with respect to grouped items only, the vacation of some  
21 items on that basis in this appeal, without vacation of the entire group, does not result in any  
22 reduction in the assessed penalty.

23 All citations except those designated above as vacated, I find to be fully supported in  
24 evidence, and they must be affirmed. With respect to all citations affirmed here, I find the penalties  
25 assessed to be appropriate with all aggravating or mitigating matters appropriately and convincingly  
26 addressed by the Department.

27 For the reasons addressed above, Citation and Notice No. 308075001 must be modified  
28 and, as modified, are affirmed.

29 **FINDINGS OF FACT**

- 30 1. On April 5, 2005, the Department of Labor and Industries issued  
31 Inspection Report No. 308075001 concerning an inspection conducted  
32 at 400 Toteff Road, Kalama, Washington, a facility of the Port of Kalama  
operated by United Harvest, LLC, and a work site of Elder Demolition,  
Inc. On April 11, 2005, the Department issued Citation and Notice

1 No. 308075001 in which the Department cites the employer at Item  
2 Nos. 1-1a, 1-1b and 1-1c for grouped willful violations of  
3 WAC 296-155-17607(1), WAC 296-155-17609(1)(a) and  
4 WAC 296-155-775(9), respectively, with a penalty of \$18,000; at Item  
5 Nos. 2-1a and 2-1b for grouped serious violations of  
6 WAC 296-155-17609(2)(e)(i) and WAC 296-155-17613(3)(a),  
7 respectively, with a penalty of \$600; at Item Nos. 2-2a, 2-2b and 2-2c for  
8 grouped serious violations of WAC 296-155-17609(2)(e)(ii),  
9 WAC 296-155-17615(1)(a), and WAC 296-155-17615(1)(b),  
10 respectively, with a penalty of \$600; at Item No. 2-3 for a serious  
11 violation of WAC 296-155-17611(1), with a penalty of \$600; at Item  
12 No. 2-4 for a serious violation of WAC 296-155-17611(2)(c), with a  
13 penalty of \$600; at Item Nos. 2-5a and 2-5b for grouped serious  
14 violations of WAC 296-155-17609(2)(e)(vi) and WAC 296-800-17030,  
15 respectively, with a penalty of \$600; at Item No. 2-6 for a serious  
16 violation of WAC 296-155-17619(3)(a), with a penalty of \$600; at Item  
17 Nos. 2-7a, 2-7b, 2-7c, and 2-7d for grouped serious violations of  
18 WAC 296-155-17609(2)(e)(iv), WAC 296-155-17619(5)(a),  
19 WAC 296-155-140(2)(a), and WAC 296-155-140(5)(c)(ii), respectively,  
20 with a penalty of \$600; at Item Nos. 2-8a and 2-8b for grouped serious  
21 violations of WAC 296-155-17609(2)(e)(iii) and  
22 WAC 296-155-17619(2)(a), respectively, with a penalty of \$600; at Item  
23 No. 2-9 for a serious violation of WAC 296-155-17619(2)(c), with a  
24 penalty of \$600; at Item No. 2-10 for a serious violation of  
25 WAC 296-842-18005, with a penalty of \$600; at Item No. 2-11 for a  
26 serious violation of WAC 296-155-17611(2)(a) with a penalty of \$600; at  
27 Item No. 2-12 for a serious violation of WAC 296-155-17617(1), with a  
28 penalty of \$600; at Item Nos. 2-13a, 2-13b and 2-13c for grouped  
29 serious violations of WAC 296-155-17609(2)(e)(v),  
30 WAC 296-155-17621(1)(a), and WAC 296-155-17621(2)(a),  
31 respectively, with a penalty of \$600; at Item No. 2-14 for a serious  
32 violation of WAC 296-842-12005(1), with a penalty of \$600; at Item  
No. 3-1 for a general violation of WAC 296-155-17627(2)(a), with a  
penalty of \$0; at Item No. 3-2 for a general violation of  
WAC 296-155-17611(2)(d) with a penalty of \$0; at Item No. 3-3 for a  
general violation of WAC 296-842-14005, with a penalty of \$0; at Item  
No. 3-4 for a general violation of WAC 296-842-15005, with a penalty of  
\$0; and, at Item No. 3-5 for a general violation of WAC 296-155-120(2),  
with a penalty of \$0, for a total penalty assessment of \$26,400. On  
April 13, 2005, the Citation and Notice was communicated to the  
employer by U.S. Postal Service.

On May 3, 2005, the employer placed in the U.S. Postal Service a  
Notice of Appeal of Citation and Notice No. 308075001. The appeal  
was received at the Safety Division of the Department of Labor and  
Industries on May 5, 2005, and forwarded to the Board of Industrial  
Insurance Appeals on May 23, 2005. The Board assigned the appeal  
Docket No. 05 W0115, and directed that further proceedings be held.

- 1           2.    On October 18, 2004, Wendy Drapeau, an employee of the Department  
2           of Labor and Industries, visited a grain facility at the Port of Kalama,  
3           Kalama, Washington, operated by United Harvest, LLC, where a railcar  
4           tipping system was being demolished in preparation for new  
5           construction. Elder Demolition, Inc., was a subcontractor of Hollinger  
6           Construction Company, the general contractor for the construction  
7           project. At the time of the initial visit by Ms. Drapeau, Josh Malone, a  
8           crew foreman employed by Elder Demolition, Inc., and four other  
9           employees of that company had been working since October 12, 2004,  
10          using oxygen plasma torches to cut steel in the demolition of the railcar  
11          tipping unit. Mr. Malone had already found paint on the steel his crew  
12          was cutting, and he was concerned that it may be a lead-based paint.  
13          Mr. Malone had already taken a sample of that paint and sent it to his  
14          supervisor, Allen Kackman, the Elder Demolition project manager for the  
15          job, for laboratory analysis. Through inquiry and observation,  
16          Ms. Drapeau learned that safety practices where lead may be present in  
17          paint that is burned or torch cut had not been implemented. On  
18          October 18, 2004, Ms. Drapeau conducted a field test that revealed the  
19          presence of lead in paint on steel she found in the debris pile of  
20          materials already removed from the railcar tipping system through the  
21          work of Mr. Malone's crew since October 12, 2004. At Ms. Drapeau's  
22          suggestion, Mr. Malone shut down the work on October 18, 2004.
- 23          3.    A paint sample taken from the material where Mr. Malone's crew was  
24          working was evaluated for lead content on October 19, 2004, and found  
25          to contain at least 28 percent lead. Paint samples taken by  
26          Ms. Drapeau on October 18, 2004, from the debris pile of materials  
27          already cut and removed from the car tipping system had lead contents  
28          of 53, 66, and 90 percent.
- 29          4.    On October 22, 2004, with the assistance of Elder Demolition  
30          employees, Ms. Drapeau conducted a hazard assessment in which one  
31          worker performed torch cutting work on the job site while air sample  
32          monitoring was done of that worker and another nearby worker. The  
33          torch cutter had lead exposure of 2600 ug/m<sup>3</sup> (micrograms per cubic  
34          meter of air) on an 8-hour time-weighted average. The permissible  
35          unprotected exposure limit is 50 ug/m<sup>3</sup> averaged over an 8-hour period,  
36          and the action level at which an employer is required to initiate  
37          protective controls is 30 ug/mg<sup>3</sup>. While no test on October 22, 2004,  
38          went longer than 104 minutes, the calculation to determine 8-hour  
39          time-weighted average is mathematically reasonable. While the natural  
40          air circulation in the work area probably varies with changes in daily  
41          weather conditions, thus making a precise replication of the worker's  
42          prior hazard exposure not possible, the results of the assessment  
43          conducted on October 22, 2004, are sufficiently elevated to make it  
44          probable that the five members of Josh Malone's Elder Demolition crew  
45          were exposed to lead at concentrations greater than 50 micrograms per  
46          cubic meter of air averaged over an 8-hour period while performing work  
47          throughout the period October 12, 2004 to October 18, 2004.

5. A blood lead test of Josh Malone's crew member William Bartow done October 22, 2004, showed he had 62.6 ug/dL (micrograms lead per deciliter). Another crew member, Sean Brunson and his family, had their blood tested and Mr. Brunson was informed by the employer that they all had lead in their blood.
6. During the period October 12, 2004 through October 18, 2004, the employer did not prevent employees from being exposed to lead at concentrations greater than 50 micrograms per cubic meter of air averaged over an 8-hour period. Also, the employer did not initially determine if any employee may be exposed to lead at or above the action level of 30 ug/m<sup>3</sup> of lead in the air while workers were using oxygen plasma cutting torches to cut out old railcar tipper equipment. In addition, the employer did not ensure that before demolition began a determination was made as to the presence of lead, did not evaluate a sample of paint for the presence of lead, and did not remove the lead paint prior to demolition. These actions of the employer are cited at Item Nos. 1-1a, 1-1b, and 1-1c, respectively.
7. During the period October 12, 2004 through October 18, 2004, the employer did not ensure that interim protection was provided for Josh Malone's crew until an employee exposure assessment and actual employee exposure was determined. This action of the employer is cited at Item No. 2-1a.
8. During the period October 12, 2004 through October 18, 2004, the employer did not ensure that appropriate personal protective clothing was provided to employees performing the trigger task of torch burning until the actual employee exposure was determined to be below the personal exposure limit. This action of the employer is cited at Item No. 2-2a.
9. During the period October 12, 2004 through October 18, 2004, the employer did not implement administrative, engineering, or work practice controls to reduce employee exposure to lead and maintain that exposure at or below the permissible exposure level to the extent such controls are feasible. Other than reliance on favorable winds and sporadic use of other-than-supplied-air respirators inadequate to the task of protecting from the lead exposure there were no controls at all. The lack of controls is cited at Item No. 2-3.
10. During the period October 12, 2004 through October 18, 2004, Elder Demolition did not ensure that a competent person, capable of identifying existing and predictable lead hazards in the working conditions and who had authorization to take prompt corrective measures to eliminate them, conducted frequent and regular inspections of the job site, materials and equipment, on the job site at the Port of Kalama. This action of the employer is cited at Item No. 2-4.

- 1 11. The employer did not ensure that specific and effective lead hazard  
2 training and respiratory protection training was provided to all workers in  
3 Josh Malone's crew. The employer also did not ensure that employees  
4 were provided with effective information on the hazardous material lead  
5 in their work area at the Port of Kalama. These actions of the employer  
6 are cited at Item Nos. 2-5a and 2-5b.
- 7 12. During the period October 12, 2004 through October 18, 2004, the  
8 employer did not ensure that shower facilities were provided for use of  
9 workers exposed to lead above the permissible exposure limit of  
10 50 ug/m<sup>3</sup> for an 8-hour time-weighted average. The employer also did  
11 not ensure that change areas were provided until an employee exposure  
12 assessment was done and actual employee exposure was determined  
13 to be less than the permissible exposure level, and the employer did not  
14 ensure that employees did not leave the workplace wearing outer  
15 clothing or equipment working during the work shift. These actions of  
16 the employer are cited at Item Nos. 2-6, 2-8a, and 2-9, respectively.
- 17 13. On October 18, 2004, the employer did not ensure that sealing problems  
18 with tight-fitting respirators were prevented in that the employer allowed  
19 workers with facial hair that would prevent a seal between the respirator  
20 and the face to occasionally use a half-face respirator while torch  
21 burning lead-based paint. This action of the employer is cited at Item  
22 No. 2-10.
- 23 14. During performance of work that involved torch burning of lead-based  
24 paint at the Port of Kalama job on and prior to October 18, 2004, the  
25 employer did not have established and implemented all elements of a  
26 written lead compliance program. The employer's program contained no  
27 description of specific means to achieve compliance, no work practice  
28 program with respect to protective work clothing or hygiene facilities and  
29 practices, and no administrative control schedule to reduce employee  
30 exposure to lead. This action of the employer is cited at Item No. 2-11.
- 31 15. During the period October 12, 2004 through October 18, 2004, the  
32 employer did not provide any biological monitoring or blood sampling  
and analysis for lead and zinc protoporphyrin levels for workers  
performing the trigger task activity of torch burning lead-based paint.  
This action of the employer is cited at Item No. 2-13a.
16. As of October 18, 2004, the employer's site specific written respiratory  
protection program for the demolition job at the Port of Kalama did not  
address proper procedures for respirator selection, respiratory hazards,  
proper use of respirators and use limitations, or procedures for  
respirator maintenance. These and other omissions in the employer's  
program are cited at Item No. 2-14.
17. On October 18, 2004, the employer had not posted a sign in the work  
area that contained the words "Warning, Lead Work Area, Poison, No  
Smoking or Eating;" did not have a written lead compliance program  
available at the work site; had not provided each worker required to use

1 a respirator a medical evaluation before use of the respirator; and did  
2 not ensure that employees required to use a respirator pass a fit test  
3 before assigned duties requiring a respirator were performed and at  
4 least annually thereafter. These actions of the employer are cited at  
5 Item Nos. 3-1, 3-2, 3-3, and 3-4, respectively.

- 6 18. Allen Kackman was the Elder Demolition, Inc., project manager for the  
7 demolition work at the Port of Kalama job site. As of October 11, 2004,  
8 or at the latest, Tuesday, October 12, 2004, Mr. Kackman knew that  
9 paint covered the steel that his crew was torch-cutting because he had  
10 been informed of this by his site foreman, Josh Malone. At the same  
11 time, and following a site meeting he attended with a representative of  
12 Hollinger Construction, the general contractor, and a representative of  
13 the Port of Kalama, the site owner, Mr. Kackman knew he had no  
14 good-faith hazardous material survey of the work site, and knew or  
15 should have known that he presently had no representation from  
16 Hollinger Construction or the Port of Kalama asserting the absence of  
17 lead in the paint. In addition, Mr. Kackman then had a suspicion that  
18 lead was present in the paint. Further, on October 12, 2004,  
19 Mr. Kackman knew that Josh Malone was concerned about lead in the  
20 paint, that Mr. Malone had taken a paint sample, and that Mr. Malone  
21 had the sample sent to Mr. Kackman. Mr. Kackman agreed on  
22 October 12, 2004, to have the sample analyzed. The sample was  
23 carried that same day by company messenger. On October 12, 2004,  
24 Mr. Kackman also directed Mr. Malone to continue work, which  
25 Mr. Kackman knew included torch burning the painted steel. Thereafter,  
26 throughout the remainder of that week, Mr. Malone spoke to  
27 Mr. Kackman more than once a day, to inquire about the status of the  
28 analysis of the paint sample. During this same period, Mr. Kackman did  
29 not send the sample to be analyzed, but rather left it sitting on a  
30 planning table in his office. The sample was not analyzed until  
31 October 19, 2004, the day after Wendy Drapeau from the Department of  
Labor and Industries inspected the worksite and requested that Josh  
Malone shut down the work because of the safety violations she found.  
As project manager for Elder Demolition on this job, Mr. Kackman had  
responsibility for managing the entire project which necessarily included  
supervisory level responsibility for preventing safety violations, and he  
had the authority to initiate all actions necessary to avoid the safety  
violations cited at Item Nos. 1-1a, 1-1b, and 1-1c. Although the written  
plan of Elder Demolition then in effect for dealing with lead is poorly  
worded, it provides sufficient information to alert any manager  
concerned with safety that the torch burning of paint is prohibited until it  
is determined that lead is not present. Acting through its project  
manager on the Port of Kalama job, Elder Demolition willfully committed  
the violations cited by the Department at Item Nos. 1-1a, 1-1b, and 1-1c,  
in that those voluntary actions of Elder Demolition, Inc., were done  
either with an intentional disregard of or plain indifference to the  
requirements of the safety standards.

- 1 19. Because the employees of Elder Demolition, Inc., had access to and did  
2 use restroom facilities within the nearby grain elevator which is less than  
3 200 feet from their work area, and which probably had hand wash  
4 facilities with hot water, the employer did not commit the violations cited  
5 by the Department at Item Nos. 2-7a, 2-7b, 2-7c, 2-7d, and 2-12. These  
6 citations should be vacated.
- 7 20. The violations cited by the Department at grouped Item Nos. 2-1a and b,  
8 2-2a, -2b and -2c, 2-8a and -8b, and 2-13a, -13b and -13c all arose out  
9 of the same incident and all address the same hazard. In addition,  
10 under the particular circumstances of this case, the same facts asserted  
11 by the Department in support of the violations at Item Nos. 2-1b, 2-2b  
12 and -2c, 2-8b, and 2-13b and -13c, are logically included in the  
13 violations asserted and proven at Item Nos. 2-1a, 2-2a, 2-8a, and 2-13a,  
14 respectively. Accordingly, the essentially repetitive citations at Item  
15 Nos. 2-1b, 2-2b and -2c, 2-8b, and 2-13b and -13c, should be vacated.
- 16 21. During the period October 12, 2004 through October 18, 2004, due to  
17 the presence at the demolition worksite at the Port of Kalama of Josh  
18 Malone, the Elder Demolition job site foreman and employer-designated  
19 safety responsible person, as well as the information Allen Kackman  
20 then had that the representatives of Hollinger Construction and the Port  
21 of Kalama did not know whether lead was present in the paint on the  
22 steel the Elder Demolition workers were torch cutting, as well as the fact  
23 that Mr. Kackman had no good faith hazardous materials survey, the  
24 employer knew or should have known of all violations. In addition,  
25 because of the hazards from exposure to airborne lead particles arising  
26 when lead paint is burned with a torch, there was a substantial  
27 probability that death or serious physical harm could result from each of  
28 the actions of the employer cited by the Department as serious (which  
29 includes all those cited by the Department as willful) to the extent those  
30 violations are affirmed here.
- 31 22. The Department's penalty calculation for each serious violation affirmed  
32 here is appropriately supported by the Department's calculation of the  
33 base penalty for each violation and the adjustments which have been  
34 made for the employer's size, good faith and history. In addition, the  
35 penalty assessment for the grouped willful violations is appropriate. In  
36 each case here where portions of grouped citations have been vacated,  
37 the remaining affirmed citation in each group appropriately supports the  
38 penalty assessed by the Department. Accordingly, the vacation of some  
39 items in a group without vacation of the entire group, does not result in  
40 any reduction in the appropriate assessed penalty for any group.
- 41 23. The total assessed penalty is reduced by \$1,200 because Citation Item  
42 Nos. 2-7a, 2-7b, 2-7c, 2-7d, and 2-12 are not proven. The remaining  
total assessed penalty of \$25,200 is appropriate.

**CONCLUSIONS OF LAW**

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and subject matter of this appeal, which was timely filed.
2. The actions of the employer described in the Citation and Notice as grouped Item Nos. 2-1b, 2-2b, and 2-2c; 2-8b; and 2-13b and 2-13c, are logically incorporated in the acts of the employer cited and affirmed here as Item Nos. 2-1a, 2-2a, 2-8a, and 2-13a, respectively. Accordingly, Item Nos. 2-1b, 2-2b and 2-2c, 2-8b, and 2-13b and 2-13c, are vacated.
3. The employer did not commit the actions described in the Citation and Notice as Item Nos. 2-7a, 2-7b, 2-7c, 2-7d, and 2-12, within the meaning of WAC 296-155-17609(2)(e)(iv), WAC 296-155-17619(5)(a), WAC 296-155-140(2)(a), WAC 296-155-140(5)(c)(ii), and WAC 296-155-17617(1), respectively, and these citations are vacated.
4. The actions of the employer described in the Citation and Notice as Item Nos. 1-1a, 1-1b, 1-1c, 2-1a, 2-2a, 2-3, 2-4, 2-5a, 2-5b, 2-6, 2-8a, 2-9, 2-10, 2-11, 2-13a, 2-14, 3-1, 3-2, 3-3, 3-4, and 3-5, were violations of WAC 296-155-17607(1), WAC 296-155-17609(1)(a), WAC 296-155-775(9), WAC 296-155-17609(2)(e)(i), WAC 296-155-17609(2)(e)(ii), WAC 296-155-17611(1), WAC 296-155-17611(2)(c), WAC 296-155-17609(2)(e)(vi), WAC 296-800-17030, WAC 296-155-17619(3)(a), WAC 296-155-17609(2)(e)(iii), WAC 296-155-17619(2)(c), WAC 296-842-18005, WAC 296-155-17611(2)(a), WAC 296-155-17609(2)(e)(v), WAC 296-842-12005(1), WAC 296-155-17627(2)(a), WAC 296-155-17611(2)(d), WAC 296-842-14005, WAC 296-842-15005, and WAC 296-155-120(2), respectively, all in effect during the period October 11, 2004 through October 18, 2004.
5. The actions of the employer cited at Item Nos. 1-1a, 1-1b and 1-1c, were willful in that they were voluntary acts of the employer and the employer committed those violations through either intentional disregard of or plain indifference to the requirements of the safety regulations and the statute.
6. Within the meaning of RCW 49.17.180(6), there is substantial probability that death or serious physical harm could result from the actions of the employer cited at Item Nos. 1-1a, 1-1b, 1-1c, 2-1a, 2-2a, 2-3, 2-4, 2-5a, 2-5b, 2-6, 2-7a, 2-8a, 2-9, 2-10, 2-11, 2-13a, and 2-14.
7. The penalties assessed for each violation not vacated here, and the total penalty of \$25,200 assessed for those same violations, are appropriate and within the Department's authority under RCW 49.17.180.

2  
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8. Citation and Notice No. 308075001, issued April 11, 2005, with a total penalty assessment of \$26,400, is incorrect and is modified to vacate Item Nos. 2-1b, 2-2b, 2-2c, 2-7a, 2-7b, 2-7c, 2-7d, 2-8b, 2-12, 2-13b, and 2-13c. As modified, with a total penalty of \$25,200, the Citation and Notice is affirmed.

5 It is so **ORDERED**.

6 DATED: \_\_\_\_\_ **SEP 26 2006** \_\_\_\_\_

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\_\_\_\_\_  
**RICHARD J. MACKEY**  
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.

ELDER DEMOLITION INC 6400 SE 101ST AVE #201 PORTLAND, OR 97266	EM1
--	-----

EA1

AARON K OWADA, ATTY  
AMS CONSULTING  
4405 7TH AVE SE #205  
LACEY, WA 98503

AG1

MARGARET A BREYSSE, AAG  
OFFICE OF THE ATTORNEY GENERAL  
PO BOX 40121  
OLYMPIA, WA 98504-0121

Dated at Olympia, Washington 9/26/2006  
BOARD OF INDUSTRIAL INSURANCE APPEALS

By:   
DAVID E. THREEDY  
Executive Secretary

In re: ELDER DEMOLITION INC  
Docket No. 05 W0115

# **APPENDIX E**

08075001



FACSIMILE TRANSMITTAL SHEET

TO: **Wendy** FROM: **Travis Stone**

COMPANY: **L and I** DATE: **3/3/2005**

FAX NUMBER: **360-575-6918** TOTAL NO. OF PAGES INCLUDING COVER: **5**

PHONE NUMBER: \_\_\_\_\_ SENDER'S REFERENCE NUMBER: \_\_\_\_\_

REF: \_\_\_\_\_ YOUR REFERENCE NUMBER: \_\_\_\_\_

- URGENT  FOR REVIEW  PLEASE COMMENT  PLEASE REPLY  PLEASE RECYCLE

NOTES/COMMENTS:

Wendy-  
 Here is the original lead program that was done before I started with Elder Demolition, Inc. I think it is mostly the same as what you received. I have been using Keller-Soft Safety Plan Customizer, OROSHA, and WISHA to go through all of our safety programs to make sure they are updated and compliant. If you know of any resources to make this task easier for me I would appreciate it very much.

Sincerely,  
**Travis Stone**  
 Travis Stone  
 Safety Coordinator

**RECEIVED**  
 MAR 04 2005  
 Dept of Labor & Industries  
 Longview Service Location

Cc: File

BOARD OF INDUSTRIAL INSURANCE APPEALS  
 OLYMPIA, WASHINGTON  
**RECEIVED**  
 MAY 01 2006

6400 SE 101ST AVE, PORTLAND, OR 97266  
 PHONE: 503-760-6330 FAX: 503-760-2266  
 EMAIL: ELDERDEMOLITION@AOL.CO

Board of Industrial Insurance Appeals  
 In re: **ELDER DEMO**  
 Docket No. **0520115**  
 Exhibit No. **16**  
 ADM. **5/30/06**  REJ.  
 Date

31/423



308 075001

## **Lead Program**

### **Purpose**

The purpose of this Lead Dust Program is to prevent Elder Demolition employee exposure to potentially harmful levels of these substances. This Program shall inform employees of the hazards of working with Lead Dust and establish necessary protocols to be followed when there is a hazard present.

### **Scope**

This Lead Dust Program is in place for the protection of all Elder Demolition employees. These procedures shall be followed whenever work is performed that presents exposure to these hazards. Only trained personnel using the applicable Personal Protective Equipment (PPE) will be authorized to work in these environments.

### **Responsibilities of site field Managers**

#### **Project Manager**

Will request from building owners a list of areas that are known to contain Lead-based paints or building materials.

#### **Site Supervisor**

Will monitor the work to identify any work practices that may create an exposure to Lead Dust to Elder Demolition employees.

#### **Employees**

Will perform work operations in such a manner as to not create hazardous levels of Lead Dust.

### **Area Control & Isolation**

Barrier tape limiting access in and around each work area will be established to prevent pedestrian foot traffic from entering the work area.

### **Engineering Controls**

It is anticipated that the only engineering controls for potential lead exposure will be wetting of surfaces when drilling or sawing and prompt clean up.

All waste debris that is not recycled will be placed in waste containers and disposed of as general construction debris.

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**Work Practices**

Standard lead paint abatement practices will be employed and include, but are not limited to:

- 1. Manual removal methods.
- 2. Wet methods and HEPA vacuuming.

The following activities are **prohibited work practices** unless it has been determined that lead is not present:

- 1. Open flame (torch) burning of Lead-Based Paint.
- 2. Silica and blasting of Lead-Based Paint.
- 3. Eating, smoking, drinking or applying cosmetics in the work area.

A clean change area will be designated in the core sections of \_\_\_\_\_ It shall have a hand and face wash station. Workers will be required to use the wash facilities to cleanse hands and face at breaks and before leaving the site at the end of the work shift.

**Respiratory Protection**

Half-face negative pressure respirators with HEPA cartridges will be provided to the workers to wear within each work area. Workers will be required to wear respirators until an initial determination has been made that activities are not creating exposures above the action level. A site specific Elder Demolition Respiratory Protection Program shall be included in the on-site safety manual.

**Protective Clothing**

Disposable protective clothing, eye protection, hard hats and other protective equipment will be provided to the workers. Protective clothing and equipment will be removed before leaving the project site and before breaks, lunch, etc.

**Other Site-Specific Hazards**

Circle applicable item(s):

- Noise
- Chemicals
- Falls
- Heavy Metals
- Heat/Cold
- Ergonomic/Vibration
- Walking/Working Surfaces

- Carbon Monoxide
- Electricity
- High Pressure (H<sub>2</sub>O, Gas)
- Fire
- Confined Space
- Asbestos
- Other

Controls, protective work practices and personal protective equipment, as appropriate, for the hazards circled item(s) above is attached or below: N/A (for future reference)

6400 SE 101<sup>st</sup> Sult 201  
Portland, OR 97266-4114  
Phone: 503-760-6330 Fax: 503-760-2266  
Email: info@elderdemolition.com

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**Air Monitoring**

Elder Demolition will perform initial air monitoring to determine representative exposures. Measured exposures that exceed the OSHA Action Level (30 mg/cubic meter TWA) or the Permissible Exposure Level (50 mg/cubic meter TWA) shall trigger a review and possible changes to this compliance plan and work procedures. Air monitoring results will be made available to the workers within 5 working days of the sample time.

**Information, Training and Notification**

This compliance plan, and test results will be available on site. Other safety and health hazards will be addressed separately from this compliance plan. Members of the work crew who have not completed lead abatement training in the past twelve months will be provided a 2 hour lead awareness class which will review the contents of this lead Compliance plan. Copies of 29 CFR 1926.62/OAR 437 Div. 3 - 001) will also be available at the Elder Demolition office and be provided to the employee upon request.

If the PEL is exceeded, signs will be posted in the affected area. Signs shall read as follows:

**WARNING LEAD WORK AREA POISON  
NO SMOKING OR EATING**

Signs will remain in place until documented airborne concentrations of lead are below the action level. Other employers working in the building will have access to all of the above-noted information; however, all other employers and owner shall be responsible for their own compliance with the lead rules.

6400 SE 101<sup>st</sup> Suit 201  
Portland, OR 97266-4114  
Phone: 503-760-6330 Fax: 503-760-2266  
Email: [Info@elderdemolition.com](mailto:Info@elderdemolition.com)

34/423

308075061

Lead Compliance Plan

Project Name: \_\_\_\_\_

Project No.: \_\_\_\_\_

Effective Date: \_\_\_\_\_

Project Dates: \_\_\_\_\_

Evaluated By: \_\_\_\_\_ Date: \_\_\_\_\_

Location of Project: \_\_\_\_\_

Site Supervisor: \_\_\_\_\_

**Statement of Purpose**

The Occupational Safety and Health Administration's (OSHA) Construction Standard requires that contractors develop a written compliance program for jobs where there is (or is likely to be) lead exposure above the Permissible Exposure Level of 50 ug/cubic meter, 8 hour TWA). The written compliance plan is intended to be the contractor's job specific strategy for minimizing exposure on projects.

**Description of Project Activity**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Area Control & Isolation**

Barrier tape limiting access in and around each work area will be established to prevent pedestrian foot traffic from entering the work area.

**work schedule**

The project is expected to start on \_\_\_\_\_ and end by \_\_\_\_\_. This compliance plan will take effect \_\_\_\_\_. All work will be conducted between the hours of 7:00 AM and 3:30 PM. The on-site supervisor will conduct work site visual inspections on a daily basis to ascertain the integrity of the area isolation, the cleanliness of the work site, proper work practices and the operative condition of safety equipment. Written documentation of daily inspections will be kept in on-site daily logs.

**Engineering Controls**

It is anticipated that the only engineering controls for potential lead exposure will be wetting of surfaces when drilling or sawing and prompt clean up. All waste debris that is not recycled will be placed in waste containers and disposed of as general construction debris.

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35/423