No. _____

SUPREME COURT OF THE STATE OF WASHINGTON

DULING ENTERPRISES, LLC DBA STUFFY'S II RESTAURANT,

APPELLANT,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

RESPONDENT.

PETITION FOR DISCRETIONARY REVIEW

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I. Identity of Petitioner.

Petitioner Duling Enterprises LLC d/b/a Stuffy's II Restaurant is a Washington limited liability corporation. Petitioner was the Plaintiff and Appellant below.

II. Citation To Court Of Appeals Decision.

Division Two of the court of Appeals issued an opinion on August 12, 2025, ("the Opinion"), attached as Exhibit A, affirming the trial court's decision, attached as Exhibit B.

III. Issues Presented For Review.

1. Whether the Court of Appeals erred in its implied holding that the Department of Labor & Industries did not waive any argument concerning the excessive fines clauses by failing to raise them at the trial court.

2. Whether the fine levied against Duling Enterprises LLC is excessive under the state and federal constitutions.

IV. Statement of the Case.

Duling Enterprises LLC does business in Longview, Washington as Stuffy's II Restaurant ("Petitioner" or "Stuffy's"). In 2020, the Governor demanded that Stuffy's only seat customers in an *ad hoc* tent erected in its parking lot, instead of inside its leased space. This mandate was issued pursuant to the gubernatorial emergency powers statute, RCW 43.06.220.

After almost a year of shutdowns with no end in sight, and faced with certain bankruptcy and the layoff of dozens of its longtime employees, Stuffy's reopened its doors in December 2020, seven weeks before state health officials declared that the shutdown was doing more harm than good. In those intervening fifty-odd days, however, the Department of Labor & Industries ("DLI") fined Stuffy's almost ***$1,000,000*** for the supposed harm it had caused by allowing indoor dining seven weeks before it was authorized to close its tent. CP 196-97.

Stuffy's appealed the fines to an industrial appeals judge and then to the Board of Industrial Insurance Appeals ("BIIA"), challenging the underlying facts with respect to the willfulness, gravity, and L&I's constitutional and/or statutory authority of to make and enforce rules promulgated via the gubernatorial emergency-powers statute. Crucial to this appeal, Stuffy's at the time alerted BIIA that L&I *and* the BIIA itself were required to comply with the limitations on fines imposed by the Washington and U.S. Constitutions' Excessive Fines Clauses.

In briefing before the BIIA, L&I insisted that the question of whether or not its behavior exceeded constitutional bounds could only be determined in a court of law. BIIA agreed, declining to rule on whether or not the massive fine passed state- and

federal-constitutional muster. Stuffy's timely appealed to the Superior Court. CP 2.

Petitioner raised the same set of issues, including whether the fine exceeded constitutional limits, to Cowlitz County Superior Court. CP 1401-1404. L&I, meanwhile, ***ignored the issue entirely***.

This alone should have sufficed for Cowlitz County Superior Court to rule in Stuffy's favor. Stuffy's raised this point to the Superior Court at oral argument. *See* Verbatim Report at 9-19. But despite L&I's prior refusal to brief a single *word* on excessive fines, the Superior Court allowed it to address it in open court, over Stuffy's objection. *Id.* at 41-51 (L&I's oral argument on excessive fine and Stuffy's response that L&I never addressed the issue in briefings).

Nevertheless, the Superior Court ruled against Stuffy's on all counts, *including* the excessive fines argument that L&I had ignored until oral argument. In so doing, the Superior Court committed two glaring errors. ***First***, arguments not briefed are waived, and the attention to this argument by both the Superior Court and Division II deprived Stuffy's of its fundamental due process rights to present fact evidence to rebut fact based arguments that L&I raised for the first time on appeal. ***Second***,

the fine was provably excessive even if L&I had *not* waived it by default. Division II repeated both errors on appeal.

V. ARGUMENT.

A. The Court of Appeals Ignored That a Party Waives an Issue Raised By Its Opponent That It Ignores.

"When an issue is not argued, briefed, or supported by citation to the record or authority, it is generally waived." *Keever & Assocs., Inc. v. Randall*, 129 Wash. App. 733, 741, 119 P.3d 926, 929 (2005). The Department did not respond at all in its trial brief to the excessive fines issue. The trial court erred in allowing it to raise unbriefed, novel arguments for the first time at oral argument. It further erred in ruling in favor of L&I on the waived issue. The Court of Appeals repeated this error.

This is not an issue of mere oversight. The decision of the Court of Appeals rests on a supposed failure of factual proof by Petitioner as to its ability to pay the fine, as well as an offhand comment—untethered to any legal argument—concerning Paycheck Protection Program funds received by Stuffy's. In allowing L&I to present those arguments, then ***relying*** on them in support of its ruling, Division II denied Stuffy's its right to fundamental due process. Before the case got to Division II, L&I never once contended that Stuffy's needed to present different fact evidence in support of its inability to pay the fine. Other than

asking decision makers to ignore the constitutional argument, L&I's only "argument" was the legally baseless claim that Stuffy's tax returns were perjured because the PPP funds were not reported on those returns as income. As Stuffy's repeatedly pointed out to the deaf ears of L&I, PPP funds were ***expressly excluded*** from income by federal law, and forbidden to appear on tax returns. L&I nonetheless repeated the baseless slander to every court, but never once contended that Stuffy's needed to present different, other, or additional evidence of its inability to pay the fine. All L&I ever argued was the false statement that Stuffy's tax returns mis-stated its annual losses.

In short, L&I waived any legal argument as to the unconstitutionality of the fine, and ***also*** waived any argument that Stuffy's had failed to present suitable proof as to its inability to pay the fine. It waived that argument at the stage of proceedings when Stuffy's could have augmented the record with additional evidence, such as the fact that the LLC had no assets beyond the movable fixtures in the restaurant (tables, chairs, wall art). By allowing L&I to present a waived argument, and then relying on that argument for a supposed failure of proof by Stuffy's, Division II denied Stuffy's the fundamental due process of the ability to present any necessary proof at the stage of proceedings when evidence can be presented.

B. The Court of Appeals Is Incorrect: The Fine Imposed By L&I *Is* Excessive Under The Eighth Amendment.

Assuming, *arguendo*, that L&I had not waived the issue—it has—the nearly ***$1,000,000*** that L&I demands Stuffy's pay is a fine subject to the Eight Amendment, ***and*** is excessive under binding U.S. and Washington Supreme Court precedent thereon. "It is self-evident that to trigger the Eighth Amendment's excessive fines clause, a sanction must be a 'fine' and it must be 'excessive.'" *City of Seattle v. Long*, 198 Wash. 2d 136, 162 (2021). "Because the clause limits the government's power to extract payments as punishment for some offense, qualifying fines must be at least partially punitive." *Id.*, 198 Wash. 2d at 162-63 ((internal citations omitted). And the Court of Appeals concurs on this point. Op. at 4.

Crucial at this stage, the fine is *excessive* under both state and federal constitutional law. It is grossly disproportional to the offense; unrelated to any harm; and is "so oppressive as to deprive [Stuffy's] of their livelihood." *Long*, 198 Wash. 2d at 171. "The Excessive Fines Clause thus limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense." *United States v. Bajakajian*, 524 U.S. 321, 328 (1998) (internal citation omitted).

1. The Fine Is Grossly Disproportional.

In evaluating whether a fine is grossly disproportional, courts consider four factors:

> "'(1) the nature and extent of the [violation], (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, and (4) the extent of the harm caused.'"

Long, 198 Wn.2d at 167 (quoting *State v. Grocery Mfrs. Ass'n*, 195 Wn.2d 442, 476, 461 P.3d 334 (2020)).

(a) The Fine is Grossly Disproportional Given the Zero Gravity of the Offense.

Division II incorrectly asserted that Stuffy's only addressed two of the four factors courts apply to evaluate excessive fines. Stuffy's did not *only* address factors (3) and (4). In its Opening Brief before Division II, Stuffy's plainly stated that courts "must balance the fine to the gravity of the offense"—(factor 1)—*and* that "the fine must be proportional to the offense (factor 3) and to the actual harm caused by the violation (factor 4). Op. Br. at 8 (citing *Bajakajian*, 524 U.S. at 334; *Long*, 198 Wash. 2d at 110). It addressed the question of the gravity of the offense in its discussion of the lack of harm and the relationship to the misdemeanor of violating the very gubernatorial proclamation that the citations purported to enforce. Stuffy's did

not address factor 2—other illegal activities—because L&I has never contended that any other illegal activity occurred.

(b) The Fine is Grossly Disproportional in View of the Proper Penalty.

Both *Bajakajian* and *Long* require the Court to look to the statutory source of the fine. In *Bajakajian*, that was $5,000; in *Long*, $44. *Bajakajian*, 524 U.S. at 338; *Long*, 198 Wash. 2d at 173. Here, the maximum fine for a gross misdemeanor is $5,000. *See* RCW 9.92.020. Assuming, *arguendo*, that each day Stuffy's opened was its own violation, even then the proper penalty would be $5,000 times 52 days—*i.e.*, $260,000. Steep, to be sure. But paltry compared to the almost $1,000,000 imposed.

This disjunction flies in the face of U.S. Supreme Court caselaw which considers fines exceeding trebling to be a "gross disproportion." *See, e.g.*, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996). Here, as in *Long*, the nearly $1,000,000 fine imposed must be compared to the per-violation maximum of $5,000 available under the *actual* statute L&I used (however dubiously) to impose fines in the first place—*i.e.*, before this litigation commenced.

In *Long*, the Court ruled the $550 total excessive compared to the *initial* $44 fine. The Court did *not* compare the $550 fine

against the actual roughly *90* violations of $44—*i.e.*, $3,960—that Seattle could have imposed (for each day the vehicle remained parked illegally). Here, L&I asserted it was enforcing a gubernatorial emergency declaration issued pursuant to RCW 43.06.220, a source of claimed authority for imposing WAC 296-800-14035. But RCW 43.06.220(5) designates violations of a governor's emergency orders a gross misdemeanor, which has a maximum fine of $5,000. The authority for the order that Stuffy's purportedly violated was a statute with a maximum fine of $5,000.

The Court of Appeals ignored this with a single note: "But courts analyzing [the gross disproportionality] factor look at the range of permissible punishments provided by the statute being enforced." Op. at 6. But according to the citations themselves, which rely on "Governor Inslee's Safe Start-Stay Healthy proclamation 20-25 and its amendments," the statute being enforced was RCW 43.06.220(5). The "range of permissible punishments" under *that* statute (and regulations thereon) is $5,000 per violation.

(c) The Fine Is Grossly Disproportional Compare to Extent of the Imaginary "Harm" Caused

Here, L&I can point to no harm at all flowing from the violations. No employee suffered any harm identified by L&I, nor did any patron. Indeed, the citations themselves reveal the complete lack of harm, because all they purport to identify is a supposed ***risk*** of harm to employees flowing from disregard of the Governor's Proclamation. Indeed, L&I cannot even point to a supposed ***increased risk*** of harm, because it had no supported, admissible, scientific evidence that workers or patrons faced a greater risk of contracting COVID from dining inside a building as opposed to in a tent in the parking lot. But in any event, neither *Bajakajian* nor *Long* support the notion that a fine can be levied in some proportion to the risk that a harm ***might*** occur even though it does not. The proper proportion of the fine to an act which caused zero harm is zero. Anything more is grossly disproportionate.

Division II instead adopted L&I's legally unsupported bootstrapping argument. But by the Court's logic, any fine of any amount by any government becomes proportional, because the "harm" was to "frustrate the purpose of WISHA." Op. at 7. But so too did Mr. Bajakajian "frustrate the purpose of" the federal

currency reporting statutes, and so too did Mr. Long "frustrate the purpose" of parking restrictions in Seattle. No case supports Division II's holding that a government-imposed fine is proportional to the amount the government decides the harm caused, by naming the harm as "frustrating the purpose" of the statute the government enforces by levying the fine. If that were the law, what fine would ever fall afoul of the relationship to harm factor? The Corut of Appeals erred in adopting this circular reasoning, and this Court should accept review to reverse.

2. The Fine Is Excessive Given Petitioner's Inability to Pay

The final factor in considering whether a fine is excessive is the ability to pay. In *Long*, the defendant had income of $400-$700 a month, and faced a payment plan of $50 for 11 months, or 1/8 to 1/14 of gross income. *Long*, 198 Wash. 2d at 175. The Supreme Court found that excessive. Here, the fine is undoubtedly excessive, and far more than Stuffy's ability to pay.

Based on the nature of the proof accepted in *Long*, Stuffy's demonstrated through its 2020-2022 tax returns, that the entity ***lost*** over $45,000 in the past three years, and made under $10,000 in the years it had positive income. In its positive years, income was about the $400—700 a month that the Supreme Court concluded was so low as to render a $550 fine excessive.

But in total, Stuffy's did not even have no income, it had ***negative*** income. It is impossible for Stuffy's to pay nearly $1,000,000 in fines out of ***negative*** $45,000 of income. In fact, the fine is so large as to undoubtedly deprive Stuffy's (and its two members) of its/ their livelihood (not to mention the livelihoods of its 36 employees). This is forbidden by this Court's *Long* decision. "The central tenant of the excessive fines clause is to protect individuals against fines so oppressive as to deprive them of their livelihood." *Long*, 198 Wash. 2d at 171. As detailed in the Duling Declaration, even paying a miniscule fraction of the fine would also deprive Stuffy's 36 employees of their livelihoods. The fine is excessive, and falls on that basis.

Again, as noted above, until the Court of Appeals, L&I never claimed that Stuffy's needed to present proof beyond what this Court accepted in *Long*. Stuffy's could have readily shown, as well, that it has essentially zero assets. But Stuffy's was never asked to present any other proof. L&I only made the false claim that the tax returns were false because Stuffy's complied with federal law in not claiming PPP funds as income. (Of course, those funds were not income, and passed through directly to employees, as the name of the program states.) Here, Division II not only comments favorably on L&I's slander, but accepted L&I's waived claim that Stuffy's should have presented other

proof, a claim L&I conveniently only raised long after the evidentiary proceedings were closed.

VI. CONCLUSION.

The proposed fine is excessive under both the state and federal constitutions, a question L&I waived by failing to brief it to the Superior Court. By accepting novel arguments, and specifically arguments concerning purportedly omitted fact proof by Stuffy's, the Court of Appeals denied Stuffy's a fundamental due process right. This Court should accept review, reverse, and dismiss the fine both due to L&I's waiver ***and*** because Stuffy's is correct on the legal merits.

I hereby certify that the foregoing brief contains 2,644 words, exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images, as calculated using Microsoft Word, the word processing software used to prepare this brief.

Submitted this September 10, 2025.

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Ex. A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DULING ENTERPRISES, LLC, DBA STUFFY'S II RESTAURANT, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	No. 59382-3-II PUBLISHED OPINION

GLASGOW, J.—Duling Enterprises appeals the superior court's order affirming the Department of Labor and Industries' imposition of fines totaling $936,000. Duling Enterprises contends that the fines violate the excessive fines clauses of the state and federal constitutions.

We disagree and affirm.

FACTS

In response to the COVID-19 pandemic, the Governor issued several emergency proclamations prohibiting restaurants from offering dine-in services. *See, e.g.*, Proclamation of Governor Jay Inslee, No. 20-25.9 (Wash. Dec. 10, 2020), https://governor.wa.gov/sites/default/files/proclamations/proc_20-25.9.pdf. The proclamations noted that there had been a substantial rise in COVID-19 cases and hospitalizations and that "a significant risk factor for spreading the virus is prolonged, close contact with an infected person

indoors." *Id.* The Department of Labor and Industries (L&I) issued a rule requiring employers to comply with conditions of operation required by the Governor's emergency proclamation. Wash. St. Reg. 20-23-076 (WAC 296-800-14035 emergency rule, effective Nov. 16, 2020).

Duling Enterprises (Duling) owns Stuffy's II, a full-service restaurant. Stuffy's provided indoor dining services during the COVID-19 pandemic in violation of the Governor's emergency proclamation. Following inspections by L&I, L&I issued 6 separate citations to Stuffy's for 52 violations of WAC 296-800-14035(2), which required employers to comply with the Governor's emergency proclamation. L&I classified each of the 52 days Stuffy's was open as a separate willful serious violation and imposed a civil penalty of $18,000 for each violation.

L&I assessed the penalty for each violation in accordance with WAC 296-900-140. WAC 296-900-14010 provides the base penalties for a violation of Washington Industrial Safety and Health Act of 1973 (WISHA), ch. 49.17 RCW, by calculating the gravity of the offense. Gravity is calculated by multiplying the violation's severity by its probability. WAC 296-900-14010. L&I assessed the severity of the hazard presented by offering dine-in services to be a 3 on a scale from 1 to 3 and the probability of harm to be a one on a scale of 1 to 3. This resulted in a base penalty of $3,000 for each violation. Because Duling had fewer than 251 employees at the time of the inspections, the base penalty was reduced to $1,800 per violation. The base penalty was then multiplied by 10 because the violations were willful, resulting in a $18,000 penalty for each violation.

Duling appealed the citations to the Board of Industrial Insurance Appeals (Board). Duling argued, in part, that the fines are excessive under the state and federal constitutions, given the minimal harm done and Duling's inability to pay. Glenda Duling, one of the two members of

Duling Enterprises, submitted an affidavit stating that Duling operated at a loss in 2020 and 2021. Glenda Duling attached Duling's 2020 and 2021 income tax return forms, which reflected that Duling operated at a loss in 2020. The chief financial officer of Duling testified in a deposition that Duling applied for and received relief under the Paycheck Protection Program.

The Board affirmed the citations, and concluded that the Board "does not have authority to address constitutional issues or rule on the constitutionality of statutes or administrative process." Clerk's Papers at 197. Duling appealed the Board's decision to the superior court, again arguing that the fines assessed were excessive. The superior court affirmed the Board's decision and concluded that the fines were not excessive. Duling appeals.

DISCUSSION

I. EXCESSIVE FINES

Duling argues that the total fine imposed by L&I violated the excessive fines clause because it was grossly disproportional to Duling's WISHA violations. Duling contends this is so because the total fine is outside of the statutory maximum for a gross misdemeanor, no actual harm resulted from its violations, and it is unable to pay the fine. We conclude that Duling has not established that the total fine levied against it is excessive.

A. Legal Principles

In WISHA appeals, we sit in the same position as the superior court in reviewing the Board's decision. *Dep't of Lab. & Indus. v. Tradesmen Int'l, LLC*, 198 Wn.2d 524, 534, 497 P.3d 353 (2021). We review the Board's decision on its own record. *Id.* We determine whether the Board's findings of fact are supported by substantial evidence and whether they support the Board's conclusions of law. *Id.*

Both the state and federal constitutions prohibit the government from imposing excessive fines. *City of Seattle v. Long*, 198 Wn.2d 136, 158, 493 P.3d 94 (2021). To trigger the protection of the excessive fines clause, "a sanction must be a 'fine' and it must be 'excessive.' " *Id.* at 162. A sanction is a "fine" when it is at least partially punitive. *Id.* A fine is excessive if it is "grossly disproportional to the gravity of a defendant's offense." *Id.* at 166. Our supreme court has adopted the Ninth Circuit's test to determine whether a fine is grossly disproportional. *Id.* at 167. The test considers, at least, " '(1) the nature and extent of the [violation], (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, and (4) the extent of the harm caused.' " *Id.* (internal quotation marks omitted) (quoting *State v. Grocery Mfrs. Ass'n*, 195 Wn.2d 442, 476, 461 P.3d 334 (2020)). We are also required to consider an individual's ability to pay the fine. *Id.* at 173. The party challenging a fine has the burden of demonstrating that the fine is excessive. *See id.* at 175 ("if the value of the fine is within the range prescribed by a legislative body, a strong presumption exists that a [fine] is constitutional."). We review whether a penalty violates the excessive fines clause de novo. *State v. Grocery Mfr.s Ass'n*, 198 Wn.2d 888, 899, 502 P.3d 806 (2022) (*GMA* II).

B. Application

Duling challenges only factors three and four of the test used to determine if a fine is grossly disproportional to the violation, and further contends that it lacks the ability to pay the fine.[1]

[1] The parties do not dispute that the penalties assessed against Duling were "fines."

i. Gross Disproportionality Factors

Duling contends that the total fine that L&I imposed is grossly disproportional to its violations because the third and fourth disproportionality factors weigh in favor of concluding the fine imposed was excessive. Specifically, Duling argues that the fine is grossly disproportional because the total fine amount exceeded the maximum fine available for a gross misdemeanor criminal offense and because no actual harm resulted from its violations. We disagree.

With respect to the third factor, we analyze the other penalties, especially the maximum penalties, the legislature has authorized for the offense. *See id.* at 904. The maximum penalty authorized by the legislature indicates a legislative judgment about the seriousness of the offense. *See U.S. v. Bajakajian*, 524 U.S. 321, 339 n.14, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998). We grant substantial deference to the legislature's judgment about the appropriate punishment for an offense. *Id.* at 336. We also afford deference to penalty guidelines, especially where those guidelines consider the specific culpability of the offender. *U.S. v. $100,348.00 in U.S. Currency*, 354 F.3d 1110, 1122 (9th Cir. 2004).

First, Duling argues that we must compare the total amount of fines imposed against it to the statutorily permissible fine for a single violation. Duling contends that *Long* supports this proposition because in that case, the court compared the sought-after fine of $550 to a single day's fine rather than the total fines that could have been imposed if the city had issued a ticket on each of the 90 days that Long violated the parking ordinance. But *Long* is factually distinct from this case. In *Long*, the court determined that impoundment of Long's vehicle and a $547 impoundment fee were excessive in light of the fact that the parking infraction itself only carried a $44 fine. In this case, Duling is challenging the constitutionality of fines directly incurred from 52 willful

violations of the WAC prohibiting employers from offering dine-in services. Here, it is appropriate to compare the fine imposed for each violation to the statutory maximum provided for individual violations.

Duling next argues that the fine is grossly disproportional because the fine imposed was greater than the $5,000 fine authorized for a gross misdemeanor. This argument appears to be based on RCW 43.06.220(5), which makes violations of the Governor's proclamation a gross misdemeanor. But courts analyzing this factor look at the range of permissible punishments provided by the statute being enforced. *See GMA* II, 198 Wn.2d at 903-04. Here, L&I relied on RCW 49.17.180 to enforce Duling's violations of WAC 296-800-14035, which authorizes a penalty of between $5,000-$70,000 *per willful violation.* RCW 49.17.180; WAC 296-800-14035. The $18,000-per-violation penalty is well within the authorized statutory range. Moreover, L&I expressly considered Duling's culpability in determining the appropriate fine within this range. L&I calculated the fee as outlined by WAC 296-900-140, 296-900-14010, and 296-900-14015; based on the severity of the hazard; the probability of an injury; and adjustments for the company's size, history of violations, and lack of good faith efforts to comply with safety regulations. Duling does not contend that L&I misapplied the regulations.

The fourth factor, the extent of the harm caused by the violation, also weighs against a finding of gross disproportionality. Duling argues that its violations did not result in any actual harm because there was no evidence that any Stuffy's employee actually contracted COVID-19 and was harmed by it. Essentially, Duling asks us to hold that a fine is grossly disproportional where a violation resulted only in the *risk* of harm, rather than *actual* harm. But the premise of Duling's argument is flawed because in this case there was actual harm.

Duling's analysis suggests that, in order to demonstrate harm, L&I must show that some individual inside Stuffy's on each day of operation actually had COVID-19. But no Washington case has required such a showing. In *GMA* II, for example, the government was not required to demonstrate that any voter actually tried to ascertain which organizations opposed GMO labeling efforts. Instead, it was enough that GMA's actions "struck at the heart of the principles embodied in the FCPA" which entitled voters to know who is contributing to political committees. *GMA* II, 198 Wn.2d at 904.

Here, Duling's repeated, willful violations frustrated the purpose of WISHA. WISHA was created to ensure "safe and healthful working conditions for every [person] working in the state of Washington." RCW 49.17.010. WISHA obligates employers to furnish a workplace free from hazards that are "likely to cause serious injury or death to his or her employees." RCW 49.17.060. Offering dine-in services on 52 separate occasions in the midst of a global pandemic and in willful violation of WAC 296-800-14035(2) caused actual harm because it significantly compromised WISHA's aim of ensuring safe and healthful working conditions by exposing employees to a substantial risk of contracting a potentially deadly disease. Moreover, L&I directly considered the fact that there was only a risk of contracting COVID-19 when it measured the probability of harm as a 1 out of 3. This factor weighs against a finding of gross disproportionality.

ii. Ability to Pay

Duling argues that the total fine imposed against it is excessive because Duling is unable to pay it. L&I contends that the inability to pay factor applies only to individuals, not corporations. As we explain below, we agree with Duling that corporations, like individuals, are entitled to have

inability to pay considered as a factor when a court determines whether a fine is excessive. However, Duling has not demonstrated that it is unable to pay the fine or that the fine is excessive.

First, we conclude that Duling's ability to pay the fine is a consideration under the excessive fines analysis. While no Washington court has applied this factor to a corporation, it is undisputed that our case law applies the protections of the excessive fines clause to corporate entities. *See GMA* II, 198 Wn.2d 888. And it is undisputed that Washington courts consider an individual's ability to pay when determining whether a fine is unconstitutionally excessive. *See Long*, 198 Wn.2d 173. Other jurisdictions that have similarly made these two conclusions also conclude that we must consider a corporation's ability to pay in determining whether the fine is excessive. *See Colorado Dep't of Lab. and Emp. v. Dami Hosp., LLC*, 442 P.3d 94 (Colo. 2019); *New York v. United Parcel Serv., Inc.*, 942 F.3d 554 (2nd Cir. 2019); *H&L Axelsson, Inc. v. Pritzker*, 16 F. Supp. 3d 353 (D. N.J. 2014); *People v. Ashford Univ., LLC*, 100 Cal. App. 5th 485, 319 Cal. Rptr. 3d 132 (2024). Those courts have reasoned that considering a corporation's ability to pay is consistent with the concept of proportionality because a fine that would "put a company out of business would be a substantially more onerous fine than one that did not." *Dami Hosp.*, 442 P.3d at 102.

That said, a fine is not necessarily excessive because a corporation is unable to pay it. *Id.* at 103. Such a harsh consequence may be warranted in light of the egregiousness of the violation and other proportionality factors. *Id.* We agree with these other jurisdictions that we must consider the corporation's ability to pay the fine, but that a corporation's inability to pay the fine does not automatically render the fine excessive.

As the party challenging the constitutionality of a fine, Duling had the burden of demonstrating that it is unable to pay. *See Long*, 198 Wn.2d at 174-75; *see also Ashford Univ., LLC*, 100 Cal. App. 5th at 535 (stating party opposing fine has burden to demonstrate trial court incorrectly found penalty did not exceed party's ability to pay). Here, even though such a showing would not be dispositive for a corporation, Duling has still not demonstrated that it is unable to pay the fines assessed against it. Duling submitted tax returns indicating that it operated at a loss in 2020. But this information alone is insufficient for us to conclude that Duling was unable to pay the fines. The record also indicates that Duling received a loan under the Paycheck Protection Program, and there is nothing in the record about what savings or assets Duling had. Duling had ample opportunities to provide additional documentation and deposition testimony to support its contention that it was unable to pay the fine and it did not do so. Accordingly, this factor does not weigh in favor of a finding of gross disproportionality.

CONCLUSION

We conclude that Duling has failed to demonstrate that the fine levied against it is excessive and, accordingly, we affirm.

GLASGOW, J.

We concur:

CRUSER, C.J.

PRICE, J.

Ex. B

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SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

DULING ENTERPRISES, LLC, DBA STUFFY'S II RESTAURANT **Plaintiff,** **vs.** **DEPARTMENT OF LABOR & INDUSTRIES,** **Defendant.**	**No. 22-2-00717-08** **COMMISSIONER'S ORDER**

This matter comes before the Court on Duling Enterprises, LLC DBA Stuffy's II Restaurant's ("Stuffy's) appeal from a July 20, 2022, decision of the Board of Industrial Insurance Appeals ("Board"). The Department of Labor & Industries ("Department") appears here via the Attorney General's office.

In response to the COVID-19 pandemic spanning several years since 2020, Governor Inslee issued a series of Emergency Proclamations. At issue in this case are Proclamations 20-25.9, 20-25.10, 20-25.11, and 20-25.12. These proclamations prohibited restaurants from offering indoor dine-in services effective November 18, 2020. The Department enacted WAC 296-800-14035 as the means of enforcing these proclamations. It is important to note from the outset that Stuffy's does not dispute that it was open for business in violation of the proclamations. Rather, it challenges the basis and constitutionality of the fines.

The parties submitted the case to the Board on cross-motions for Summary Judgment. The Board upheld the basis and amount of the citations. Stuffy's appeals the Board's decision, and asks this Court to dismiss the fines or to "drastically reduce them." *Duling Enterprises LLC Trial Brief,* page 1, lines 10-11.

In WISHA appeals, this Court reviews the Board's decision based on the record before the Board. *Frank Coluccio Constr. Co. v. Dept. of Labor & Indus.* 181 Wn.App. 25, 35, 329 P.3d 91 (2014). Issues of law are reviewed de novo. *Pro-Active Home Builders, Inc. v. Dept. of Labor & Indus.,* 7 Wn.App. 2d 10, 16, 465 P.3d 375 (2018). The Board's findings of fact are presumed conclusive if they are supported by substantial evidence. *Erection Co. v. Dept. of Labor & Indus.*, 160 Wash.App. 194, 202, 248 P.3d 1085 (2011). Courts construe WISHA statutes and regulations liberally to achieve the purpose of providing safe working conditions for workers in Washington. *Bayley Constr. V. Dept. of Labor & Indus.*, 10 Wn.App. 2d 768, 781-82, 450 P.3d 647 (2019).

1. <u>Authority to Enforce RCW 43.06.220</u>

Stuffy's argues that the Department and the Attorney General have no authority to levy the citations at issue here because any such violations would be classified as gross misdemeanors and jurisdiction would vest in the local courts. Stuffy's also argues that it has the right to a trial by jury on this issue.

The Court summarily rejects this argument. This is not a criminal proceeding. Certainly, the Department can choose to criminally prosecute matters that it also has jurisdiction to handle in a civil realm; for instance, the Department retains jurisdiction to issue "willful misrepresentation" orders under workers' compensation laws, but may also refer charges to the local prosecutor for fraud related to the same set of facts. That has not occurred here. The matter was properly litigated through the administrative process and now on appeal to Superior Court.

2. <u>Eighth Amendment and excessive fines.</u>

At the Board level, Stuffy's did not dispute the method of calculation of the fines, but argues here that the fines are excessive and violative of the 8th Amendment. To support its primary argument it cites *to City of Seattle v. Long,* 198 Wash.2d 136, 162 (2021) and *United State v. Bajakajian*, 524 U.S. 321, 328 (1998). Both of these cases are easily distinguishable from the activity and potential harm here. The cases cited by Stuffy's dealt with a parking penalty and civil forfeiture after an airline passenger failed to report foreign-based money coming in to the United States, respectively. This case involves, as discussed at length below, a demonstrable risk that death or serious bodily injury could occur. See, Court's discussion below.

Stuffy's argues that the fine is grossly disproportional to the offense and unrelated to any harm. The Court rejects this argument based on the medical and scientific evidence presented in this case by the Department. The Court also notes that the stated purpose of WISHA is to assure, insofar as reasonably possible, safe and healthful working conditions for every man and woman working in the state of Washington...RCW 49.17.010.

Specifically, the declaration of Ms. Anne Soiza, Assistant Director for the Division of Occupational Safety and Health of the Department declared that "workers have a higher probability of during from COVID 19 than from any of the other hazards that L&I regulates." Dr. Scott Lindquist, M.D., MPH, is the Deputy Health Officer and State Epidemiologist for Communicable Diseases with Office of Health and Science for Washington Department of Health. He declared that COVID-19 presents one of the greatest health crises to ever face Washington.and that the most common outbreak scenario reported was in restaurants and food service settings. I believe the preponderance of evidence supports the Department's actions and is relational to the potential harm.

3. Constitutionality of WAC 296-800-14035

The Washington Supreme Court has already affirmed the power of the governor to issue emergency proclamations that limited activities such as the activity engaged in

by Stuffy's. *Matter of Recall of Inslee*, 199 Wn.2d 416, 424, 508 P.3d 635 (2022). "[t]he Governor had the lawful authority under Revised Code of Washington 43.06.010(12) to issue Proclamation 20-05, as the pandemic is both a public disorder and a disaster affecting life and health in Washington. *Slidewaters LLV v. Dept. of Labor & Indus.*, 4 F.4th 747, 755 (9th Cir. 2021), cert. denied, ___U.S.___, 142, S. Ct. 779, 211 L.Ed.2d 487 (2022). The Court summarily rejects this argument based on the record presented and the case law preceding this Commissioner's Order.

4. Serious and Willful: Basis for the Multiplier.

Stuffy's argues that the Department must justify its multiplier primarily because it argues the Department cannot prove there was a substantial probability that death or serious physical harm could result from the violative conditions. *See, Respondent's Opposition Brief*, page 1, lines 23-26. The Board rejected this argument as does this Court. To prove a violation of WISHA, the Department need not prove that the violation will in fact result in death or serious physical harm. Rather, substantial probability refers to the likelihood that, should harm from the violation, that harm could be death or serious physical harm. There was a preponderance of evidence by way of declarations from the Department's witnesses to meet this threshold. As noted by the Board, the Declaration of Dr. Lindquist also established that the pandemic risk was present in Cowlitz County, where Stuffy's is located, during the relevant time periods here.

Stuffy's also argues its actions were not willful. It asks this court to find that "[t]here was no basis for the *ipse dixit* that a person exposed to COVID faced a substantial risk of serious injury or death." *Trial Brief*, page 20, lines 14-15. Again, the preponderance of scientific and medical evidence via declarations proves just the contrary. The Court finds the actions were willful.

Here, Stuffy's admitted it violated WAC 296-800-14035(2) 52 times. Because this Court affirms the Board, the Court hereby adopts by reference the Findings of Fact and Conclusions of Law of the Board in it's Decision and Order, while also incorporating this

Court's rulings on constitutionality that the Board indicated it did not have jurisdiction to address.

DATE: 2-15-2024

/s/ Jill Karmy
Jill Karmy, Superior Court Commissioner

ARD LAW GROUP PLLC

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