

NO. 70451-6-1

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

BRIEF OF APPELLANT

ROBERT L. OLSON, WSBA # 05496
SCHLEMLEIN GOETZ FICK & SCRUGGS, PLLC
66 S. Hanford St., Suite 300
Seattle, Washington 98134
(206) 448-8100

RECEIVED
STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
APPELLATE DIVISION
NOV 19 11:11:07

SO

ORIGINAL

TABLE OF CONTENTS

A.	INTRODUCTION AND OVERVIEW	4
B.	PROCEEDINGS BELOW	6
C.	ASSIGNMENTS OF ERROR AND ISSUES	9
D.	STANDARDS OF REVIEW	10
E.	STATEMENT OF THE CASE	11
	1. Violation 1-2 and Cited Regulation	11
	2. Evidence Presented	13
F.	ARGUMENT	19
	1. <u>Finding of Fact No. 5 that PAS Failed to Provide Required Hand Washing Facilities Is Not Supported by Substantial Evidence.</u>	19
	2. <u>The Board Failed to Interpret Correctly the Hand Washing Regulation.</u>	21
	3. <u>Alternatively, The Board Should Have Ruled that Violation 1-2 Is Not a Serious Violation.</u>	26
	a. The Department failed to prove that the result of using buckets to wash hands could include serious physical harm.	27
	b. There is no significant difference between the protection provided by PAS and that which would be afforded by technical compliance with the hand washing regulation	29
G.	CONCLUSION	31
	APPENDIX – Washington Regulations	34

TABLE OF AUTHORITIES

CASES

WASHINGTON

<u>City of Redmond v. Central Puget Sound Growth Mgmt.</u> , 136 Wn.2d 38, 46, 959 P.2d 1091 (1993)	11
<u>Legacy Roofing v. Dep't of Labor & Industries.</u> 129 Wn.App. 356, 363, 119 P.3d 366 (2005)	10
<u>Mid-Mountain Contractors, Inc. v. Wash. Dep't of Labor & Indus.</u> , 136 Wn.App. 1, 4, 146 P.3d 1212, 1213 (2006)	11
<u>Mowat Const. Co. v. Department of Labor and Industries.</u> 148 Wn.App. 920, 931-932, 201 P.3d 407 (2009)	11, 30, 31

FEDERAL

<u>Phoenix Roofing, Inc. v Dole.</u> 874 F2d 1027 (5 th Cir. 1989)	29, 30, 31
<u>Secretary of Labor v. Eshbach Brothers.</u> LP, 23 BNA 1106, 2010 WL 1471967	22
<u>Secretary of Labor v. Korte Construction Co.</u> , 23 BNA OSHC 1724, 2011 WL 1796517	22, 23
<u>Secretary of Labor v. Thomas Industrial Coatings, Inc.</u> , 21 BNA OSHC 2283, 2287, 2007 WL 4138237	21, 22, 31

STATUTES

WASHINGTON

RCW 49.17	6, 10, 26, 30
-----------	---------------

REGULATIONS

WASHINGTON

WAC 296-155-140 8, 12, 23, 32

WAC 296-155-17619 8, 12, 13, 23, 24, 32

FEDERAL

29 CFR 1926.51(f)(3)(ii) 21, 23

A. INTRODUCTION AND OVERVIEW

Performance Abatement Services, Inc. (“PAS”) seeks reversal of a WISHA citation that charged it with failing to provide adequate hand washing facilities during lead abatement work it was performing. The citation was erroneously upheld by the Board of Industrial Insurance Appeals following an administrative hearing. The Board’s Decision and Order is not supported by applicable law and substantial evidence. On the contrary, the Board failed to consider substantial evidence presented by PAS at the hearing that it provided multiple means for its employees to wash their hands and failed to interpret the governing regulation in a proper manner.

PAS is an asbestos and lead abatement contractor operating and licensed in the state of Washington. In March 2011 PAS was performing lead and asbestos abatement services at a former National Guard armory in Bellingham that was being renovated into office space for Western Washington University. This was a 3-story building with a former rifle shooting range in the basement. PAS set up showers for its abatement crew at various locations in the building and provided additional hand washing facilities consisting of tubs of water with hoses connected to a water source and sprayers. It established containment areas around parts

of the building where lead was likely to be present. It instructed its nine employees on site to wear protective suits and full face respirators when working in the containment areas and to take showers when leaving the areas.

PAS was only on site for less than one month. Its work progressed without incident except for one anomalous high measurement of lead on a personal air monitoring device while three fully protected employees were working in the containment area around the rifle range loading and removing sand with spent rifle casings. PAS sent all of its workers to a health clinic to provide blood samples to be examined for the presence of lead. All of the samples showed blood lead levels to be normal.

WISHA conducted a routine safety inspection of the project site consisting of the WISHA inspector walking around the site with the PAS general foreman and PAS branch safety supervisor. When asked by the inspector about hand washing facilities, the foreman pointed out a shower that the inspector noted was more than adequate. The WISHA inspector requested and PAS supplied all of the air monitoring samples that had been collected and tested during PAS' work on the project. With the single exception of the sample taken in the rifle range noted above, all of

the other samples showed lead levels well below the applicable WISHA standard.

After PAS concluded its work on the project and notwithstanding the inspector's comment about the adequacy of the use of showers and the multiple other means to wash hands provided by PAS, the Department cited PAS for failing to provide adequate hand washing facilities based on the inspector's later testimony that he saw only buckets of water that he considered to be inadequate.

B. PROCEEDINGS BELOW

Respondent Department of Labor and Industries ("Department") cited PAS for violations of regulations implementing the Washington Industrial Safety and Health Act ("WISHA"), RCW 49.17. Specifically, the Department cited PAS for three violations related to lead abatement:

1. a serious violation for failure to provide initial medical surveillance to its employees (\$2,000 penalty) ("Violation 1-1");
2. a serious violation for failure to provide adequate hand washing facilities (\$400 penalty) ("Violation 1-2"); and
3. a general violation for failure to provide notice to employees of lead exposure (no penalty) ("Violation 2-1").

Record, 46-47.¹

¹ References to pleadings in the Certified Board Record are cited here as "Record" followed by the page number.

Board Judge Sara M. Dannen conducted hearings on March 6 and 7, 2011, to consider three issues: (1) whether the violations were correct; (2) whether they were properly classified as serious violations; and (3) whether the assessed penalties were appropriate. The Department called three witnesses: PAS employees Arnoldo Cantu (“Cantu”) and Mynar Arita (“Arita”), both of whom testified with the aid of a translator, and Department inspector Christian Bannick (“Bannick”). PAS also called three witnesses: PAS employee Lauro Santiago (“Santiago”), PAS general foreman Ernest Crane (“Crane”) and PAS branch safety supervisor Gary Hansen (“Hansen”). Five exhibits were introduced at the hearing. The parties then submitted post-hearing briefs on the law and facts.

Judge Dannen issued a Proposed Decision and Order (“PDO”), Record, 28-44, that agreed with PAS that Violation 1-1 was not a serious violation: she reclassified that as a general violation and ruled that no penalty should be assessed, Record, 43 (Finding of Fact No. 4); she affirmed Violation 1-2 as serious with the assessed penalty; and affirmed Violation 2-1 as a general violation without penalty. Record 43-44. PAS filed a petition for review, Record 4-18, that the Board denied and affirmed the PDO as its Decision and Order on August 10, 2012. Record,

2. The Decision and Order asserts that Violation 1-2 is supported by the following Findings of Fact (Record, 43-44):

5. In March 2011, PAS employees were not given access to hand washing facilities which met the requirements of WAC 296-155-140 in violation of WAC 296-155-17619(5)(a).

6. PAS knew or, through the exercise of reasonable diligence, could have known of this condition, the result of which could include serious physical harm.

7. For the violation of WAC 296-155-17619(5)(a), the severity of injury due to the hazard was high (rated as a 5 on a scale of 1 to 6), the probability of an accident was low (rated as a 1 on a scale of 1 to 6), the employer had an average workplace history rating and its faith rating was “average.” The company employed between 101 and 250 employees. With an adjustment for size, the appropriate penalty for this violation is \$400.

Based on those Findings, the Board entered Conclusion of Law No. 3: “In March of 2011, PAS committed a serious violation of WAC 296-155-17619(5)(a).” Record, 44.

PAS then appealed to the Superior Court of Whatcom County.² The case was fully briefed, CP 4-49³ and a hearing with oral argument before the Honorable Charles R. Snyder occurred on April 24, 2013, CP

² The notice of appeal was inadvertently omitted from the Designation of Clerk’s Papers. A supplemental designation will be filed.

³ CP = Clerk’s Papers

50-51, VRP 1-48⁴, that resulted in findings of fact, conclusions of law and a judgment affirming the Board's decision. CP 52-54.

This appeal followed. CP 55-60.

C. ASSIGNMENTS OF ERROR AND ISSUES

ASSIGNMENT OF ERROR No. 1: The Board's Finding of Fact No. 5 is not supported by substantial evidence.

ISSUE: Does the limited opinion testimony by the WISHA inspector about the adequacy of providing buckets of water constitute substantial evidence to support a violation of the hand-washing facility regulation in light of other testimony about other means and methods that were provided to wash hands?

ASSIGNMENT OF ERROR No. 2: The Board failed to interpret correctly the WISHA regulation related to hand washing.

ISSUE: Did the Board correctly interpret the performance-based hand-washing facility regulation when it failed to allow PAS leeway in deciding how to comply with the regulation?

⁴ VRP = transcript of the hearing held on April 24, 2103.

ASSIGNMENT OF ERROR No. 3: The Board erred in entering Finding of Fact No. 6 and Conclusion of Law No. 3 ruling that Violation 1-2 was serious.

ISSUE No. 1: Did the Department prove that the result of employees using buckets to wash hands could include serious physical harm when there was no observation of use of buckets by PAS employees; no sampling, testing or measurement of the extent of contamination of the water in the buckets; no testimony as to frequency of use; and evidence that water was emptied?

ISSUE No. 2: Were the showers provided by PAS a measure that provided protection equal or greater than those required by the hand-washing regulation such that Violation 1-2 should not be considered a serious violation?

D. STANDARDS OF REVIEW

WISHA governs judicial review of decisions issued by the Board. RCW 49.17.140-.150(1). The court of appeals reviews a decision by the Board directly, based on the record before the agency. Legacy Roofing, Inc. v. Dep't of Labor & Industries, 129 Wn.App. 356, 363, 119 P.3d 366 (2005). Factual findings of the Board are conclusive if supported by

substantial evidence on the record considered as a whole. RCW 49.17.150(1). The court will review the Board's findings of fact to determine whether they are supported by substantial evidence and whether those findings support the Board's conclusions of law. Mid-Mountain Contractors, Inc. v. Wash. Dep't of Labor & Indus., 136 Wn.App. 1, 4, 146 P.3d 1212, 1213 (2006). Substantial evidence is evidence in sufficient quantity to persuade a fair-minded person of the truth of the declared premise. Mowat Constr. Co. v. Dep't of Labor & Indus., 148 Wn.App. 920, 925, 201 P.3d 407 (2009).

The court reviews an agency's interpretation and application of the law de novo. City of Redmond v. Central Puget Sound Growth Mgmt., 136 Wn.2d 38, 46, 959 P.2d 1091 (1993). It will defer to an agency's interpretation of the law where the agency has specialized expertise in the relevant field, but it is not bound by the agency's interpretation. Id. It is ultimately for the court to determine the purpose and meaning of statutes, even when the court's interpretation is contrary to that of the agency charged with carrying out the law. Id.

STATEMENT OF THE CASE

1. Violation 1-2 and Cited Regulation

Violation 1-2 alleges that PAS violated WAC 296-155-17619(5)(a), that the violation was serious, that the violation was corrected during the inspection and that a penalty of \$400.00 should be assessed.

Record, 46. WAC 296-155-17619(5)(a) states:

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

The term “adequate hand-washing facilities” is not defined in the regulation other than by reference to WAC 296-155-140 that deals with Sanitation. Sub-section (2) of that section deals with Wash Water and notes what is required:

- (a) Clean, tepid wash water, between 70 and 100 degrees Fahrenheit, shall be provided at all construction sites.
- (b) Individual hand towels shall be provided. Both a sanitary container for the unused towels and a receptacle for disposal of used towels shall be provided.
- (c) Hand soap, industrial hand cleaner or similar cleansing agent shall be provided. Cleansing agents shall be adequate to remove any paints, coatings, herbicides, insecticides or other contaminants.
* * *
- (f) Wash water areas will be maintained in a dry condition. Slipping or other hazards

shall be eliminated from the wash water areas before it is acceptable for use.

WAC 296-155-17619 also provides for the use of showers. Subsection (3) states:

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

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

* * *

In addition, WAC 296-155-17619(5), dealing with Hand washing facilities, imposes on an employer an additional duty when showers are not provided:

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

The Appendix hereto contains the full text of these two regulations.

2. Evidence Presented.

Testimony presented at the hearing showed that PAS provided multiple means for employees to wash their hands, including showers. A tub on the second floor (3' x 3' x 1' deep) was filled with water supplied by a hose with a sprayer that was used specifically to wash hands. 3/6 TR 110-111 (Santiago)⁵. Waste water from the tub emptied into a 55 gallon container that was not used to wash hands. Id. Specifically, Santiago testified:

A. "We call it a Hotsy with clean water."

* * *

Q. How was it [the tub] being filled with clean water?

A. By a hose.

Q. By a hose with a sprayer on it?

A. Yes.

Q. Okay. And did you use the sprayer at times to wash your hands with?

A. Yes, sir.

Q. And then would it drain into some other – how was it – How was the water being removed?

A. Water go to the container, the small container.

Q. And how did the water get out of the tub that you were talking about into this other container?

A. They go inside to a 55-gallon container.

Q. Do you know how it got out of the tub into the 55-gallon container?

A. We empty by hand.

⁵ References to the Transcript of the hearings contained in the certified Board Record are cited by the abbreviation "TR" preceded by the date of the hearing and followed by the page number of the transcript with lines enclosed in parentheses. The Exhibits are those contained in the Board Record.

Q. Okay. And did you use that sometimes to wash your hands?

A. No. Because we use it with the Hotsy with the sprayer.

Q. With a sprayer?

A. Yes.

3/6 TR 110(16) – 111(14)(emphasis supplied).

A washing station was located on the first floor with a foot pump

for running water. 3/6 TR 31 (Cantu). Specifically Cantu testified:

Q. Do you recall if there were hand washing facilities in other parts of that project on other floors?

A. I know there was one, yeah, right as you go into the front door of the building.

Q. On the first floor?

A. Right.

Q. And what did that look like or what did that consist of?

A. It was a washing station.

Q. And what did it – How was it set up, and what did it consist of?

A. It had a foot pump to pump the water. It had soap, towels.

Q. A foot pump for running water?

A. Right.

Q. And was it warm water? Cold water? Do you recall?

A. It wasn't – I can't recall, but it wasn't cold. I know that.

3/6 TR 31(2-16)(emphasis supplied).

The showers had running water heated by an internal hot water tank.

3/6 TR 14, 107-09; 3/7 TR 16. Water was supplied by hoses connected to

the water supplied to the project site. 3/7 TR 16. Operational showers were available on site at all times and PAS employees used them. 3/6 TR 28, 109, 112; 3/7 TR 31. Two were located in the basement area, one of which was adjacent to the rifle range. 3/7 TR 14-15. One was located on the second floor hallway. 3/7 TR 33.

PAS employees Cantu and Arita testified with the aid of a translator as witnesses called by the Department. Cantu testified that he used a tub of water to wash his hands but provided no details as to where, when or how often such a tub was used, 3/6 TR 13-14 (Cantu), other than to limit his testimony by saying the tub was part of a shower area, Id. at 28-29, and the shower had running water. Id. at 14. Arita testified that a shower at an unidentified location did not have water⁶ so he and others washed their hands in a bucket that was part of the shower, 3/6 TR 43 (Arita), but it was unclear as to whether there was also a sprayer:

Q. And then would there be some point in the day when the bucket was emptied?

A. Okay. Inside there was like a water sprayer in that area. Okay. Sometimes we wash our hands there with the water because we remove and take out wood and metal and we use that water sometimes to wash our hands.

Q. In the bucket?

⁶ Arita's testimony on this point was not corroborated by either Cantu or Santiago.

A. No. Inside the area. Then after that, we went to the shower.

3/6 TR 43(13-20)(Arita).

PAS foreman Crane led Inspector Bannick on a walk-through of the project site on his first visit on March 17, 2011. 3/7 TR 65-67. They were accompanied by PAS safety supervisor Gary Hansen. Id. When asked by Bannick about hand washing facilities, Crane pointed to the shower on the second floor. Id at 66. According to Hansen, Bannick replied, “that’s even better.” Id. Crane’s account is that Bannick noted “good job.” 3/7 TR 37. Bannick’s version of the exchange is “I don’t remember saying that. But I’m not saying I didn’t say that.” 3/6 TR 91(7-12).

Crane also testified that more than one shower had been installed, described where the showers were located with reference to building plans, Exhibit 3; 3/6 TR 15, 19, 27, 29-30; 3/7 TR 20, and noted that at least one shower was set up every day during the time that PAS was doing lead abatement work. 3/7 TR 31 (5-8).

Despite this evidence, Department inspector Bannick testified he saw no hand washing facilities on site which he defined as “having clean tepid water that employees can use to wash up at breaks and at the end of the day.” 3/6 TR 78(5-10). Bannick admits Crane told him “about the

shower set ups,” but then added that Crane said “he was filling up buckets for workers to use to wash their hands.” 3/6 TR 78. No details were provided as to specific locations or number of such buckets or how they were being used.⁷ Bannick focused solely on Crane’s limited statement to support his opinion that a bucket would not constitute a hand washing facility because “if multiple workers are using the hand wash or even one person, it’s not providing clean water.” Id. His testimony presumes that workers were dipping their hands into the buckets thereby contaminating the water. But no testimony of such use was presented. Further, Bannick’s limited opinion testimony was not supported by his other testimony and was contrary to the testimony of the PAS employees cited above, especially the testimony of Santiago and Cantu quoted above. Bannick admits he saw evidence of showers but did not recall on what floor. 3/6 TR 90. Nor did he recall if the showers were operational. Id. at 92. Nevertheless and without any supporting facts and contrary to PAS employee testimony, he testified that it was his “understanding” that “a shower was not always up, available, operational to be used in the fashion of a hand washing facility.” 3/6 TR 92(23)-93(1). Although he says he saw buckets on the ground floor (basement level), he was not sure what

⁷ Santiago was the only worker who specifically mentioned any stand-alone buckets and he provided no such details either other than to say they were filled with water and soap with the water being supplied by a hose. 3/6 TR 109(18) – 110(4).

the source of water was, 3/6 TR 89-90, nor could he specifically describe what they looked like.⁸ He didn't recall seeing any buckets on the first or second floors. Id. at 90. He didn't recall seeing any evidence of hoses in any part of the site. Id. at 91-92. He never testified that there were not any hoses and he never testified that he did not see any hoses. He never sampled or tested any of the water that was in the buckets to determine its temperature or cleanliness. And he never testified that he saw any employees actually using the buckets to wash their hands. The Department did not offer into evidence any photographs of any such buckets or their use.

F. ARGUMENT

1. Finding of Fact No. 5 that PAS Failed to Provide Required Hand Washing Facilities Is Not Supported by Substantial Evidence

The evidence of multiple means provided by PAS to wash hands was uncontroverted and was largely ignored by the Board. While Judge Dannen conceded that “the testimony did establish that employees would use buckets, tubs, hoses, hotsy sprayers or a combination thereof to wash their hands,” she erroneously limited that evidence to “when showers weren't present or working properly.” Record, 41(15-17). There was no

⁸ “I think they were just standard 5-gallon buckets as I recall.” 3/6 TR 90(3-4).

such limitation presented in the testimony⁹ and no such inference can be drawn from the testimony. The judge then focused exclusively on the limited opinion testimony from inspector Bannick about using buckets with water to wash hands before concluding:

Because I agree with Mr. Bannick that standing bucket water becomes progressively more contaminated depending upon the number of individuals using it (or, indeed, even as one individual uses it), I cannot find that these ‘alternatives’ met the strict (and mandatory) requirement set forth in the WAC. Accordingly, I find that PAS violated WAC 296-155-176(5)(a) by failing to provide hand washing facilities which complied with its requirements.

Record 41(17-22).

Apparently the “alternatives” mentioned are the means other than showers used to wash hands that the judge found had been established by the evidence. As an example, see Santiago’s testimony that water in the tubs was emptied into a 55 gallon drum, cited above, and thus could not have gotten progressively dirtier as the judge intimates. The judge did not explain why that “alternative” was not adequate.

The Board erred in accepting the abstract opinion testimony of inspector Bannick and in failing to examine carefully the evidence of

⁹ As noted above, only Arita testified that showers were sometimes not reliable; Santiago and Cantu did not corroborate that testimony and Bannick’s testimony on the subject was conclusory and without foundation.

multiple means to wash hands provided by PAS. Bannick's testimony was only his opinion. While it may be true in the abstract that standing water that is used to wash hands results in unclean water, that opinion testimony was not supported by the evidence that had been presented and does not amount to substantial evidence.

2. The Board failed to interpret correctly the hand washing regulation.

Under the correct interpretation of the WISHA hand washing regulation, PAS should be afforded leeway in deciding how to comply with the regulation. The Washington hand-washing regulation is similar to the analogous federal OSHA sanitation standard for construction. 29 CRF 1926.51(f)(1) states:

The employer shall provide adequate washing facilities for employees engaged in the application of paints, coating, herbicides, or insecticides, or in other operations where contaminants may be harmful to the employees. Such facilities shall be in near proximity to the worksite and shall be so equipped as to enable employees to remove such substances.

Because of the lack of definition and specific obligations, this federal standard has been called a "performance standard" which is interpreted in light of what is reasonable. Secretary of Labor v. Thomas Industrial Coatings, Inc., 21 BNA OSHC 2283, 2287, 2008 OSHD (CCH)

32937, 2007 WL 4138237 (OSHC No. 97-1073, 2007)(assessing adequacy of hand washing facilities under this regulation).¹⁰ A performance standard means that an employer is allowed “some leeway in developing the specific methods to protect against the hazard.” Secretary of Labor v. Eshbach Brothers, LP, 23 BNA 1106, 2010 WL 1471967, (OSHC No. 09-1148, 2010) citing Thomas Industrial Coatings. In Secretary of Labor v. Korte Construction Co., 23 BNA OSHC 1724, 2011 WL 1796517 (OSHC No. 09-1907, 2011), the Commission, citing Thomas Industrial Coatings, elaborated on the permitted leeway accorded to employers in a case dealing with the OSHA standard for protecting cords and cables from damage before vacating the citation for lack of evidence:

While these protective measures may not have been the best recommended practices for protecting flexible electric cords, it is not this court’s role to determine whether Respondent implemented the best method of

¹⁰ In Thomas, a lead paint removal company was cited under OSHA for failing to provide adequate hand washing facilities while removing lead paint from a bridge. Thomas did not have any of its hand-washing trailers available and instead provided its two-man crew with an “Igloo” water cooler. Moistened towelettes were also provided but there was no evidence that soap was provided. OSHA regulations required running water, soap and towels. Based on the concessions of the employer’s safety manager that he had no knowledge of how the employees were using the cooler and that the cooler was not the preferred practice for hand washing and further evidence that the employer’s safety program contemplated facilities with running water, soap and towels and water storage tanks, the Commission concluded that “a reasonable person in Thomas’s position would not rely on the cooler as ‘adequate’ under this performance standard.” None of those facts are present in our case.

protection available. Rather, this court's role is to decide whether Complainant has proven by a preponderance of the evidence that Respondent failed to implement at least the minimally acceptable levels of protection for the cords in compliance with the cited regulation.

2011 WL 1796517 at 5. (Emphasis added.)

The Board failed to accord PAS that leeway and failed to consider the ample evidence that PAS provided multiple means of compliance. Instead the Board erroneously focused on one minor aspect of the testimony and the opinion testimony of the inspector to find a violation.

The wording of the governing regulation WAC 296-155-17619 allows the leeway that the case law supports. First, it allows the use of showers where feasible. Second, it prescribes that “hand washing facilities” be “adequate” without defining either term other than by reference to WAC 296-155-140. Third, that regulation at subsection (2)(a) merely requires that “clean, tepid wash water” be provided (along with other requirements not at issue here) unlike the federal hand washing facilities requirement that “hot and cold running water or tepid running water” be provided. 29 CFR 1926.51(f)(3)(ii) (emphasis added). Fourth, there is no form or description of what a hand-washing facility looks like. So long as there is “clean, tepid water” available, that facility – no matter

what the form – will meet the regulation. Fifth, there is thus no prohibition in using showers with such clean, tepid water as a means and method for washing hands. Sixth, in fact when showers are provided, they are to be used as an alternative to hand and face washing at the end of the shift. Seventh, the regulation says only that the “employer shall provide.” It does not say “make sure your employees use only facilities that are specifically identified for use for hand-washing.” Compare the requirement in WAC 296-155-17619(3)(b) that the employer “assure” that employees shower.

From those points, it is clear that showers and multiple other means, when available with clean and tepid water, can be considered hand-washing facilities. That is exactly what PAS provided at various locations throughout the site. The Department inspector acknowledged that showers were more than adequate. If showers were required by the regulation, then substituting a sink and faucet would not comply. But the opposite is not true: there is no reason why an adequate hand washing facility could not be in the form of a shower or a sink or a tub so long as the water was clean and tepid.

When the record is considered as a whole, there is substantial evidence that PAS provided operable showers through-out the job site.

Crane described the location of the showers in great detail and confirmed that at least one shower was set up every day during the time lead abatement work was being performed. Bannick initially acknowledged that such a set-up would comply with the regulation. Arita was the only worker who testified that showers were sometimes not reliable; the other two workers who testified did not corroborate that testimony. Banick's testimony on that point was only his unsupported "understanding" that showers were sometimes not operational.

Rather than giving PAS credit for providing a back-up in the unlikely event of shower malfunction, the Board erroneously focused on the limited testimony about buckets filled with water as the sole basis for finding a violation of the hand washing regulation. But, as argued above and summarized here, that testimony does not amount to substantial evidence. Most significantly, the Department inspector never saw any such use. Nor was there any evidence provided as to when and where and how such buckets were being used by PAS. Rather, the Department's position rests solely on the thin and untenable reed that the PAS foreman said that he was providing buckets and the Department inspector's assumption that employees were using the buckets by dipping their hands into the buckets thus contaminating the water. But there is no evidence to

support the underlying statement and the assumption. Nevertheless, the Board erroneously concluded, despite the lack of evidence of how such buckets may have been used or were intended to be used or were being used or when or where, that there is substantial evidence to support the Department's case. PAS contends that the correct interpretation of ALL of the evidence is that it establishes that multiple means -- operable showers, either full body or hand held, and a foot operated pump facility -- were provided for use at all times and that clean tepid water was available for hand washing.

3. Alternatively, the Board Should Have Ruled that Violation 1-2 Is Not A Serious Violation.

The Board ruled that Violation 1-2 was a serious violation as cited by the Department. Record, 43-44 (Finding of Fact No. 6 and Conclusion of Law No. 3). A "serious" violation exists when there is a "substantial probability that death or serious physical harm could result from" the cited violation. RCW 49.17.180(6). "Substantial probability" refers to the likelihood that should harm result from the violation, that harm could be death or serious physical harm. Washington Cedar & Supply Co., Inc. v. Department of Labor & Industries, 119 Wn.App. 906, 914, 23 P.2d 1012 (2003). To prove that a serious violation exists, the Department must prove each of the following elements by a preponderance of evidence: (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. *Id.* (Emphasis added) .

While PAS maintains that adequate hand washing facilities were provided, if the court concludes otherwise, PAS contends the Board should have found the violation to be not serious because the Department did not meet its burden of proof on the 5th element and because the Board failed to consider and address arguments and authority presented by PAS that, if considered, would have resulted in a non-serious violation.

a. The Department failed to prove that the result of using buckets to wash hands could include serious physical harm.

The Department's case for finding a serious violation is based on inspector Bannick's opinion testimony that the buckets he claims to have seen on site did not comply with the regulation because they did not supply "clean, tepic wash water" as required. The case is further premised on Bannick's conclusory opinion that once an employee used the water and the bucket was not emptied, the water would be contaminated and any

further use “could” result in serious physical harm given the nature of lead.

PAS does not contest Bannick’s conclusion in the abstract but asserts that Bannick’s testimony is premised on incomplete and inconclusive evidence that does not amount to the proof required. As stated in the facts section E.2 above and as argued in section F.1 above, the Department presented no physical evidence to support Bannick’s testimony, 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; no consideration was given to the testimony that the buckets contained soap; 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, finally, the testimony of the PAS employees is limited, incomplete, inconclusive, confusing and contradictory. In total, the evidence presented does not provide the foundation for Bannick’s opinion

testimony on this crucial element of the Department's case. And the Board was wrong to enter its Conclusion of Law No. 3 based on that lack of evidence.

b. There is no significant difference between the protection provided by PAS and that which would be afforded by technical compliance with the hand washing regulation.

PAS contends the Board should have found the violation to be not serious based on the following arguments and authority that were not addressed at all by the Board.

In Phoenix Roofing, Inc. v Dole, 874 F2d 1027 (5th Cir. 1989)¹¹ the Court held that an alleged serious violation of an OSHA regulation may be considered to be de minimis where there is no significant difference between the protection provided by the employer and that which would be afforded by technical compliance with the standard

¹¹ In Phoenix, OSHA cited a roofing contractor for failing to meet fall-protection requirements. The OSHA regulation required that when working on roofs more than 50 feet in width, the employer must use either a motion-stopping device (such as safety nets or guardrails at the edge of the roof) or a warning line that the employee would bump into when within 6 feet of the roof edge. The employer admitted that it was working on a roof more than 50 feet in width and did not employ either type of safety measure. Instead, it used a monitor system whereby two experienced employees had a duty to warn employees when they approached the edge. *Id.* at 1029-30. The Court of Appeals held that the use of monitors did not comply with the regulation but that the violation of the regulation was not serious, finding that it was only de minimis for the reason that "the measures taken provided protection equal to or greater than those required by regulation." *Id.* at 1031. (Emphasis added.)

established by the regulation. The same rationale should be employed here with even greater reason. The hazard in Phoenix Roofing, a fall from a roof, is more immediate and impactful than possibly being exposed to lead. In both cases alternative measures were taken to protect against the hazard. In our case, there is no significant difference between the protection provided by PAS in providing showers and that which would be afforded by technical compliance with the undefined “hand washing facilities” required by the WAC regulation. Instead of a serious violation, the violation should be considered at least general, if not de minimis. See RCW 49.17.180(3) (setting the maximum penalty for a violation “specifically determined not to be of a serious nature”); RCW 49.17.120(2)(defining de minimis violations as those “which have no direct or immediate relationship to safety or health”).

The Department has argued that Phoenix Roofing is not applicable because it was considered and rejected in Mowat Const. Co. v. Department of Labor and Industries, 148 Wn. App. 920, 931-932, 201 P.3d 407 (2009). But the facts in Mowat are distinguishable. There the employer argued that Phoenix Roofing should apply to overturn a citation for a serious violation of a WISHA regulation that required the employer to “reduce employee noise exposure, using feasible controls, wherever

exposure equals or exceeds 90 DBA TWA8.” Id. at 923. Mowat argued that the violation was not serious because the protection provided by the earplugs was, in the words of Phoenix Roofing “equal to or greater than that imposed by regulation.” Id. at 931. The Court rejected that argument:

Unlike in Phoenix, Mowat's operation did create an additional hazard to worker safety which would not have existed absent the violation. And the regulation itself spells out that the use of earplugs is not to be considered the functional equivalent of noise control at the source.

Id. The facts in Mowat are not the same as here and PAS is not making the same argument as Mowat. The PAS argument has nothing to do with protective equipment. It has not created an additional hazard which would not have existed absent the violation. Just the opposite: by supplying showers which were not required, PAS enhanced the safety of its workers. Under Phoenix Roofing, this alleged serious violation should be ruled to be no more than a general violation.¹²

G. CONCLUSION

Finding of Fact No. 5 is not supported by substantial evidence. In fact, PAS presented substantial evidence to the contrary – that it did

¹² See also the Thomas case cited supra at footnote 10 where the OSHA Commission exercised its discretion not to decide whether the violation of the OSHA hand-washing facility regulation was serious and instead affirmed it as an unclassified violation with a fine of \$600.

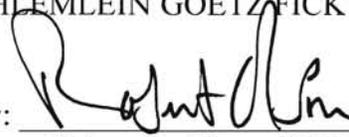
provide adequate hand washing facilities. The Board failed to interpret the underlying regulation properly in accordance with applicable law. With proper interpretation and in light of the evidence presented at the hearing, there was no violation of the hand washing regulation. For those reasons, the court should reverse Finding of Fact No. 5 and substitute in its place a new finding that PAS employees were provided access to hand washing facilities which met the requirements of WAC 296-155-140; vacate Findings of Fact Nos. 6 and 7; and conclude in Conclusion of Law No. 3 that PAS did not commit any violation of WAC 296-155-17619(5)(a).

Alternatively, if the court affirms Finding of Fact No. 3, it should find that the violation was not serious based on the Department's failure to prove all elements required for a serious violation. The citation should be reduced to a general violation. The penalty can remain at \$400 in the court's discretion. Specifically, the court should reverse Finding of Fact No. 6 and substitute a finding that the violation was not serious; and it should enter a new corrected Conclusion of Law No. 3 that Violation 1-2 was not serious.

Respectfully submitted this 18th day of November, 2013.

SCHLEMLEIN GOETZFICK & SCRUGGS, P.L.L.C.

By:

A handwritten signature in black ink, appearing to read "Robert L. Olson", written over a horizontal line.

Robert L. Olson, WSBA#5496
Attorneys for Appellant
Performance Abatement Services, Inc.

APPENDIX

Washington Regulations

WAC 296-155-17619

WAC 296-155-140

WAC 296-155-17619

Hygiene facilities and practices.

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

(2) Change areas.

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

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

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

(3) Showers.

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

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

(4) Eating facilities.

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

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

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

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

(5) Hand washing facilities.

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

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

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

WAC 296-155-140**Sanitation.**

(1) Potable water.

(a) An adequate supply of potable water shall be provided in all places of employment.

(b) Portable containers used to dispense drinking water shall be capable of being tightly closed and equipped with a tap. Water shall not be dipped from containers.

(c) Any container used to distribute drinking water shall be clearly marked as to the nature of its contents and not used for any other purpose.

(d) The common drinking cup is prohibited.

(e) Where single service cups (to be used but once) are supplied, both a sanitary container for the unused cups and a receptacle for disposing of the used cups shall be provided.

(f) All water containers used to furnish drinking water shall be thoroughly cleaned at least once each week or more often as conditions require.

(g) The requirements of this subsection do not apply to mobile crews or to normally unattended work locations as long as employees working at these locations have transportation immediately available, within the normal course of their duties, to nearby facilities otherwise meeting the requirements of this section.

(h) The following definitions apply:

(i) Mobile crew: A work crew that routinely moves to a different work location periodically. Normally a mobile crew is not at the same location all day.

(ii) Normally unattended work location: An unattended site that is visited occasionally by one or more employees.

(iii) Nearby facility: A sanitary facility that is within three minutes travel by the transportation provided.

(iv) "Potable water" means water that is suitable for drinking by the public and meets the requirements of chapter 246-290 or 246-291 WAC.

(2) Wash water.

(a) Clean, tepid wash water, between 70 and 100 degrees Fahrenheit, shall be provided at all construction sites.

(b) Individual hand towels shall be provided. Both a sanitary container for the unused towels and a receptacle for disposal of used towels shall be provided.

(c) Hand soap, industrial hand cleaner or similar cleansing agents shall be provided. Cleansing agents shall be adequate to remove any paints, coatings, herbicides, insecticides or other contaminants.

(d) The requirements of this subsection do not apply to mobile crews or to normally unattended work locations as long as employees working at these locations have transportation immediately available, within the normal course of their duties, to nearby facilities otherwise meeting the requirements of this section.

(e) Gasoline or solvents shall not be used for personal cleaning.

(f) Wash water areas will be maintained in a dry condition. Slipping or other hazards shall be eliminated from the wash water area before it is acceptable for use.

(3) Nonpotable water.

(a) Outlets for nonpotable water, such as water for industrial or firefighting purposes only, shall be identified by signs meeting the requirements of Part E of this chapter, to indicate clearly that the water is unsafe and is not to be used for drinking, washing or cooking purposes.

(b) There shall be no cross-connection, open or potential, between a system furnishing potable water, a system furnishing nonpotable water or a system furnishing wash water.

(4) Toilets.

(a) The provisions of this section apply to both portable chemical toilets and to flush toilets, except where flush toilets are used the requirements of WAC 296-800-230 shall apply instead of (b) of this subsection.

(b) Accessible toilets shall be provided for employees according to the following table:

TABLE B-1

<u>Number of Employees</u>	<u>Toilets Required</u>
1 - 10	1
11 - 25	2
26 - 40	3
41 - 60	4
61 - 80	5
Over 80	one additional toilet for each additional twenty employees or any fraction thereof.

(c) When the employer provides both flush and portable chemical toilets, the number of employees allowed to be served by the flush toilets, per WAC 296-800-230 will be calculated. That number will be subtracted from the total number of employees and the employer will be required to provide an adequate number of portable chemical toilets for the number of remaining employees, as required by (b) of this subsection.

(d) Toilets shall be maintained in clean, sanitary and functional condition. Internal latches shall be provided to secure the units from inadvertent entry. Where there are twenty or more employees consisting of both sexes, facilities shall be provided for each sex.

(i) Each unit shall be properly cleaned on a routine basis.

(ii) Chemicals, toilet tissue and sanitary seat covers shall be maintained in a supply sufficient for use during the entire shift.

(iii) Any defective or inadequate unit shall be immediately removed from service.

(e) Specifications. The following specifications apply:

(i) A noncaustic chemical toilet (portable chemical toilet is) a self-contained unit equipped with a waste receiving chemical holding container.

(ii) Portable chemical toilets consisting of only a holding tank, commonly referred to as "elevator units" or "elevator toilets" are not acceptable. "Elevator units" may be used if they are individually located in a lockable room which affords privacy. When this type unit is used in a private individual lockable room the entire room will be considered a toilet facility, as such the room will meet all requirements of toilet facilities and be inspected in accordance with subsection (5)(b)(iii) of this section.

(iii) Rooms, buildings or shelters housing toilets shall be of sound construction, easy to clean, provide shelter and provide privacy. The toilet rooms shall be ventilated to the outside and adequately lighted. All openings into the toilet room shall be covered with 16-mesh screen.

(iv) Toilets shall be serviced on a regular schedule. Servicing shall include the use of a disinfectant for cleaning urinals and seats, removing waste from containers, recharging containers with an odor controlling chemical and installing an adequate supply of toilet tissue and seat covers.

(v) Service shall be performed in accordance with local codes by approved servicing organizations. Waste shall be disposed of or discharged in accordance with requirements of local health department regulations.

(vi) Waste containers shall be fabricated from impervious materials, e.g. plastic, steel, fiberglass or their equivalent. Containers shall be water tight and capable of containing the chemical waste in a sanitary manner. The container shall be fitted to the building in a manner so as to prevent insects from entering from the exterior of the building. Containers shall be adequate in size to be used by the number of persons, according to the schedule for minimum requirements, without filling the container to more than half of its volume before regularly scheduled servicing.

(vii) Removal of waste shall be handled in a clean and sanitary manner by means of a vacuum hose and received by a leak-proof tank truck. All valves on the tank shall be leak-proof.

(viii) Provisions shall be made so service trucks have a clear approach and convenient access to the toilets to be serviced.

(ix) Disposal of waste from tank trucks shall be in accordance with local health department requirements. In the absence of provisions by local health departments, waste must be disposed of

through municipal or district sanitary sewage systems. Municipal or area sanitary sewage districts shall provide sewage disposal locations and facilities which are adequate and convenient for duly authorized toilet service organizations.

(f) The requirements of this subsection do not apply to mobile crews or to normally unattended work locations as long as employees working at these locations have transportation immediately available, within the normal course of their duties, to nearby facilities otherwise meeting the requirements of this section.

(5)(a) On multiemployer worksites, the prime contractor shall ensure that the requirements of this section are met. Each employer is responsible for seeing that facilities for their own employees are provided.

(b) Each employer shall ensure, at the beginning of each shift, that the sanitation facilities required by this section are inspected. If any facility or unit fails to meet the following requirements, immediate corrective action shall be taken. Such action shall be documented and maintained at the site for at least 72 hours. Inspection shall establish:

(i) Potable water: Sufficient supply of water, sufficient supply of cups, container integrity, cleanliness of unit and area, capacity of trash receptacle (empty).

(ii) Wash water: Sufficient supply of clean water, proper temperature, sufficient supply of towels, sufficient supply of cleansing agents, container integrity, cleanliness of unit and area without the presence of physical hazards, capacity of trash receptacle (empty).

(iii) Toilets: Sufficient supply of toilet tissue and sanitary seat covers, capacity and condition of chemical agent, capacity and condition of holding tank, cleanliness of unit and area without the presence of physical hazards, physical and structural condition of unit, condition of lock, condition of toilet seat and tissue holder, absence of all foreign debris.

(c) The location of the facilities required by subsections (1), (2) and (4) of this section shall be as close as practical to the highest concentration of employees.

(i) On multistory structures they shall be furnished on every third floor.

(ii) At all sites they shall be located within 200 feet horizontally of all employees.

(iii) The requirements of subsection (5)(c)(i) and (ii) do not apply to mobile crews or to normally unattended work locations as long as employees working at these locations have transportation immediately available, within the normal course of their duties, to nearby facilities otherwise meeting the requirements of this section.

(6) Food handling. All employees' food service facilities and operations shall meet the applicable laws, ordinances and regulations of the jurisdictions in which they are located.

(7) Temporary sleeping quarters. When temporary sleeping quarters are provided, they shall be heated, ventilated and lighted.

[Statutory Authority: RCW 49.17.010, 49.17.040, 49.17.050, 49.17.060 and chapter 49.17 RCW. WSR 12-24-071, § 296-155-140, filed 12/4/12, effective 1/4/13. Statutory Authority: RCW 49.17.010, [49.17].040, and [49.17].050. WSR 01-11-038, § 296-155-140, filed 5/9/01, effective 9/1/01. Statutory Authority: Chapter 49.17 RCW. WSR 94-15-096 (Order 94-07), § 296-155-140, filed 7/20/94, effective 9/20/94; WSR 89-11-035 (Order 89-03), § 296-155-140, filed 5/15/89, effective 6/30/89. Statutory Authority: RCW 49.17.040 and 49.17.050. WSR 86-03-074 (Order 86-14), § 296-155-140, filed 1/21/86; Order 74-26, § 296-155-140, filed 5/7/74, effective 6/6/74.]

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 foregoing Brief of Appellant upon the attorney for the Respondent in the manner indicated:

Anastasia Sandstrom
Attorney General's Office
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

- Via Fax: 206-812-1418
- Via Messenger for delivery on November 19, 2012.
- 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 18th day of November,
2013


Laurel Barton