

NO. 70451-6-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

PERFORMANCE ABATEMENT SERVICES, INC.
Appellant,

v.

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES,
Respondent.

Appeal from the Superior Court for Whatcom County
Cause No. 12-2-02435-5

APPELLANT'S REPLY BRIEF

2014 FEB 20 PM 3:24

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

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I. INTRODUCTION

Appellant Performance Abatement Services, Inc. (“PAS”) submits this Reply Brief in response to the points and argument asserted by the Department of Labor and Industries in its Response Brief.

II. ARGUMENT

A. The Department Has Failed To Prove Its Case With Substantial Evidence.

When the Department charges an employer with a WISHA regulation violation, the Department bears the burden of proving the violation occurred. *Express Constr. Co. v. Dep't of Labor & Indus.*, 151 Wn.App. 589, 597, 215 P.3d 951 (2009). Proof must be by substantial evidence when considering the record as a whole. RCW 49.17.150(1) (findings of fact are conclusive if supported by substantial evidence on the record considered as a whole).

The crux of the Department’s case is that PAS violated WAC 296-155-17619 by failing to provide its employees with “adequate hand washing facilities.” That term is not defined. The regulation merely requires the facilities to be “in accordance with” WAC 296-155-140.¹ That regulation, as applicable in this case, merely requires “clean, tepid

¹ “Accordance” simply means “agreement; conformity; (in ** with a rule).” Webster’s Ninth New Collegiate Dictionary (1985); Merriam-Webster.com (2014).

wash water.” WAC 296-155-140(2)(a). The regulation does not specify how this water is to be supplied or in what form or fashion. It does not say it must be in a “lavatory” or that the water must be “running” as the corresponding OSHA regulation does.² It does not say it cannot be in the form of a shower or a hand sprayer. It does not prohibit the employer from using buckets. So long as the water is clean and tepid, that facility – no matter what the form – will meet the regulation.

The Department’s case is built around the testimony of its inspector Christian Bannick who on a site walk-through observed 5-gallon buckets of water and concluded that those buckets did not meet the requirements of the regulation based on his hypothetical opinion:

Q. And would a bucket constitute a hand washing facility?

A. No.

Q. Why is that?

A. Well, if multiple workers are using the hand wash or even one person, it’s not providing clean water.

3/6 TR 78 (Bannick) (*emphasis supplied*). The Department has argued that the inference from Bannick’s testimony is that workers used the buckets *seriatim* and thus contaminated the water. There is no evidence to support that inference. Although the Department elicited testimony from some PAS workers about their use of buckets, that testimony was limited,

² 29 § C.F.R. 1926(f)(3)(i) and (ii).

sporadic, inconclusive and conflicting. It did not clearly explain how the buckets were used or if other workers used the same buckets without changing the water.

PAS contends that the Department has failed to present substantial evidence to support its contention that a violation occurred. In fact, when viewed as a whole, the record shows no more than a scintilla of evidence in support of the Department's position.

"A scintilla of evidence does not meet the requirements of the substantial evidence rule." *Wilson v. Stone*, 71 Wn.2d 799, 802, 431 P.2d 209, 210 - 211 (1967). *State v. Zamora*, 6 Wn.App. 130, 132, 491 P.2d 1342 (1971), explains the difference between substantial evidence and a scintilla of evidence by drawing a distinction between opinion testimony supported by facts which can constitute substantial evidence and opinion testimony without any factual support which is "merely scintilla in character:"

The determination of whether or not there is substantial evidence is a law question for the court. . . . In determining whether there is substantial evidence on the issue of criminal intent, the court should consider all the circumstances of the case If, therefore, there is both evidence of the consumption of alcohol or other drugs and opinion testimony based thereon concerning the existence of intoxication . . . the totality of such evidence

is substantial evidence . . . If on the other hand, evidence of intoxication is based merely on opinion evidence, unsupported by facts on which to base it, the evidence at best is merely scintilla in character. . . . Scintilla evidence is something less than substantial evidence. It is speculative and conjectural, . . .

Id., 6 Wn.App. at 132 (emphasis added; internal citations omitted).

Although *Zamora* is a criminal case, a number of civil cases support the *Zamora* distinction. In *Charlton v. Baker*, 61 Wn.2d 369, 373, 378 P.2d 432 (1963), the sole testimony of the defendant driver as to the speed of the plaintiff, without any corroborating physical evidence, was not substantial evidence needed to establish contributory negligence. Similarly, in *Zorich v. Billingsley*, 55 Wn.2d 865, 868, 350 P.2d 1010 (1960), the court held that the opinion of the defendant driver as to the speed of the plaintiff carried no probative value, being at most a scintilla of evidence. Likewise, in *Wold v. Jones*, 60 Wn.2d 327, 330-31, 373 P.2d 805 (1962) the self-serving and unsupported testimony of the defendant driver, contradicted by three witnesses and physical evidence (pictures of the scene of the accident) was held to be no more than a scintilla of evidence. *See also, Wilson v. Dep't of Labor & Indus.*, 6 Wn.App. 902, 907, 496 P.2d 551 (1972) (finding that opinion testimony of claimant's medical expert, standing alone, was of no more than scintilla quality and

was not substantial evidence in affirming denial of worker's compensation claim even under a liberal construction of the Industrial Insurance Act as a remedial statute). Compare *Pilchuck Contractors, Inc. v. Dep't of Labor & Indus.*, 170 Wn.App. 514, 518, 286 P.3d 383, 385 (2012)(WISHA inspector's personal observation and photographs of two employees directing traffic in an intersection in violation of WISHA regulations held to constitute substantial evidence of the violation).

This distinction is important in our case because the Department's entire case rests on the opinion testimony of the inspector that providing only buckets of standing water does not satisfy the regulation because it means that the water will become contaminated with use and thus will not meet the "clean, tepid" water requirement. But, as stated in the PAS Opening Brief, there are no facts to support this opinion, to-wit: no physical evidence was presented by the Department, specifically no pictures were taken of any standing buckets of water or of employees using the buckets or of water contaminated from such use; no water was sampled or tested to determine its water quality or to determine if the water was in fact contaminated by some standard; no expert testimony or scientific evidence was presented to show what amount of lead it takes to "contaminate" a bucket of water; the inspector himself did not testify that

he saw any employee actually use any such bucket; he did not testify and no evidence was presented as to how many times a bucket of water was used before the water was changed; and the limited testimony of the PAS employees cited by the Department is incomplete, inconclusive and taken out of context.

PAS is not arguing that this Court should re-weigh the evidence or substitute its view of the evidence for that of the Board or superior court as the Department suggests it is doing. All it is asking is that this Court fairly considers all of the evidence in light of the applicable substantial evidence rule. PAS submits that taken as a whole, even considering all reasonable inferences and weighing the evidence in favor of the Department, there is not substantial evidence to uphold the violation. In fact, at most, there is no more than a scintilla of evidence of the violation which is not enough

B. The Cited Regulation Is a Performance Standard That Allows PAS Leeway in Deciding How to Comply.

The Department attempts to distinguish the *Thomas*³ case decided under OSHA standards and cited by PAS in support of its contention that the WISHA hand washing regulation is a performance specification that allows PAS some leeway in deciding how to comply. The Department's

³ *Secretary of Labor v. Thomas Industrial Coatings, Inc.*, 21 BNA OSHC 2283, 2008 OSHD (CCH) 32937, 2007 WL 4138237 (OSHRC No. 97-1073, 2007) discussed at pp. 21-22 of Appellant's Brief.

effort is of no avail. The OSHA regulations are different in format from the WISHA regulations. What is critical, however, is that the OSHA regulation deemed to be a performance specification in *Thomas* called for the employer to “provide adequate washing facilities” which is similar to the WISHA regulation requiring “adequate handwashing facilities.” In both cases, the requirements are less than precise and afforded Thomas and should provide PAS the same latitude and leeway in deciding how to comply. Specifically for PAS, there is no specification as to what sort of means or mechanism complies with the regulation so long as there is a supply of “clean, tepid wash water.” It could be any or all of the following: a permanent sink and faucet with running water; a portable sink with foot pump for water; a tub with sprayer attached to a hose; a shower; or even a tub with clean water. The evidence is that PAS provided all but the permanent sink.

The Department overstates its case when it argues, in contravention of the regulation, that a shower is not and cannot be a hand washing facility. In light of the lack of definition in the WISHA regulation of what constitutes “adequate hand washing facilities” and applying common sense and common definitions, while a hand washing

facility cannot be a shower, there is no reason why a shower cannot be a hand washing facility.

C. The Rationale from the Phoenix Roofing Case Should Be Followed to Reduce this Serious Violation to a General Violation.

PAS cited *Phoenix Roofing*⁴ for the proposition that a serious violation would be considered less than serious if there was no significant difference between the protection provided by the employer and that which would be afforded by technical compliance with the standard established by the regulation. *Appellant's Brief at 29-31*. PAS noted that our court of appeals had addressed that argument in *Mowat*⁵ but found the facts of *Mowat* to be different. *Id. at 31*. The Department's response, *Department Brief at 43*, fails to rebut the proposition advanced by PAS and supported by *Phoenix Roofing*: that PAS did not create an additional hazard that would not have existed absent the violation but by providing multiple means of washing hands, including showers, PAS enhanced the safety of its workers. Under the rationale of *Phoenix Roofing*, the alleged serious violation should be ruled to be no more than a general violation.

⁴ *Phoenix Roofing, Inc. v. Dole*, 874 F.2d 1027 (5th Cir. 1989)

⁵ *Mowat Construction Co. v. Dep't of Labor & Indus.*, 148 Wn.App. 920, 201 P.3d 407 (2009)

III. CONCLUSION

The Department contends that buckets without running water were provided by PAS and used by certain employees for hand washing and that this evidence, in the opinion of the WISHA inspector, results in unclean water in violation of the cited regulation.

But the testimony cited by the Department in support of that contention is extremely limited, speculative, conjectural, inconclusive, internally contradictory, unclear and at odds with other more substantial testimony presented by PAS as to the use of other means to wash hands – showers, hotsy sprayers and a self-contained wash basin – that the Department and the Board have ignored altogether.

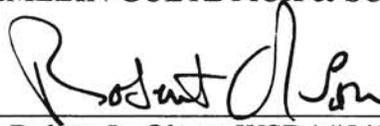
When the record is considered as a whole, as required, the Court must come to the conclusion that the Department's evidence is merely a scintilla or less than substantial. Whatever the measure, the evidence is insufficient to enable the Department to carry its burden of proving that PAS violated the regulation. The citation should be dismissed.

In the alternative and at the very least, the Court can and should conclude that the Department has failed to prove by substantial evidence that a serious violation occurred. The citation should be reduced to a general violation.

Respectfully submitted this 20th day of February, 2014.

SCHLEMLEIN GOETZ FICK & SCRUGGS, P.L.L.C.

By: _____



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DECLARATION OF SERVICE

I, Laurel Barton, do hereby declare that:

1. I am an employee of Schlemlein Goetz Fick & Scruggs, P.L.L.C., and am now, and at all times material hereto was, a citizen of the United States and a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-referenced action and competent to testify hereto.

2. On the date set forth below, I caused to be served a copy of the Appellant's Reply Brief with Declaration of Service upon the following party in the manner indicated:

Paul Weideman
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800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

- Via Fax: 206-812-1418
- Via Messenger for delivery on February 20, 2014.
- Via Overnight Delivery

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, this 20 day of February, 2014.



Laurel Barton