

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

WASHINGTON CEDAR & SUPPLY
COMPANY, INC.,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT
OF LABOR AND INDUSTRIES,

Respondent.

No. 34009-7-II

Consolidated with:

No. 34441-6-II

PART PUBLISHED OPINION

BRIDGEWATER, P.J. — At oral argument, we consolidated two cases, cause no. 34009-7-II and cause no. 34441-6-II, involving the Washington Department of Labor and Industries and Washington Cedar & Supply Company, Inc. We address both in this joint opinion. We affirm in part and reverse in part.

Both cases involve citations for Washington Cedar’s failure to ensure that its employees use a fall safety system¹ while working on a roof, a violation of the Washington Industrial Safety and Health Act (WISHA) regulations. WAC 296-155-24510. We affirm these citations in both cases because Washington Cedar did not ensure use of the equipment it provided. In cause no. 34441-6-II, we hold that the Department was not required to follow the civil rules of superior

¹ WAC 296-155-24510 refers to fall restraint systems and fall arrest systems. For ease of reading this opinion, we refer to these systems as fall safety systems.

34441-6-II/
34009-7-II

court and serve the registered agent of the errant company; sending notice of the citation by certified mail to the yard manager was sufficient for due process. In cause no. 34009-7-II, we also affirm the citation for lack of a safety plan because specific fall hazards were not listed on a preprinted form that was perfunctorily filled out. But we reverse the citation regarding the required safety meeting for lack of substantial evidence.

Because they are common to both cases, we will first address the proper interpretation of WAC 296-155-24510, the affirmative defenses to a violation of that standard, and Washington Cedar's constitutional challenge. And we address Washington Cedar's challenge to notice required for the Department citation in cause no. 34441-6 in this joint section because it is generally applicable. We address the factual issues unique to each case in the unpublished portion of our opinion.

I. Statutory and Regulatory Scheme

We begin by noting that both consolidated cases involve a similar factual scenario in which Washington Cedar supplied fall safety equipment but its employees did not use that equipment. In both cases, a Department inspector watched Washington Cedar employees on roofs moving roofing materials without using fall protection equipment. In one case, the employee wore a harness that was not attached to a roof anchor, in the other, the equipment was in the truck. In both cases, the employees were exposed to a fall of more than 10 feet.

In response to these violations, the Department cited Washington Cedar for violating WAC 296-155-24510, which requires an employer to provide, install, and implement a fall

34441-6-II/
34009-7-II

restraint system any time an employee is working where he or she may fall more than 10 feet. Washington Cedar appealed these citations to the Board of Industrial Insurance Appeals, whose industrial appeals judge (IAJ) held hearings. After the IAJ upheld these fall safety citations, Washington Cedar appealed to the superior court, which also affirmed the citations.

A. Duties Under WAC 296-155-24510

Washington Cedar asks us to interpret WAC 296-155-24510, as a “hardware requirements” regulation rather than a safety regulation. Amended Br. of Appellant (no. 34009-7) at 18. Washington Cedar urges us to hold that the safety standard requires an employer to only provide a fall safety system that meets the regulation’s technical requirements. The Department responds that the regulation requires that, in addition to providing appropriate fall safety gear, employers ensure that its employees use fall protection. We agree with the Department’s interpretation of the regulation.

We interpret agency regulations as if they were statutes. *Roller v. Dep’t of Labor & Indus.*, 128 Wn. App. 922, 926-27, 117 P.3d 385 (2005) (quoting *Cobra Roofing Serv., Inc. v. Dep’t of Labor & Indus.*, 122 Wn. App 402, 409, 97 P.3d 17 (2004), *aff’d*, 157 Wn.2d 90 (2006)). Our review is, therefore, de novo, but we give substantial weight to an agency’s interpretation of statutes and regulations within its area of expertise. *Roller*, 128 Wn. App. at 926-27. Accordingly, we will uphold an agency’s interpretation of a regulation if it reflects a plausible construction of the statutory language and is not contrary to the legislature’s intent and purpose. *Roller*, 128 Wn App. at 926-27. But we retain the ultimate responsibility for interpreting a statute

34441-6-II/
34009-7-II

or regulation. *Children's Hosp. & Med. Ctr. v. Dep't of Health*, 95 Wn. App. 858, 864, 975 P.2d 567 (1999), *review denied*, 139 Wn.2d 1021 (2000).

Before interpreting this specific regulation, we must address Washington Cedar's argument that the Department's interpretation of its own regulation is not entitled to deference. Washington Cedar argues that such deference is only appropriate where interpreting the statute requires special expertise. According to Washington Cedar, defining terms in the regulation is not within the Department's expertise.

To support this position, Washington Cedar cites *Willowbrook Farms v. Dep't of Ecology*, 116 Wn. App. 392, 397, 66 P.3d 664 (2003). But *Willowbrook* is inapposite. In *Willowbrook*, Division Three of this court declined to give deference to the Department of Ecology when interpreting the word "ministerial" in a water rights statute. *Willowbrook*, 116 Wn. App. at 394, 397. The court reasoned that "the question--what is ministerial when filing a required government form--is not something requiring the expertise of an administrative board." *Willowbrook*, 116 Wn. App. at 397.

But this case, unlike *Willowbrook*, does involve the Department's area of expertise. In interpreting the duties a substantive safety regulation imposes, the Department is acting within the scope of its expertise--promoting safety in the work place. Therefore, although we retain the ultimate authority to determine the regulation's meaning, giving deference to the Department's interpretation of its own regulation is appropriate.

Having decided that deference is appropriate in this case, we now discuss the applicable

34441-6-II/
34009-7-II

principles of statutory construction. If a regulation is unambiguous, we will not look beyond the plain meaning of the words in the regulation. *Mader v. Health Care Auth.*, 149 Wn.2d 458, 473, 70 P.3d 931 (2003). In determining the plain meaning of the regulation, we may also look to the entire statutory scheme. *Mader*, 149 Wn.2d at 473. Our interpretations must give meaning to every word in the statute or regulation. *Berrocal v. Fernandez*, 155 Wn.2d 585, 121 P.3d 82 (2005) . Our goal is to achieve a harmonious total statutory scheme and avoid conflicts between different provisions. *Lee Cook Trucking & Logging v. Dep't of Labor & Indus.*, 109 Wn. App. 471, 481, 36 P.3d 558 (2001).

Specifically, when interpreting a WISHA regulation, we interpret it in the light of the WISHA statutes and regulations as a whole. *Netversant v. Dep't of Labor & Indus.*, 133 Wn. App. 813, 825, 138 P.3d 161 (2006). We keep in mind that we interpret WISHA statutes and regulations liberally to achieve their purpose of providing safe working conditions for every worker in Washington. *Inland Foundry Co. v. Dep't of Labor & Indus.*, 106 Wn. App. 333, 336, 24 P.3d 424 (2001) (citing RCW 49.17.010).

With these principles in mind, we turn to the regulation in question. The fall restraint regulation provides:

When employees are exposed to a hazard of falling from a location 10 feet or more in height, the employer shall ensure that fall restraint, fall arrest systems, or positioning device systems are provided, installed, and implemented according to the following requirements.

WAC 296-155-24510. The rest of the regulation details the specifications that a fall restraint, fall arrest or position device system must meet.

34441-6-II/
34009-7-II

The Department interprets this regulation to mean that the employers have a duty to provide a fall safety system and a duty to make certain its employees use that system. Thus, under the regulation's plain language, the employer has a duty to provide a fall safety system and to ensure that its employees use that system; i.e., that the system is "installed, and implemented."

We agree with the Department's interpretation. The regulation's plain language imposes three mandatory duties on employers. First, the employer "shall ensure" that fall safety systems "are provided." Second, the employer "shall ensure" that fall safety systems "are . . . installed." Third, the employer "shall ensure" that fall safety systems "are . . . implemented." WAC 296-155-24510. Where a regulation uses a non-technical term like "ensure" we may look to the dictionary for guidance. *State v. Pacheco*, 125 Wn.2d 150, 154, 882 P.2d 183 (1994). "[E]nsure" means to "make sure, certain, or safe." Webster's Third New International Dictionary 756 (2002). Thus, this regulation's plain language requires employers to make certain that a fall system is provided, installed, and implemented. In other words, the employer must ensure that it provides safety equipment and that its employees use that equipment.

Washington Cedar objects that this interpretation makes the language "according to the following requirements" superfluous. WAC 296-155-24510. Washington Cedar is incorrect. The regulation requires that a fall safety system, meeting the requirements specified in the remainder of the regulation, be provided and used. Thus, the Department's interpretation does not render any statutory language superfluous.

Washington Cedar next argues that the Department's interpretation collapses the separate

34441-6-II/
34009-7-II

duties of employers and employees. For example, WISHA requires each employee to comply with all WISHA provisions. RCW 49.17.110. Washington Cedar argues that this means that employees rather than employers have the duty to comply with safety regulations. For further support, Washington Cedar observes that in some regulations, the Department has delineated separate duties. For example, Washington Cedar points out, WAC 296-155-200 requires construction personnel to comply with job safety practices and procedures, while requiring that employers be responsible for requiring the wearing of appropriate personal protective equipment. WAC 296-155-200(3), (4).

Even though Washington Cedar correctly notes that employees must comply with safety rules, it is entirely consistent with the overall purpose of WISHA to impose overlapping duties on both employees and employers. In fact, while WISHA imposes a duty on employees to follow applicable WISHA regulations, it also requires that “[e]ach employer . . . [s]hall comply with the rules, regulations, and orders promulgated under this chapter.” RCW 49.17.060(2). Such overlapping duties further WISHA’s ultimate goal of ensuring a safe work place.

We also note that the Department’s interpretation of the fall protection regulation is the most consistent with WISHA’s enforcement scheme. WISHA authorizes the Department to issue citations and sanctions for violations of WISHA regulations. RCW 49.17.120(1). The statute also provides an affirmative defense to citations for unpreventable employee misconduct. RCW 49.17.120(5)(a). As the Department points out, this affirmative defense only makes sense if the employer can be held responsible for the employees’ actions. Thus, in keeping with WISHA’s statutory scheme, the Department’s interpretation of the regulation as imposing a duty on the

34441-6-II/
34009-7-II

employer is more plausible.

Thus, WAC 296-155-24510 imposes a duty on employers to ensure that their employees use a fall safety system when working at a location from which they might fall more than 10 feet. The employer may then avoid responsibility for the violation if it can establish the affirmative defense of unavoidable employee misconduct.

Washington Cedar next argues that we should interpret this regulation to be a general duty regulation.² There are two kinds of duties under the safety regulations: general and specific. *Dep't of Labor & Indus. v. Kaiser Aluminum & Chem. Co.*, 111 Wn. App. 771, 780, 48 P.3d 324 (2002). A general duty is a non-specific duty that an employer take all reasonable steps to protect the safety of its employees. *See Kaiser Aluminum*, 111 Wn. App. at 780 (describing the general duty to “do every other thing reasonably necessary” in former WAC 296-24-073(2) (1994)). If the Department issues a general duty citation, it must specify the steps an employer should have taken and that those measures were feasible. *Kaiser Aluminum*, 111 Wn. App. at 782. A general duty governs unless a more specific standard applies. *Kaiser Aluminum*, 111 Wn. App. at 780.

We have already implicitly acknowledged that a violation of the fall safety regulation is a specific duty rather than a general one. We did so by describing the elements for a fall safety citation without requiring the Department to prove what steps an employer should have taken. *Wash. Cedar & Supply Co. v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 914, 83 P.3d 1012, *review denied*, 152 Wn.2d 1003 (2004). We now hold explicitly that the fall safety regulation

² Washington Cedar raises this only in cause No. 34441-6, but it is applicable to both cases so we address it here.

imposes a specific rather than general duty to ensure that fall safety systems are provided and used. Therefore, the Department does not have to prove what steps Washington Cedar failed to take; it is enough to show that the company did not comply with the regulation.

B. Affirmative Defenses

In order to complete the context of the Washington Cedar's duty under WAC 296-155-24510, we briefly describe two affirmative defenses Washington Cedar presented. Washington Cedar argued that this was unavoidable employee misconduct and that it should be allowed to present an infeasibility defense based on financial cost.

As we indicated above, Washington's statutory scheme for safety regulations recognizes a defense of unavoidable employee misconduct. RCW 49.17.120(5)(a). The employer bears the burden of proving that (1) it has a thorough safety program designed to prevent violations; (2) it has adequately communicated the program to its employees; (3) it takes steps to discover and correct violations of its rules; and (4) its safety program is effective in practice. *Legacy Roofing, Inc., v. Dep't of Labor & Indus.*, 129 Wn. App. 356, 362-63, 119 P.3d 366 (2005). In order to show that a safety program is effective in practice, it must show that the employee's misconduct was an isolated occurrence and was not foreseeable. *Wash. Cedar*, 119 Wn. App. at 912.

Washington Cedar also argues that it should have been able to present an infeasibility defense. To support its argument, Washington Cedar relied on a federal case, *Bancker Constr. Corp. v. Reich*, 31 F.3d 32 (2d Cir. 1994). In interpreting our WISHA regulations in the absence of state decisions, we may look to the federal Occupational Safety and Health Administration

(OSHA) regulations and consistent federal decisions. *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 147, 750 P.2d 1257, 756 P.2d 142 (1988); 29 U.S.C § 651 *et seq.* Assuming, without deciding, that Washington law recognizes a similar affirmative defense,³ we hold, following federal precedent, that an affirmative infeasibility defense requires an employer to prove that compliance is technically impossible or that that compliance would have exposed the employees to a greater hazard. *Banker Constr.*, 31 F.3d 32, 34 (2d Cir. 1994).

C. Vagueness

Washington Cedar's next argues that if we adopt the Department's interpretation, the regulation would be unconstitutionally vague. We disagree.

A duly adopted regulation is presumed constitutional. *Inland Foundry*, 106 Wn. App. at 339 (citing *Longview Fibre Co. v. Dep't of Ecology*, 89 Wn. App. 627, 632, 949 P.2d 851 (1998)). The party raising a vagueness challenge bears the heavy burden of proving the regulation's unconstitutionality beyond a reasonable doubt. *Inland Foundry*, 106 Wn. App. at 339. A regulation is unconstitutionally vague if persons of common intelligence must necessarily guess at its meaning and disagree as to its application. *Inland Foundry*, 106 Wn. App. at 339. The regulation does not, however, have to provide complete certainty. *Inland Foundry*, 106 Wn. App. at 339-340.

Here, the regulation requires an employer to ensure that it provides, installs, and implements a fall-safety system, meeting the regulations specifications. As indicated above, that

³ Because we hold below that Washington Cedar failed to show that compliance was physically impossible or more dangerous, we do not address whether Washington recognizes this defense.

34441-6-II/
34009-7-II

means that an employer must make certain that it provides a safety system and that its employees use it. When an employee fails to use a safety system and the employer cannot prove unavoidable employee misconduct, the regulation is violated. The meaning of this regulation is not so vague that Washington Cedar cannot understand its meaning. Its constitutional challenge fails.

D. Notice

Washington Cedar contends that because the Department did not serve its registered agent for service of process in cause no. 34441-6-II, the citation notice was not sufficient. Washington Cedar's position turns on a WAC 263-12-125 that requires the Board to follow the superior court's civil rules of procedure where applicable. From this regulation, Washington Cedar asks us to conclude that CR 4's requirements governing service apply and that the Department failed to meet CR 4. We reject Washington Cedar's argument.

We review procedural errors, such as lack of proper notice, de novo. *Reg'l Transit Auth. v. Miller*, 156 Wn.2d 403, 412, 128 P.3d 588 (2006). Because this case turns on our interpretation of regulations and statutes, we must engage in statutory construction. We interpret unambiguous statutes and regulations according to their plain meaning. *Mader*, 149 Wn.2d at 473. We give an agency's interpretation of statutes and regulations within its area of expertise special substantial weight. *Roller*, 128 Wn. App. at 926-27.

The WISHA statutes authorize the Department to issue citations for violations of the WISHA statutes and regulations. RCW 49.17.120(1). The statute actually has two forms of notice. First, the citation or copies of it must be prominently posted at or near each place a

34441-6-II/
34009-7-II

violation occurred. RCW 49.17.120(3). Second, the Department must “notify the employer by certified mail.” RCW 49.17.140(1). The Department regulations echo this requirement and mandate that the Department mail a citation and notice to an employer. WAC 296-900-13005. Neither the regulation nor the statute specifies who should receive service for the employer.

The Department contends that service on Washington Cedar’s yard manager is sufficient to meet the requirement that notice be sent to the employer. We agree. Notice must be reasonably calculated, under all circumstances, to apprise all interested parties of the action and afford them the opportunity to present their objections. *Duskin v. Carlson*, 136 Wn.2d 550, 557, 965 P.2d 611 (1998).

On the facts of this case, sending notice of the violation to Washington Cedar’s yard manager who was also in charge of safety enforcement was a reasonable way to achieve notice. In fact, Washington Cedar was able to file its notice of appeal on the same day that its yard manager received the mailed notice.

This interpretation is in line with other decisions involving the Department. In determining that service by certified mail in worker’s compensation cases was appropriate, our Supreme Court noted that certified mail is both efficient and inexpensive and satisfies due process. *Duskin*, 136 Wn.2d at 557-58. Where a company delivers goods from a particular location and the employee involved violates a regulation, it is appropriate to mail the notice to the manager of the delivery center from which the employee came. That person is very likely to either have the authority to handle citations or the responsibility to forward them on in a timely manner. Such notice is

34441-6-II/
34009-7-II

reasonably calculated to apprise all interested parties.

This interpretation of the statute also squares with the federal OSHA Committee interpretation of its federal regulations. Interpreting a statute very similar to Washington's, OSHA Committee requires service "reasonably calculated to provide an employer with knowledge of the citation and notification of proposed penalty." *Baker Support Servs., Inc. v. Sec'y of Labor*, 18 OSHC (BNA) 2200 at *5 (2000) (quoting *B.J. Hughes, Inc.*, 7 OSHC (BNA) 1471 (1979)). Under that formulation of the test, so long as the Department's notice is likely to be passed along to the appropriate officials, service is appropriate.

Washington Cedar cites *Buckley & Company, Inc. v. Secretary of Labor*, 507 F.2d 78 (3d Cir. 1975).⁴ In *Buckley*, the Federal Third Circuit Court of Appeals reviewed an administrative ruling that an employer could not challenge a citation because the employer had not responded within 15 days of receiving notice of the citation. *Buckley*, 507 F.2d at 79-80. OSHA served the superintendent of Buckley's maintenance shop where a fatal accident occurred. *Buckley*, 507 F.2d at 80. The superintendent was Buckley's representative during the OSHA inspection and participated in the closing conference. *Buckley*, 507 F.2d at 80-81. The court reasoned that because the superintendent was the employee who might be considered responsible for the circumstances leading up to the violation, he might have an incentive to cover up his derelictions and not forward citations to his superiors. *Buckley*, 507 F.2d at 80-81. Based on this concern and the theory that the goal of OSHA was to abate dangerous conditions, the court concluded

⁴ We note that although this is a federal circuit opinion, the OSHA Committee does not feel itself bound by the federal circuit decisions. *Baker Support Servs., Inc.*, 18 OSHC (BNA) 2200 at *5.

34441-6-II/
34009-7-II

that notice should be given to officials at corporate headquarters with the authority to disperse corporate funds to abate the condition. *Buckley*, 507 F.2d at 80-81.

Buckley does not aid Washington Cedar. The *Buckley* court did not hold that lack of notice voided the citation. Instead, the *Buckley* court merely allowed the employer to contest a citation where the time for appeal had passed. *Buckley*, 507 F.2d at 81. This result—extending the time for the employer to challenge a citation—was confirmed in the Sixth Circuit as well. *Capital City Excavating Co. v. Donovan*, 679 F.2d 105, 110 (6th Cir. 1982). But Washington Cedar received actual notice and had the opportunity to litigate the citation fully. Thus, even under the reasoning in *Buckley*, Washington Cedar was not prejudiced and would not be entitled to relief.

But we decline to follow the *Buckley* court's interpretation in this case. The *Buckley* court was concerned that an employee might deceive a corporation by covering up a citation. *Buckley*, 507 F.2d at 80-81. Here, there was no reasonable possibility that the yard manager was going to cover up the citation. The Department was not going to forget about a penalty and such a cover up would have inevitably failed. Eventually, the Department would have contacted someone about the citation. So long as Washington Cedar was allowed to contest the citation, as it was here, the service on the yard manager was sufficient.

The *Buckley* court also wished to promote abatement of dangerous conditions. *Buckley*, 507 F.2d at 80. This goal is adequately served by giving the citation to the person in charge of safety at the specific worksite, or in this case, the regional distribution center. Service on a

34441-6-II/
34009-7-II

corporate officer, if anything, adds another layer for people to contact before the unsafe condition might be redressed.

We also expressly reject Washington Cedar's proposed interpretation applying CR 4's rules. Washington Cedar relies on WAC 263-12-125, which provides that proceedings before the Board of Industrial Insurance Appeals are governed by the statutes and rules governing civil cases in superior courts. WAC 263-12-125. A citation issued by the Department is not a proceeding before the Board. If a citation is not appealed to the Board, it becomes a final agency action not subject to review by any court or agency. RCW 49.17.140(1). Moreover, as discussed above, the WISHA statutes contain their own notice provisions for citations. And specific provisions control over general regulations. *Spokane v. Taxpayers of Spokane*, 111 Wn.2d 91, 102, 758 P.2d 480 (1988). Therefore, the notice required in this case was notice via certified mail to the employer. There was no error.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Having described the applicable duties under WAC 296-155-24510 as well as the applicable affirmative defenses, we turn now to the specific factual allegations in each individual case.

II. May 12, 2003 Violation (Cause No. 34441-6-II)

On May 12, 2003, a Department inspector, William Sturman, saw a Washington Cedar

34441-6-II/
34009-7-II

employee working on a 13-foot-high roof without any fall protection. As a result of the inspection, the Department cited Washington Cedar for failing to ensure that its employees used fall protection. Because Washington Cedar had nine previous similar violations, the Department classified the citation as a repeat violation and assessed a \$2,700 penalty.

The Department contacted Washington Cedar about the violation and subsequent citation in more than one way. First, Sturman spoke with Mike Honeycutt, the yard manager where the employees worked, and held a closing conference. According to Honeycutt, he is in charge of carrying out Washington Cedar's safety program at his yard. Second, the Department sent the citation, via certified mail, to Honeycutt. Honeycutt received the citation on August 29, 2003, and on the same day, Washington Cedar prepared and mailed its appeal from the citation.

On appeal, Washington Cedar argues that substantial evidence did not support the IAJ's factual findings and that we should reverse the citation.

Our review of a Department citation proceeds in two stages. First, we review the IAJ's findings of fact to determine if substantial evidence supports them. RCW 49.17.150(1); *Kaiser Aluminum*, 111 Wn. App. at 778. Substantial evidence exists if the record contains sufficient evidence to persuade a fair-minded person of the truth of the declared premise. *Inland Foundry*, 106 Wn. App. at 340.

Second, we review whether these findings support the Department's conclusions of law. *Danzer v. Dep't of Labor & Indus.*, 104 Wn. App. 307, 319, 16 P.3d 35 (2000). We review the conclusions of law de novo. *Inland Foundry*, 106 Wn. App. at 340. While we grant deference to

34441-6-II/
34009-7-II

an agency's factual findings, applying of the law to a set of facts is a question of law we review de novo. *Mader*, 149 Wn.2d at 470.

In order to establish a serious violation of a WISHA safety regulation, the Department must prove that (1) the cited regulation applies; (2) the regulation requirements were not met; (3) employees were exposed to the violative condition; (4) the employer knew, or through the exercise of reasonable diligence, should 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. *Wash. Cedar*, 119 Wn. App. at 914.

In this case, Washington Cedar employees were on a roof at least 13 feet high. Therefore, the fall safety protection regulations applied and, because those employees were not wearing any safety equipment, Washington Cedar violated the regulation and its employees were exposed to a dangerous fall. The Department's inspector testified that the fall could cause serious injuries, so the last element was met. We also note that the nine previous similar violations are more than adequate to show that this is a repeat violation.

Washington Cedar first argues that the Department failed to establish that the regulation applied or that Washington Cedar did not meet the fall protection requirements. Specifically, Washington Cedar asserts that if we were to interpret WAC 296-155-24510 as a hardware requirements provision only, then it does not apply when an employee unhooks himself. But this argument merely repeats Washington Cedar's argument over how to interpret the regulation. Because we interpret the regulation to require an employer to ensure its employees use safety

34441-6-II/
34009-7-II

equipment, this argument fails. We reject Washington Cedar's argument that it met the hardware specifications for the same reason.

The only real issue is whether Washington Cedar knew or should have known its employees were exposed to a dangerous condition. We recently addressed this element in *Washington Cedar* where we held that "evidence of similar past violations was sufficient to support a finding that Washington Cedar was on notice that its employees were not complying with its safety requirements." *Wash. Cedar*, 119 Wn. App. at 916. In *Washington Cedar*, the Department introduced evidence that Washington Cedar had had two prior fall protection violations in the three years before the appealed violation. *Wash. Cedar*, 119 Wn. App. at 910.

Following the first *Washington Cedar* case, we hold that the Department produced more than enough evidence to support the IAJ's finding that Washington Cedar knew or should have known that its employees were not complying with the safety requirements. Specifically, Washington Cedar had nine previous violations of fall safety regulations in the three years before the May 12, 2003 violation. This pattern of misconduct was more than enough to put Washington Cedar on notice that its employees were disregarding its safety policy. These facts support the conclusion that Washington Cedar knew or should have known its employees violated the safety regulation and that this was an ongoing problem. We therefore hold that the Department met its burden of proving that Washington Cedar violated WAC 296-155-24510.

Washington Cedar next argues that the IAJ should have found that it proved the affirmative defense of unavoidable employee misconduct. As described above, to avail itself of

34441-6-II/
34009-7-II

this defense, Washington Cedar must prove that (1) it has a thorough safety program designed to prevent violations; (2) it has adequately communicated the program to its employees; (3) it takes steps to discover and correct violations of its rules; and (4) its safety program is effective in practice. *Legacy Roofing*, 129 Wn. App. at 362-63.

Without addressing the other elements, we hold that substantial evidence supported the IAJ's finding that Washington Cedar's safety program was not effective in practice. The Department elicited testimony that Washington Cedar failed to follow its own safety policy by not giving its offending employee further safety instruction. Nor does Washington Cedar have the company-wide safety committee specified in its program. But the main evidence of Washington Cedar's ineffectual enforcement is the number of citations in the three years before this citation. On this evidence, a reasonable trier of fact could find that Washington Cedar was not effectively enforcing its safety policy, and therefore the unavoidable employee misconduct defense does not shield Washington Cedar from this citation.

Washington Cedar argues that the nine citations is a small number given that it makes 25,000 deliveries a year. But a reasonable trier of fact may infer from these violations that there were other times Washington Cedar employees failed to use fall safety equipment and did not get caught. The number of actual violations may therefore be much higher. As this is a permissible inference from the record, this argument does not alter the result.

On this record, we hold that there was substantial evidence to support the IAJ's findings and therefore, we affirm the citation in this case.

34441-6-II/
34009-7-II

III. January 23, 2003 Violation (Cause No. 34009-7-II)

On January 23, 2003, Larry Adams, a Department inspector, watched a Washington Cedar employee working on a roof moving roofing materials. The employee, Jason Stewart, was wearing a fall restraint harness but the harness was not attached to the roof anchor. The eaves of the roof were 17 feet above the ground.

Adams contacted Stewart and Bobby Pope, Washington Cedar's lead employee on the scene, and conducted an investigation. During the investigation, Adams determined that Washington Cedar's fall protection plan failed to identify any hazards specific to this work site. In addition, he discovered that Washington Cedar held safety meetings only once or twice a month.

The Department issued a three-part citation: failing to ensure use of the fall restraint system; failure to complete a fall protection plan; and failure to hold weekly safety meetings. The first two violations were classified as repeat serious violations and the safety meeting citation as a general violation. The Department classified the first two citations as repeat violations because Washington Cedar had been cited five times for fall protection violations in the three preceding years. Although there were three citations, the Department only imposed a penalty for the fall safety system citation.

A. Substantial Evidence for Fall Safety System

Washington Cedar first asserts that substantial evidence did not support the IAJ's factual findings on the elements of a WAC 296-155-24510 violation. We disagree and affirm this citation.

As we noted above, the Department must prove that (1) the cited regulation applies; (2) the regulation requirements were not met; (3) employees were exposed to the violative condition; (4) the employer knew or should have known of the violative condition; and (5) there is a substantial probability that death or serious physical harm. *Wash. Cedar*, 119 Wn. App. at 914. In this case, Washington Cedar challenges whether substantial evidence supported the IAJ's finding that its employee was exposed to a dangerous condition and whether Washington Cedar should have known its employees were failing to use the fall safety system. It also suggests there was not enough evidence to establish the seriousness of the harm. We reject these arguments.

In this case, Washington Cedar first argues that the Department failed to establish that its employee was exposed to a dangerous condition. It argues that a "condition" is a permanent abiding circumstance and not a transitory trip across a roof without a safety line. Assuming, without deciding, that Washington Cedar's definition of "condition" is correct, their argument fails. The hazard to which the employees were exposed was a fall from greater than 10 feet. *See Cobra Roofing*, 157 Wn.2d at 98 (noting that the fall safety regulation seeks to protect employees to that hazard of falling). As gravity is a permanent abiding circumstance, Washington Cedar's employees were exposed to a dangerous condition.

We next examine whether there was substantial evidence from which the IAJ could conclude that Washington Cedar knew or should have known of the danger. Again, the Department may meet its burden by introducing evidence of similar past violations. *Wash. Cedar*, 119 Wn. App. at 916.

Applying the same reasoning to this case, the Department produced sufficient evidence to support a finding that Washington Cedar was on notice that its employees were not using fall safety systems. Specifically, the Department introduced evidence that Washington Cedar had been cited for fall safety violations on three occasions within three years. In addition, at the hearing, Washington Cedar's yard manager Rick Hedlund, admitted that he had disciplined the same employee for violating the fall safety standard less than a month before the Department inspector found him on this roof. Given this past history, the IAJ did not err in concluding that Washington Cedar was aware of the problem of its employees failing to use safety equipment.⁵

We also hold that the Department produced sufficient evidence, as a matter of law, to prove that this was serious and caused a substantial probability of harm. Specifically, the Department inspector testified that a fall from 10 to 20 feet can cause severe injury and permanent disability. Thus, the IAJ did not err in finding that this violation exposed the employee to a serious injury. *Wash. Cedar*, 119 Wn. App. at 916-17 (holding that injuries from a fall satisfy the requirement for a serious injury); *see also Lee Cook Logging*, 109 Wn. App. at 482 (holding the

⁵ To the extent that Washington Cedar argues that its safety program record was sufficient to refute the knowledge element, we address that argument under the affirmative defense of unavoidable employee misconduct. It is enough for this element to prove that Washington Cedar was aware that this was a recurring problem. At that point the burden shifted to Washington Cedar to prove that they were effectively enforcing a safety program.

34441-6-II/
34009-7-II

Department needs only show that the potential harm from a violation is serious).

Having determined that the Department established all five of the elements to prove a serious violation, we turn next to Washington Cedar's affirmative defenses. Washington Cedar argues that it established the defense of unavoidable employee misconduct. The IAJ disagreed and found that defense inapplicable.

Once again, we can resolve this issue by affirming the IAJ's finding that Washington Cedar's safety program is not effective. *Wash. Cedar*, 119 Wn. App. at 912. Here, the IAJ found that:

Washington Cedar's safety program is deficient. It does not prevent violation as evidenced by the repeated violations, and policies and procedures that allow multiple violations prior to sanction. There is inadequate communication. There is ineffective enforcement. Washington Cedar has not retrained employees who have violated fall protection and fall protection plan requirements. The actions of these employees have been foreseeable and preventable.

CABR (No. 34009-7) at 131.

Here, there were three similar prior citations, which is more than enough to support the IAJ's finding. Moreover, the very same employee had violated the rule without a Department citation less than a month earlier. Even though Washington Cedar documented this incident, as the Department notes in its brief, Washington Cedar conceded that it did not offer any training to its employee after that violation even though its written policy requires it. We hold that where there were three previous similar violations, the employee involved had violated the regulation a month earlier, and the employer had failed to follow its own written safety policy, the Department met its burden to show that the employer's safety program was not effective. On these facts, we

cannot say that this was an unforeseeable isolated occurrence. *Wash. Cedar*, 119 Wn. App. at 912. Washington Cedar knew that its employees were violating its safety policy and did not take adequate steps to remedy that problem.

We note that we have found safety programs ineffective on less evidence. In *Legacy Roofing*, we upheld a finding that a safety program was not effective where the Department introduced evidence of one recent prior identical violation. *Legacy Roofing*, 129 Wn. App. at 367-68. In *Washington Cedar*, we found that two recent similar violations were sufficient to establish that a current violation is not an isolated occurrence. *Wash. Cedar*, 119 Wn. App. at 913.

We also reject Washington Cedar's infeasibility defense. Washington Cedar argues that compliance with the safety program would be too expensive and therefore it should be excused from meeting the regulation. As we noted above, the infeasibility defense requires an employer to show that compliance is technically impossible or would cause greater danger. *Banker Constr.*, 31 F.3d at 34. Financial difficulty is not a defense to this statute.⁶ Washington Cedar produced no evidence of technical impossibility nor that compliance created a greater danger. Its infeasibility defense fails.

Washington Cedar next argues that the Department failed to prove that this violation was a repeat violation. It argues that repeat violations can only be sanctioned if they were employer violations. This argument merely repeats Washington Cedar's interpretation of the regulation as a

⁶ We note that despite Washington Cedar's allegations, this regulation does not cause Washington Cedar a competitive disadvantage. Every employer must comply with this regulation. We do not condone achieving a competitive advantage by disregarding safety regulations and thereby placing employees and others at risk. See *Danzer*, 104 Wn. App. at 325 (rejecting employer's good faith defense that relied on economic viability concerns).

34441-6-II/
34009-7-II

hardware requirement provision only. Because WAC 296-155-24510 imposes a substantive duty to ensure use of fall safety equipment, this citation and the other fall safety violation citations are employer violations. Moreover, our Supreme Court has recently held that so long as prior citations involve the same kind of hazard, the Department has met its burden to show a repeat violation. *Cobra Roofing*, 157 Wn.2d at 98. Here, the prior citations were for fall safety violations and so the Department met its burden.

B. Evidentiary rulings (Cause No. 34009-7-II)

Washington Cedar next alleges that its due process rights were violated when the IAJ excluded evidence that Washington Cedar had complied with the technical requirements of the fall safety regulation and that compliance with the regulation was financially infeasible.

Washington Cedar assigns error to many individual evidentiary rulings. Rather than discussing them individually, we will describe them in general categories. First, the IAJ ruled that evidence of Washington Cedar's compliance with the hardware specifications was not relevant. Second, the IAJ excluded evidence of financial infeasibility on relevance grounds. Third, the IAJ sustained objections to questions that called for legal opinions about the propriety of the WAC regulation. Fourth, the IAJ disallowed questions that would have required the Department's inspector to speculate. Fifth, the IAJ excluded some evidence about Washington Cedar's safety policy on hearsay and foundation grounds.

The superior court rules govern proceedings before the IAJ. WAC 263-12-115(4). The WISHA statute does not specify what standard of review we are to apply in reviewing an IAJ's

34441-6-II/
34009-7-II

evidentiary rulings. *See* RCW 49.17.150. The statute does, however, grant the trial court, acting in an appellate capacity, the authority to order the Board to take additional material evidence on remand. RCW 49.17.150. We interpret this to mean that the IAJ has the authority to make evidentiary rulings and, therefore, we review those rulings under the same standard as a trial court's evidentiary ruling. Had the legislature intended the trial court's review of evidentiary rulings to be *de novo*, it would have allowed the trial court to admit evidence directly rather than remand to the Department.

Therefore, we review the IAJ's evidentiary rulings for abuse of discretion. *Northington v. Sivo*, 102 Wn. App. 545 n.6, 549, 8 P.3d 1067 (2000). An IAJ abuses its discretion when it applies the wrong legal standard or takes a view no reasonable person would take. *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000).

We hold that the IAJ did not err in excluding evidence regarding the hardware Washington Cedar provided or financial feasibility. There is no right to present irrelevant evidence. *State v. O'Connor*, 155 Wn.2d 335, 349, 119 P.3d 806 (2005); *see also Cobb v. Snohomish County*, 86 Wn. App. 223, 236, 935 P.2d 1384 (1997) (holding constitutional rights are not implicated by relevancy determinations). Here, because the Department did not cite Washington Cedar for failing to meet the hardware specifications, that evidence was irrelevant to the real issue of whether Washington Cedar's employees used a fall safety system. Similarly, because financial infeasibility is not a defense, that evidence was also irrelevant. There was no error.

We also hold that the IAJ did not err in excluding speculative evidence or in sustaining

34441-6-II/
34009-7-II

objections to questions calling for a legal opinion. Under ER 704, a witness may testify about matters of law but may not give legal conclusions. *Hyatt v. Sellen Constr. Co.*, 40 Wn. App. 893, 898-99, 700 P.2d 1164 (1985). Nor is a witness allowed to offer speculative evidence. *Curtiss v. YMCA*, 82 Wn.2d 455, 466, 511 P.2d 991 (1973). The IAJ acted within its discretion to exclude this evidence and exclude Washington Cedar's questions seeking legal opinions from the Department's inspector.

Last, based on our review of the record, we cannot say that the IAJ erred in requiring Washington Cedar to lay the proper foundation for the admission of hearsay documents. Hearsay is generally not admissible unless an exception applies. ER 802. Here, the IAJ properly refused to allow in documents until Washington Cedar established the requirements for an applicable hearsay exception. There was no error.

Even if we ruled that there was error, the IAJ allowed Washington Cedar to present the excluded evidence in offers of proof. Based on these offers, we hold that if there was error, it was harmless. None of the excluded evidence would have affected the outcome of this case, and therefore its exclusion was harmless. *See Cobb*, 86 Wn. App. at 236.

C. Fall Protection Plan Citation

Washington Cedar also challenges the Department's citation for lack of a safety plan. Of the five elements described above that the State must prove to show a violation, Washington Cedar challenges two. First, it argues that paperwork errors cannot be a serious violation because they do not cause exposure to serious harm. Second, Washington Cedar argues that substantial

34441-6-II/
34009-7-II

evidence does not support the trial court's finding that Washington Cedar did not have a fall protection plan. Our standard of review for this citation is the same as described above.

We reject Washington Cedar's invitation to adopt a rule that paperwork violations cannot cause a safety violation. The facts of this case provide a good illustration of precisely how failure to fill out a proper protection plan can expose a worker to danger. The violation where the employee failed to hook to the anchors occurred because Washington Cedar's employee could not reach a pile of roofing material while attached to the existing safety line. Had Washington Cedar properly identified the applicable hazards such as a pile of roofing materials beyond the reach of the nearest safety line, it could have remedied the situation by attaching an additional safety anchor or by having the general contractor do so. In fact, Washington Cedar conceded as much in its testimony. And the Department's inspector testified that failure to identify hazards in the plan leads to increased exposure to danger. On these facts, a paperwork violation may classify as a serious violation.

Washington Cedar did have a posted fall protection plan. Washington Cedar argues that substantial evidence does not support the IAJ's finding that the fall protection plan was deficient. The Department's allegation is that this plan was not sufficient to satisfy the regulation because it was not properly filled out. We agree and hold that there was substantial evidence that Washington Cedar's fall protection plan did not meet the regulation's requirements.

The WISHA regulations require that an employer provide a written fall protection plan any time employees face a fall hazard of 10 feet or more. WAC 296-155-24505(1). The

34441-6-II/
34009-7-II

regulation requires the employer to include several specific items. WAC 296-155-24505(2)(a)-

(g). The two at issue here provide that:

- (2) The fall protection work plan shall:
 - (a) Identify all fall hazards in the work area.
 - (b) Describe the method of fall arrest or fall restraint to be provided.

WAC 296-155-24505(2)(a). We must therefore determine if there is substantial evidence from which the IAJ could reasonably conclude that Washington Cedar's plan did not identify all fall hazards.

Washington Cedar uses a preprinted form for its fall protection work plans. This plan identifies unprotected roof edges, roof openings, and ladders as fall hazards. Each hazard has a specific safety requirement. Thus, for example, for the hazard of falling to a lower level, the form requires a full body harness. The form then provides a column in which employees may check off the applicable hazards and safety measures.

There is nothing inherently wrong about using a preprinted form in this format. If used properly, it allows employees to identify any fall hazards and use the appropriate safety equipment. But here, the form was filled out with a single line through the middle of the form. By itself, we agree that using a single line rather than checks in each box is not sufficient to show that the employee did not properly fill out the form.

But the evidence in this case indicates more than inadequate use of a form. Washington Cedar's yard manager testified that had the employees properly filled out the form, they would have identified that there were not enough anchors in the roof. In other words, there were

34441-6-II/
34009-7-II

specific fall hazards on this job that were not listed in the fall protection plan. Because the regulation at issue here requires the fall protection plan to list all hazards, there is substantial evidence from which the IAJ could conclude that Washington Cedar did not meet the regulation. We affirm this citation.

D. Safety Meetings

Washington Cedar asks us to overturn the citation for failure to hold safety meetings. First, it argues that the regulation does not apply to workers who merely deliver supplies to construction sites. In the alternative, Washington Cedar argues that if the regulation does apply, it met the requirement because its workers prepared a fall protection safety plan. The Department responds that the regulation applies to all industries and that we should interpret the regulation's application liberally to promote safety for all workers. We agree with Washington Cedar.

Our review of this citation follows the standards set out above. Washington Cedar argues that this regulation does not apply to its employees and that substantial evidence did not support the IAJ's conclusion that Washington Cedar failed to meet the regulation's requirements.

We turn first to Washington Cedar's argument that the safety meeting regulation does not apply to workers who load and unload roofing materials. The regulations in chapter 296-155 WAC apply,

to any and all work places . . . where construction, alteration, demolition, related inspection and/or maintenance and repair work, including painting and decorating is performed. These standards are minimum safety requirements with which all industries must comply when engaged in the above listed types of work.

WAC 296-155-005(1). The regulations define construction work to include,

34441-6-II/
34009-7-II

all or *any part* of excavation, construction, erection, alteration, repair, demolition, and dismantling, of buildings and other structures and all operations in connection therewith.

WAC 296-155-012 (emphasis added). Reading these provisions together, Washington Cedar falls within chapter 296-155 WAC. It is an industry whose employees are engaged in construction work as its employees take part in construction, erection, and alteration of buildings.

The specific regulation at issue in this case is WAC 296-155-110(5). That regulation requires a safety meeting “at the beginning of each job, and at least weekly thereafter.” WAC 296-155-110(5)(a). The meeting has to include a review of any safety inspections since the last safety meeting, a review of any citations, and an evaluation of any accidents. WAC 296-155-110(6). We hold that this regulation applies to Washington Cedar.

But although this regulation applies to Washington Cedar, we hold that there was insufficient evidence from which the IAJ could conclude that Washington Cedar violated it. The regulation’s plain language contemplates job-specific safety meetings rather than general safety meetings and imposes two duties. First, there must be an initial safety meeting and, second, a weekly meeting after that. Moreover, the regulation applies to “each job.” WAC 296-155-110(5)(a). Thus, under the regulation’s plain language Washington Cedar must have a safety meeting at the beginning of each of its jobs and then another if one of those jobs last more than a week.

According to its yard manager, Washington Cedar delivers and retrieves roofing materials from 20,000 sites a year. Each of these deliveries is a new job for Washington Cedar and

34441-6-II/
34009-7-II

presumably these jobs do not last more than a week. Only if Washington Cedar's job required more than a week of work would it be required to have a weekly safety meeting. Thus, applied to Washington Cedar, the regulation requires only a meeting at the beginning of each job.

And the regulation could be satisfied by a meeting in which the Washington Cedar employees also filled out a fall protection work plan. We note that Washington Cedar's fall protection form includes a pre-work inspection, equipment hazards, fall hazards, overhead hazards, electrical hazards, chemical hazards, as well as an "other" category. CABR (No. 34009-7), Ex. 14 at 2. A meeting at which employees fill out this form can constitute a safety meeting for the purposes of this regulation.

The IAJ reasoned that Washington Cedar conceded that it did not have weekly safety meetings. Accordingly, he found that Washington Cedar failed to conduct sufficient safety meetings. But there is no evidence that this job took more than a week, and the evidence indicates that someone filled out a fall protection plan at this specific website. Although the fall protection safety plan was not properly filled out and that violated another regulation, Washington Cedar did hold a safety meeting. Therefore, we hold that substantial evidence does not support the IAJ's finding that Washington Cedar did not comply with the safety meeting requirement. Therefore, we reverse the citation for failure to conduct safety meetings.

IV. Attorney Fees

Washington Cedar asks for attorney fees under RCW 4.84.350. While we do reverse one citation, the key citations for lack of a fall safety system were justified and attorney fees are not appropriate. In order to award fees under RCW 4.84.350, if applicable, we must find that the agency action was not substantially justified. Here, the agency's citation was substantially justified. We do not award attorney fees.

In conclusion, we affirm the citations in both cases for failure to ensure fall protection system. We affirm the citation for failure to prepare a fall protection plan. We reverse the citation for failing to have the required safety meetings. And, we hold that notice was proper even though the registered agent was not served.

Affirmed in part, reversed in part.

Bridgewater, P.J

We concur:

Armstrong, J.

Quinn-Brintnall, J.