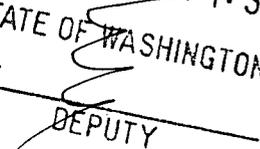


FILED
COURT OF APPEALS
DIVISION II

2012 OCT 31 PM 1:34

STATE OF WASHINGTON

BY 
DEPUTY

NO. 43327-3-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

PILCHUCK CONTRACTORS, INC.

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES

Respondent.

Appeal from Superior Court of Pierce County

REPLY BRIEF OF APPELLANT

Aaron K. Owada, WSBA #13869
Attorney for Appellant

AMS LAW, P.C.
975 Carpenter Road NE #201
Lacey, WA 98516
Tel: (360) 459-0751
Fax: (360) 459-3923

TABLE OF CONTENTS

I. REPLY TO COUNTERSTATEMENT OF ISSUES ... 1,2

II. STATEMENT OF THE CASE..... 2

 A. PROCEDURAL BACKGROUND..... 2

 B. STATEMENT OF FACTS 3

III. REPLY TO RESPONDENT ARGUMENTS..... 6

 A. Where Substantial Evidence Supports
 the Photographic Evidence Offered by the
 Respondent Did Not Show an Accurate
 Depiction of the Spoil Piles at Issue, did the
 Respondent Fail to Establish the Prima Facie
 Elements as Required to Uphold a Violation?..... 6

 B. Where Substantial Evidence Supports
 the Respondent Did Not Show an Accurate
 Trench Depth and the Appellant Followed
 Required Manufacturer Instructions, did the
 Respondent Fail to Establish the Prima Facie
 Elements as Required to Uphold a Violation?..... 9

 C. Where Case Law is Clear That
 Strict Liability Was Never Intended
 and whereby the Respondent erred in Imputing
 Knowledge, did the Respondent Fail to Establish
 the Prima Facie Elements as Required to
 Uphold a Violation?..... 11

 D. Where the Department’s Issuance of an
 Alleged Violation(s) Cannot Lead to an
 Assumption That a Safety Program is Ineffective

in Practice, did the Lower Court err when finding Violation 1-2 and Violation 1-3, and should it be affirmed where the Respondent has failed to adequately show a defense of employee misconduct is inapplicable? 14

E. Assuming arguendo, where the Respondent can meet the Prima Facie Elements as required, did the lower Court err in affirming calculation of penalties for Violation 1-1 and Violation 1-3 where the Respondent failed to recognize the presence of plates, pump jacks and a ladder when determining the numerical value of probability for the basis of the penalty calculations?..... 19, 20

IV. CONCLUSION 23

TABLE OF AUTHORITIES

FEDERAL CASES

Brennan v. Occupational Safety and Health Review Com'n
(Hanovia Lamp),
502 F.2d 946, 951-52 (3d Cir.1974)..... 14

Horne Plumbing & Heating Co. v. OSHRC,
528 F. 2d 564, 568-69 (5th Cir.1976)..... 14

Nat'l Realty & Construction Co. v. OSHRC,
489 F.2d 1257 (D.C.Cir.1973) 14

Penn. Power & Light Co. v. OSHRC,
737 F.2d 350, 354-55 (3rd Cir.1984) 14

Secretary v. Southern Tea Company,
OSHRC Dkt. No. 78-2321, Jan. 25, 1979..... 15

STATE STATUTES

RCW 49.17.180(6) 13

RCW 49.17.120(5)(a)..... 15

RCW 49.17.120(5)(a)(i) 17

RCW 49.18.120(5)(a)(ii) 17

WASHINGTON ADMINISTRATIVE CODE

WAC 296-155-655(3)(b)..... 5

WAC 296-155-655(10)(b)..... 5

WAC 296-155-657(1)(a)..... 5

WAC 296-900-14005	20
WAC 296-900-14010	20

I. REPLY TO COUNTERSTATEMENT OF ISSUES

1. Where Substantial Evidence Supports the Photographic Evidence Offered by the Respondent Did Not Show an Accurate Depiction of the Spoil Piles at Issue, did the Respondent Fail to Establish the Prima Facie Elements as Required to Uphold a Violation?
2. Where Substantial Evidence Supports the Respondent Did Not Show an Accurate Trench Depth and the Appellant Followed Required Manufacturer Instructions, did the Respondent Fail to Establish the Prima Facie Elements as Required to Uphold a Violation?
3. Where Case Law is Clear That Strict Liability Was Never Intended and whereby the Respondent erred in Imputing Knowledge, did the Respondent Fail to Establish the Prima Facie Elements as Required to Uphold a Violation?
4. Where the Department's Issuance of an Alleged Violation(s) Cannot Lead to an Assumption That a Safety Program is Ineffective in Practice, did the Lower Court err when finding Violation 1-2 and Violation 1-3, and should it be affirmed where the Respondent has failed to adequately show a defense of employee misconduct is inapplicable?
5. Assuming arguendo, where the Respondent can meet the Prima Facie Elements as required, did

the lower Court err in affirming calculation of penalties for Violation 1-1 and Violation 1-3 where the Respondent failed to recognize the presence of plates, pump jacks and a ladder when determining the numerical value of probability for the basis of the penalty calculations?

II. STATEMENT OF CASE

A. PROCEDURAL BACKGROUND

On July 6, 2009, the Department of Labor and Industries (hereinafter “Respondent”) issued Citation and Notice No. 313224354 against the Appellant. (CABR p. 42-44).¹ A timely appeal by the Appellant was made with the Department of Labor and Industries’ Safety Division on July 9, 2009. As a result, the Respondent transferred the Appellant’s appeal to the Board and a hearing was held on June 17, 2010, with subsequent perpetuation depositions scheduled thereafter.

A Proposed Decision and Order was signed by Industrial Appeal Judge Wakenshaw on September 23, 2010. (CABR p. 25- 38). A timely Petition for Review filed on behalf of the

¹ The Certified Appeal Board Record (CABR) is referenced in the Clerk’s Papers. References throughout this brief will be contained in the CABR.

Appellant was filed on November 3, 2010. (CABR p. 12-20). On November 22, 2010 the Board issued an Order Denying Petition for Review and found the Proposed Decision and Order to become the Decision and Order of the Board. (CABR p. 1). The matter was thereafter heard on March 2, 2012, in the Superior Court in and for the County of Pierce wherein the Court affirmed the Board's Decision and Order. The Appellant timely appealed before the Court of Appeals and filed Brief of Appellant. The Respondent filed Brief of Respondent and the Appellant now respectfully submits Appellant's Reply to Respondent Brief.

B. STATEMENT OF FACTS

On July 16, 2009, the Appellant was working on a project at the Chandler Street Railroad Track (hereinafter "worksite"). (Tr. 7/13/10, p. 5).² The Department of Labor &

² The Transcripts are referenced and supplemented to the Certified Appeals Board Record (CABR). Hereinafter transcripts will be referred to by date, page and relevant line number(s).

Industries Safety and Health Compliance Officer Mr. John Korzenko (hereinafter "Mr. Korzenko"), was called to the worksite based upon an anonymous call alleging imminent danger. (Tr. 6/17/10, p. 13-14). Mr. Marv LaRue (hereinafter "Mr. LaRue") served as the general superintendent for the project and was not onsite during the inspection. (6/17/10, p. 57). The record reflects two Appellant employees were temporarily in the center portion of the trench to repair a broken conduit for a line. Photographs offered show three areas where the "fin" forms (trench boards) were set up. The Appellant's workers were located only in the center area where the wood splice was located. Mr. Jeff Heaton (hereinafter "Mr. Heaton") testified that the fin forms in that section had been cut from 8 feet to 6 feet. However, none of the employees were in the trench closest to the trackhoe.

In referencing the manufacturer's tabulated data, only one pump jack is required when the depth of the trench is 6 feet or less. Mr. Heaton testified that the 6 foot fin forms were

above the ground level of the trench. For that reason, Mr. Heaton testified that the spoils piles could not have possibly gone into the trench.

Despite failing to establish a hazard, exposure and employer knowledge, Mr. Korzenko completed his inspection and issued three serious citations against the Appellant:

- 1-1 WAC 296-155-655(3)(b) alleging the employer did not ensure that employees were protect by a safe means to access and egress an excavation.
- 1-2 WAC 295-155-655(10)(b) alleging the employer did not ensure protection of employees from excavated materials.
- 1-3 WAC 296-155-657(1)(a) alleging the employer did not assure excavation was adequately protected by cave-ins in that only one hydraulic cylinder was used.

The lower Court was correct in vacating Violation 1-1 along with the penalty which alleged the employer did not ensure that employees were protected by a safe means to access and egress an excavation. (CABR p. 35, lines 2-7). The Appellant respectfully appeals before this Court for review of

Violation 1-2, alleging the employer did not ensure protection of employees from excavated materials and Violation 1-3, alleging the employer did not assure excavation was adequately protected by cave-ins in that only one hydraulic cylinder was used.

III. REPLY TO RESPONDENT ARGUMENTS

A. Where Substantial Evidence Supports the Photographic Evidence Offered by the Respondent Did Not Show an Accurate Depiction of the Spoil Piles at Issue, did the Respondent Fail to Establish the Prima Facie Elements as Required to Uphold a Violation?

The Appellant respectfully asserts that the Respondent is incorrect in stating the Appellant “ignores” testimony yet in the same breath faults the Appellant for not citing sufficient testimony. (Respondent Brief, p. 13).

As there is no dispute that the Respondent has the prima facie burden to establish a violation. The focus should be adequately upon whether the Department has met the required element of hazard.

Again, the reliance of a picture is not sufficient. In relevant testimony Mr. Heaton explained the difficulty in establishing spoil distance (6/17/10, p. 124, lines 14-23):

Q. When you were putting up the spoils piles and allowing the workers to go into the trench, could you see how close the spoils piles were to the ends of the trench?

A. I could yes. But if that picture shows, that Finn board goes all the way to the existing ground level, and then the spoil piles are back from there. So I believe that the load-bearing soil had been taken care of and the spoil piles were above and beyond needing to be further away because of the height of the shore boards in the ditch.

The Respondent ignores any acknowledgment that the load bearing soil was “taken care of” and therefore not creating a hazard. The Appellant asserts the lower court failed to consider the record as a whole when concluding the following as such an opinion runs contrary to the substantial weight of the record presented, “Testimony was elicited by the employer to establish that the shoring sheets at the deepest part of the trench came above the top of the trench to hold the spoils back. *I*

don't think this was sufficient to comply with the WAC section..." (Emphasis added); (CABR p. 35, p. 19-21). Such a statement refutes the established facts in the Proposed Decision and Order whereby the shoring sheets actually aided in the safety of the trench at issue and the Department's inspector acknowledged spoil piles were two feet away from the edge of the trench. (CABR p. 29, lines 4-7). As an industry worker, Mr. Heaton testified as the IAJ acknowledged that the height of the shoring boards would actually stop any alleged piles from actually coming into the trench. (CABR p. 31, lines 20-22). The record reflects that the Respondent failed to present objective measurements of the spoil piles at issue yet made assumptions that the Employer's activities were in definite violation. (Tr. 6/17/10, p. 81-82).

The aforementioned clarification by Mr. Heaton establishes the "optical illusion" per se that was presented at the worksite on the day of inspection. Where the Respondent failed to take the time and care to provide applicable

measurements of the height and distances at issue, lower Court erred in finding the Respondent establish hazard and exposure and Violation 1-2 must be vacated.

B. Where Substantial Evidence Supports the Respondent Did Not Show an Accurate Trench Depth and the Appellant Followed Required Manufacturer Instructions, did the Respondent Fail to Establish the Prima Facie Elements as Required to Uphold a Violation?

The Respondent has acknowledged the failure to establish the actual height of the alleged trench in violation. (Respondent Brief, p. 16).

There is no dispute that sheeting was used onsite, as referenced in the Proposed Decision and Order the Department's inspector also admitted "sheeting is used to prevent raveling or sloughing and that if that is not present you can simply use the hydraulic jacks alone. The inspector admitted that *under six feet deep only one hydraulic jack is required.*" (Emphasis added); (CABR p. 28, lines 26-29).

The record reflects extensive testimony regarding the data table requirements and whether they were followed. However, the prima facie burden rests upon the Department and in relevant testimony Mr. Korzenko, acknowledges a lack of exposure to a hazard (6/17/10, p. 67, lines 8-18):

Q. So when they're working, they're between the two shore boards shown in photograph 3 where the shovel is, correct?

A. Yes.

Q. And you never saw them work at any other portion of the entire excavation other than that area where the shovel is, correct?

A. No.

Q. And you don't see any kinds of tools or footprints further east of the ladder going towards the track hoe; aren't that true?

A. True.

Mr. LaRue was not present at the worksite during the inspection and as a working foreman and per case law cited, Mr. Heaton's knowledge is not automatically imputed to the

Employer to full the Department's prima facie burden of knowledge.

The Appellant respectfully asserts the IAJ erred when relying only on tabulated data requirements and failing to consider the impact of trench height in adjusting requirements. (CABR p. 35, lines 13-15). In referring to Exhibit 4 under section 5.6, the Department agreed with the statement that "an excavation six feet deep or less only one hydraulic cylinder is required." (Tr. 6/17/10, p. 69-70).

A thorough review of the record demonstrates the Appellant was in compliance with the manufacturer's instructions requiring only one hydraulic cylinder, as such Violation 1-3 must be vacated.

C. Where Case Law is Clear That Strict Liability Was Never Intended and whereby the Respondent erred in Imputing Knowledge, did the Respondent Fail to Establish the Prima Facie Elements as Required to Uphold a Violation?

The Appellant respectfully reasserts the lower Court erred in relying upon the Employer's general knowledge of the trenching industry, rather than weighing the specific facts supported in the record, to establish the Employer had knowledge of alleged hazard in the violations involved in the present case. (CABR p. 35, lines 26-29). Contrary to the Respondent's assertions, the record reflects the basis for a finding that the alleged actions by the Appellant were "foreseeable" were in fact referenced to overall industry knowledge, not that the Appellant could have known in this specific instance. Employers are not held to a strict liability standard for WISHA violations. Where the Respondent has failed to establish the Appellant would have knowledge of what actions to take when employees choose to expose themselves to a hazardous condition the violations must be vacated.

Mr. Korzenko acknowledged that in order for a citation to be issued the elements of hazard, exposure, code and employer knowledge must be established. (6/17/10, p. 56, lines

3-25). Based upon the foregoing, the Respondent has failed to establish the prima facie elements of hazard, exposure and knowledge and thus the citations must be vacated.

As set forth under RCW 49.17.180(6) and federal case law interpreting OSHA statutory requirements, the Department of Labor & Industries must establish that either the employer had actual knowledge of the alleged fall protection violation, or that it failed to meet its duty of care in exercising due diligence in order to establish constructive knowledge of the violation. In relevant part, RCW 49.17.180(6) declares:

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

“It is clear that the failure to comply with a specific regulation, even coupled with substantial danger is, standing

alone, insufficient to establish a violation of the Act.” See, e.g., *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564, 568-69 (5th Cir.1976) (citing *Nat'l Realty & Construction Co. v. OSHRC*, 489 F.2d 1257 (D.C.Cir.1973)); *Penn. Power & Light Co. v. OSHRC*, 737 F.2d 350, 354-55 (3rd Cir.1984) (citing *Brennan v. Occupational Safety and Health Review Com'n (Hanovia Lamp)*, 502 F.2d 946, 951-52 (3d Cir.1974)).

Proving employer knowledge is a strict obligation of the Department as part of its *prima facie* case. This obligation cannot be ignored or shifted away from the Department. In the present case, where the lower Court failed to recognize the Respondent failed to present the *prima facie* elements required, Violation 1-2 must be vacated.

D. Where the Department's Issuance of an Alleged Violation(s) Cannot Lead to an Assumption That a Safety Program is Ineffective in Practice, did the Lower Court err when finding Violation 1-2 and Violation 1-3, and should it be affirmed where the Respondent has failed to adequately show a defense of employee misconduct is inapplicable?

There is no dispute that the affirmative defense of Unpreventable Employee Misconduct is available to the Respondent by Statute. (RCW 49.17.120(5)(a)). Employers are not charged with monitoring each individual employee at all hours of the day to ensure compliance with the State's Safety and Health Act. Instead, where employers act with due diligence the employer cannot be liable for the personal subjective decisions of their employees.

In the case of *Secretary v. Southern Tea Company*, it is established that the statutes related to the enforcement of employee safety and health was not designed to protect against intentional or deliberate acts of employees. *Secretary v. Southern Tea Company*, OSHRC Dkt. No. 78-2321, Jan. 25, 1979.

As referenced by Mr. LaRue, there is no doubt that the Appellant's internal discipline policy is to reiterate the commitment to safety (7/13/10, p. 32, lines 5-19):

Q. And despite their belief that they had adequate shoring, you still believed or you will still cause Exhibit No. 11, the written warning to be issued?

A. That is correct.

Q. Even if they are right, would you have still issued the warning or not?

A. Yes, I would have.

Q. And tell us the reason why?

A. Well, because when I understand it – there's – I've been on L&I inspections before, and if there's a citation issued or believed to be issued, there's some gray there, and I take safety very serious. And if nothing else, it's just a written warning, it's a wake up crew – or awake up for this crew to make sure they are on their toes and they're doing a hundred and ten percent instead of a hundred.

Where the employee at issue was fully aware of the Employer's practices and procedures yet affirmatively chose to ignore them with subjective and unauthorized discretion, violations at issue must be vacated under the affirmative defense of employee misconduct. In the present case, not only were rules communicated but the record clearly demonstrates that employees knew and recognized the safety standards required.

As per the Proposed Decision and Order, the IAJ took issue with 1) whether the disciplinary system was clear to the workers and 2) whether the Petitioner utilized a sufficient safety check system. (CABR p. 36, lines 1-5). Simply, as referenced in RCW 49.17.120(5)(a)(i) and (ii), the employer is required to adequately communicate a thorough *safety program, including work rules, training, and equipment* designed to prevent the violation.” (RCW 49.17.120(5)(i) & (ii). At no point in the WAC is there a requirement that disciplinary policies be clear to workers.

In regard to the Appellant’s efforts in discovering violations, the record is clear that Mr. Heaton was a well-trained equipment foreman and operator. (Tr. 6/17/10, p. 97-98). Prior to June 16, 2009, Mr. Heaton had never been disciplined for trenching or excavation violations. (6/17/10, p. 128). In fact, Mr. LaRue testified that Mr. Heaton had always been a “top hand” that could be counted on to keep workers safe. (7/13/10, p. 13). Therefore, there was simply no steps

that could have been taken to “discover” or “check” for any alleged actions that could be deemed to support the violations at issue.

The Appellant provided a thorough safety program which included an accident prevention program. (6/17/10, p. 70). In fact, the Respondent’s inspector, Mr. Korzenko acknowledged the Employer conducted safety orientations including ones specifically for trenching and weekly safety inspections. (6/17/10, p. 71).

Mr. Ron Martinez (hereinafter “Mr. Martinez” served as the Safety Director for the Appellant during the inspection period at issue. In relevant testimony Mr. Martinez went into detail regarding the specific training of employees and the emphases on trenching and excavations since the Employer is primarily an underground utility contractor. (6/17/10, p. 133-135). Despite extensive training and on the job experience, Mr. Heaton testified that he had data on site and but *chose not to refer to it but instead relied upon his gut instincts* which were

contrary to the Employer's direction. (Emphasis added).
(6/17/10, p. 103).

The Appellant has always strived to hire and continually train only qualified and competent operators. Such effort is demonstrated by Mr. Martinez's testimony regarding the Employer's training program and Mr. LaRue's stringent perspective on discipline. Mr. Heaton's work had always been valued and continually monitored with no reason for concern before the June 16th, 2009, incident.

Assuming *arguendo*, where this Court finds that the Respondent can establish the *prima facie* elements required to sustain the violations, the Court must also find that the IAJ erred in failing to find the Appellant met all the requirements to support a finding of the affirmative defense of unpreventable employee misconduct whereby a decision reflecting vacating of all remaining violations must be issued.

E. Assuming *arguendo*, where the Respondent can meet the *Prima Facie* Elements as required, did the lower Court err in affirming calculation of

penalties for Violation 1-1 and Violation 1-3 where the Respondent failed to recognize the presence of plates, pump jacks and a ladder when determining the numerical value of probability for the basis of the penalty calculations?

The Appellant respectfully asserts that the lower Court erred in affirming the Respondent's "low medium" probability calculation where the record reflects the Board of Industrial Insurance Appeals IAJ failed to take into account the impact of the Appellant's actions for prevention and safety. (CABR p. 27, lines 26-30).

Under WAC 296-900-14005, the Washington Industrial Safety and Health Act (hereinafter "WISHA") will assess monetary penalties "when a citation and notice is issued for a serious, willful, or egregious violation." (WAC 296-900-14005). WISHA calculates the base penalty by deferring to a specific amount dictated by statute or by utilizing the more common gravity method. (WAC 296-900-14010). The gravity or "weight" of the violation is established by multiplying

severity by probability. *Id.* Severity rates are expressed in whole numbers ranging from the lowest “one” to the highest “six.” Rates under severity are based on the most serious injury, illness or disease that could be reasonably expected to occur due to a hazardous condition. *Id.* At issue is the probability rate that unlike the severity rate reflects “the *likelihood* of any injury, illness, or disease occurring.” *Id.* (Emphasis added). Similarly to the severity rating scale, the probability scale is also based upon a whole number system ranging from the lowest “one” to the highest “six.” When determining probability, the following factors are considered: 1) frequency and amount of exposure, 2) number of employees exposed, 3) instances or numbers of times the hazards is identified in the workplace and 4) how close an employee is to the hazard, 5) weather and other working conditions, 6) employee skill level and training, 7) employee awareness of hazard, 8) pace, speed and nature of the task or work, 9) use of personal protective equipment and 10) other mitigating or

contributing circumstances. *Id.*

In the present case, the probability rating of “3” for Violation 1-2 and Violation 1-3 is not supported by the substantial record as a whole. Specifically, probability of a cave-in was greatly reduced as there were plates and pump jacks in place, even if assuming *arguendo*, not as many as required by the manufacturer. Furthermore, a ladder was close by and egress ramps were located within 25 feet for exit.

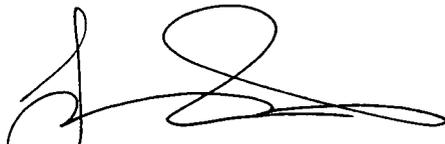
The record also reflects that the probability score of “three” for all citations at issue were based on alleged employee exposure of five minutes. (Tr. 6/17/10, p. 76). However, even after acknowledging the following, the Department inspector still failed to lower the assignment of probability based upon their own standards: 1) workers allegedly involved were trained journey-level workers, 2) the Employer had communicated their tailored safety program to workers via safety orientations, 3) there was a competent person onsite and 4) shoring was in place on Chandler Street. (6/17/10, p. 77-80).

Where the Respondent can meet the prima facie elements as required, the IAJ erred in finding penalties for Violation 1-1 and Violation 1-3 should be affirmed where the Respondent failed to recognize presence of plates, pump jacks and a ladder when determining probability for the basis of the penalty calculations.

IV. CONCLUSION

The Respondent is charged by statute to assure a safe and healthful working environment, not to punish employers based on technicalities. Based upon the foregoing, where the Respondent has failed to meet the prima facie elements required the lower Court erred and the violations at issue must be vacated. In the alternative, where this Court upholds the violations the Appellant respectfully requests a penalty reduction based upon the incorrect probability calculations.

DATED this 30th day of October, 2012.



for Aaron K. Owada, WSBA No. 13869
Jennifer L. Truong, WSBA No. 40004
Attorneys for Appellant

CERTIFICATE OF SERVICE

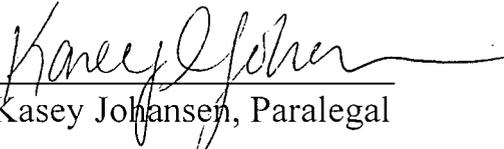
I, Kasey Johansen, hereby certify under penalty of perjury under the laws of the State of Washington that on October 30, 2012, I filed with the Court of Appeals Division Two, via Legal Messenger, the original and one copy of the following document:

1. **REPLY BRIEF OF APPELLANT**

and that I further served a copy via U.S. mail upon:

Oscar Chaves, AAG
Office of the Attorney General
Labor & Industries Division
1250 Pacific Avenue, Suite 105
Tacoma, Washington 98401

SIGNED in Seattle, Washington on October 30, 2012.


Kasey Johansen, Paralegal

FILED
COURT OF APPEALS
DIVISION II
2012 OCT 31 PM 1:34
STATE OF WASHINGTON
BY  DEPUTY