

North Coast Iron Corp.

SAFETY AND HEALTH

"Serious" violation

A citation based on the failure to document that workers were properly trained and warned regarding proper fall protection can be cited as a serious violation. ...*In re North Coast Iron Corp.*, BIIA Dec., 14 W1086 (2016) [Editor's Note: The Board's decision was appealed to superior court under King County Cause No. 16-2-23179-9 SEA.]

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**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

IN RE: NORTH COAST IRON CORP.) DOCKET NO. 14 W1086
)
CITATION & NOTICE NO. 316961911) DECISION AND ORDER

Aaron Adair, a welder, fell 72 feet to his death from a Fraco scaffold during the course of his job with North Coast Iron Corp. (North Coast). The Department of Labor and Industries investigated and issued a Citation and Notice alleging that North Coast had committed three willful and four serious violations of provisions of the Washington Industrial Safety and Health Act (WISHA), all of which focused on fall-protection concerns, and one general violation of WISHA for failure to conduct weekly safety meetings. It assessed a penalty in the total sum of \$85,200. North Coast contends that it did not commit any of the alleged violations. Our industrial appeals judge affirmed all of the Department's allegations except those identified as Item Nos. 1.2 and 2.1b. The judge determined that the employer committed both of the violations but that neither violation created a substantial probability that death or physical harm could result and it vacated them. The Department asked that Item Nos. 1.2 and 2.1b be modified from allegations of serious violations to general violations but that the items not be vacated. North Coast asserts that it did not commit any of the alleged violations. We agree with the Department that North Coast committed each of the asserted violations and have granted review because we are convinced that the violation of Item No. 1.2 is a willful violation that demonstrated intentional disregard or plain indifference to the requirements of the safety rules. We are also convinced that Item No. 2.1b is a serious violation that created a substantial probability that death or physical harm could result. Citation and Notice No. 316961911 is **AFFIRMED**.

DISCUSSION

For clarity, we have elected to discuss Item Nos.1.2 and 2.1b of the Citation and Notice out of order.

Item Nos.1.1, 1.2 and 1.3 of the Citation and Notice allege that North Coast willfully committed WISHA violations. A willful violation is voluntary action that demonstrates intentional disregard of or plain indifference to the requirements of safety rules.¹ Item No. 1.1 of the Citation and Notice asserted that North Coast willfully violated WAC 296-874-20054, which requires an employer to ensure that workers use a personal fall arrest system if the front edge of the scaffold on which they are performing work other than plastering and lathing is more than 14 inches away from the work face. The leading edge of the Fraco scaffold on which the welders were working was 55 inches away from the building

¹ *In re Erection Co. (II)*, BIIA Dec., 88 W142 (1990)

1 on which they were welding steel for later use by bricklayers. The workers accessed the building
2 face by standing on planks that extend from the leading edge of the scaffold they were standing on
3 to the work face, much like a diving board extends from its foundation. Because the scaffold was
4 located between the eighth and ninth floors of the building, workers were required to be tied off at all
5 times.
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9 The record established that North Coast did not ensure that the workers were provided with
10 and used a proper fall restraint system. The workers borrowed vertical lifelines from the general
11 contractor. Kent Schluter, North Coast's president and general manager, acknowledged that the
12 company did not train any of its workers on how to safely use vertical lifelines. Two of the three
13 lifelines had rope grab devices that the workers could attach the harnesses they wore but the third
14 line had a hand-tied knot that served as a tie-off point. The evidence showed that when Mr. Adair
15 had to change locations on the scaffold, he disconnected his fall arrest system, walked across the
16 upper level of the scaffold, and tripped on welding lines as he descended to the plank. He fell between
17 the work face of the building and the scaffold.
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22 Standing alone, North Coast's failure to provide the workers whom it knew were working high
23 above the ground on a scaffold with an adequate system of fall protection proved that the company
24 acted with at least plain indifference to WISHA safety rules.
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26 In Item No. 1.3, the Department charged that North Coast willfully did not ensure that its
27 employees who worked on the Fraco scaffold were given specific training to understand the hazards
28 associated with the scaffold, and the knowledge to work safely on the scaffold. Such training is
29 required by WAC 296-874-20072.
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32 Because the Fraco scaffold is lowered and raised by a self-propelled system that a worker
33 standing on the scaffold controls, its manufacturer, Sun Scaffold/J&S Masonry, contractually bars
34 anyone from working on the scaffold until a qualified representative of the manufacturer trains the
35 worker how to operate it. The training includes a short classroom presentation that trains workers on
36 the location of proper tie-off points, how to avoid power lines and other obstacles as the scaffold is
37 raised or lowered, and emphasizes the need to be tied off at all times. The manufacturer's
38 representative and the workers spend an hour on the scaffold while safe operating practices are
39 demonstrated and practiced. The workers and North Coast knew training was required before they
40 could safely operate the Fraco scaffold.
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1 In addition to Mr. Lemieux and Mr. Adair, Arthur Ayers also worked on the Fraco scaffold.
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3 Even though Brandon Elley, safety officer for North Coast, was not authorized to train workers on the
4 safe operation of the scaffold, he showed Mr. Ayers how to operate the scaffold but he did not teach
5 him how to recognize safety hazards that were associated with the scaffold or show him the location
6 of tie-off points on the scaffold.
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9 Mr. Lemieux repeatedly asked North Coast to provide him with the training he needed to work
10 from and operate the scaffold. Mr. Lemieux said that the training was provided only after Mr. Adair
11 was killed. Mr. Schluter acknowledged that the company did not provide workers with specific training
12 on the safe operation of the Fraco scaffold.
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14 North Coast acted with plain disregard to the requirements of WAC 296-874-20072. It willfully
15 violated the safety regulation.
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18 In Item No. 2.1a, the Department alleged that North Coast committed a serious violation of
19 WAC 296-155-24609(1). The regulation requires that employers ensure that its workers are provided
20 with and use a fall-protection system any time they are exposed to a hazard of falling more than four
21 feet to the ground or to a lower level.
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24 Mr. Ayers worked from the roof of the building on January 3, 2014, while Mr. Lemieux and
25 Mr. Adair worked from the scaffold. Mr. Ayers did not wear any form of fall protection while he was
26 on the roof. He worked from behind a guardrail that protected him from the edge of the roof a majority
27 of the time. On one occasion, however, Mr. Ayers stepped over the guardrail in order to hand tools
28 to the workers on the scaffold. By that action, he was exposed to a serious safety hazard because
29 he could have been killed or seriously injured if he had fallen.
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32 Because North Coast did not ensure that all of its employees who worked high above the
33 ground on the building it was helping to build wore an appropriate form of fall protection, North Coast
34 committed a serious violation of WAC 296-155-24609(1).
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37 Item No. 2.2 of the Citation and Notice cited North Coast for a serious violation of
38 WAC-296-874-20034 on the grounds that the company did not ensure that the Fraco scaffold and its
39 components were inspected for visible defects by a competent person before each work shift and at
40 any time after an occurrence happened that could have affected the scaffolds structural integrity.
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43 Mr. Ayers, who was a lead worker for North Coast, acknowledged that he did not inspect the
44 Fraco scaffold before Mr. Adair and Mr. Lemieux raised it on January 3, 2014. It was not clear that
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1 he was a competent person to do so within the meaning of the safety regulation. The record
2 established that no other North Coast employee inspected the scaffold before it was used that day.
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4 It is self-evident that had the scaffold failed to work properly, a substantial probability existed
5 that Mr. Adair and/or Mr. Lemieux would have been killed or seriously injured. The violation that
6 North Coast acknowledged happened was a serious violation of WISHA regulations.
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9 Item No. 2.3 of the Citation and Notice declared that North Coast committed a serious violation
10 of WAC 296-874-20060 because it failed to ensure that vertical lifelines were protected from sharp
11 edges and abrasion. The vertical lifelines that Mr. Adair and Mr. Lemieux used originated from the
12 rooftop of the building, where they were anchored. The lifelines did not have a protective softener,
13 that is, an outer sleeve that would have prevented the lifelines from directly contacting the edge of
14 the roof. Although the roof rim did not have a sharp edge, the rim was composed of abrasive material,
15 as was evident from photographs of the roofs edge. The Department's inspector noticed that one of
16 the lifelines was damaged. Had any of the lifelines given way because of abrasion, the worker
17 attached to it was exposed to a hazard of falling several stories and being killed or sustaining serious
18 injuries. The violation was serious.
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24 Item No. 3.1 of the Citation and Notice declared that North Coast committed one general
25 violation of WAC 296-155-110(9)(a) because it did not conduct walk-around safety inspections at the
26 beginning of the job at which Mr. Adair was killed and it did not thereafter conduct joint weekly
27 walk-around inspections with a member of management, and an employee-elected worker
28 representative. Mr. Ayers and Mr. Lemieux told the Department's inspector that North Coast did not
29 conduct weekly safety meetings. North Coast did produce records of such meetings when the
30 inspector requested them. The record establishes that North Coast committed a general violation of
31 the safety rule.
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35 We now discuss Item Nos. 1.2 and 2.1b, the alleged violations the Proposed Decision and
36 Order vacated. Our industrial appeals judge reasoned that North Coast's failure to document the
37 kind of training that its workers underwent before they were assigned to work on a scaffold with
38 lifelines and its failure to develop and implement a written site-specific fall-protection plan were mere
39 documentation deficiencies, and were not willful or serious because they did not result in a substantial
40 probability that death or physical harm would ensue. We disagree.
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1 The hazard presented by a serious safety violation is one that creates a substantial probability
2 that the violation will result in a worker's death or physical harm.² Substantial probability does not
3 mean that a safety violation will probably result in death or serious physical injury on a particular work
4 site; it means that should harm result because of the violation, the harm would probably be death or
5 serious physical harm.³
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9 Item No. 2.1b of the Department's Citation and Notice asserted that North Coast committed a
10 serious violation of WAC 296-155-24611(2) in that it did not develop and implement a written fall-
11 protection work plan specific to each area of the work place where fall hazards of at least 10 feet
12 existed. A written site-specific fall-protection plan would have identified the abrasive edge of the rim
13 of the building as a hazard. It would have emphasized to Mr. Adair and Mr. Lemieux that it was
14 essential that they be tied off at all times because a wide gap existed between the workface of the
15 building they were working and the scaffold that they were standing on and because they would be
16 working on a plank that stretched from the scaffold to near the building's workface.
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20 Item No. 1.2 of the Citation and Notice penalized North Coast for a willful violation of WAC 296-
21 155-24621(01). The regulation has two parts. Part one requires an employer to document and keep
22 on file all training mandated by the second part of the regulation. Part two directs employers to retrain
23 employees when the employer has reason to believe that affected employees who have already been
24 trained do not have the understanding and skill required to work safely. One example the regulation
25 cites as requiring retraining is when changes in the types of fall-protection systems or equipment to
26 be used render prior training obsolete.
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30 One of the purposes of WAC 296-155-24621(01) is to alert employers when their employees
31 require additional training to continue to work safely. Mr. Lemieux and Mr. Adair had no prior
32 experience on how to safely use a vertical lifeline fall-protection system and a Fraco scaffold. Their
33 prior fall-protection system and scaffold training was obsolete for that reason. Because North Coast
34 did not document the kinds of training their workers had, they were unable to ascertain prior to work
35 beginning that the training its employees who were using the Fraco scaffold and vertical lifelines
36 previously had was obsolete under the circumstances that existed on January 3, 2014.
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40 If an accident occurred because North Coast failed to warn its employees of safety hazards in
41 a written fall-protection plan, a substantial probability existed that a worker would have been killed or
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46 ² *In re Erection Co. (II)*, BIIA Dec., 89 W142 (1990)

47 ³ *Mowat Constr. Co. v Department of Labor and Indus.*, 148 Wn. App. 920 (2009)

1 seriously injured. The employer's failure to ensure and document that employees were trained and
2 retrained in fall-protection procedures demonstrates an indifference to safety rules. It is more likely
3 than not that the failure to properly train its workers and to develop a site-specific fall-protection plan
4 for North Coast's work site contributed to Mr. Adair's fatal fall. Violation 1-2 and 2.1b are willful and
5 serious within the meaning of WISHA.
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8 **DECISION**

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10 The employer, North Coast Iron Corp., filed an appeal with the Department of Labor and
11 Industries' Safety Division on July 21, 2014. The Department transmitted the appeal to the Board of
12 Industrial Insurance Appeals on July 30, 2014. The employer appeals Citation and Notice
13 No. 316961911 issued by the Department on July 2, 2014. In this notice, the Department alleged
14 that North Coast Iron Corp. committed three willful, four serious, and one general violation of
15 provisions of the Washington Industrial Safety and Health Act. The Citation and Notice is correct and
16 is affirmed.
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21 **FINDINGS OF FACT**

- 22 1. On September 30, 2014, an industrial appeals judge certified that the
23 parties agreed to include the Jurisdictional History in the Board record
24 solely for jurisdictional purposes.
- 25 2. On January 3, 2014, Aaron Adair, a welder and designated lead worker
26 for North Coast Iron Corp. (North Coast), performed welding activities on
27 a Fraco scaffold that did not have a guardrail, was 72 feet above ground
28 level, and was more than 14 inches from the work face of the building to
29 which he was welding steel. A plank extended from the scaffold so
30 Mr. Adair could access the work face.
- 31 3. North Coast did not supply a complete fall protection system to Mr. Adair
32 and William Lemieux, who also worked with Mr. Adair on the Fraco
33 scaffold on January 3, 2014. The workers borrowed vertical lifelines from
34 the general contractor at the work site, two of which had an approved rope
35 grab system for fall protection but one was rigged with a hand-tied knot
36 because it did not have a rope grab.
- 37 4. On January 3, 2014, Mr. Adair detached his lifeline from his vertical
38 lifeline, moved across the top of the scaffold, and stepped down to the
39 plank on which he intended to work. As he did so, he tripped on welding
40 lines, and fell 72 feet between the scaffold and the building's work face
41 and was killed.
- 42 5. The Department properly determined that the hazard created by North
43 Coast's failure to provide its workers with an adequate system of fall
44 protection created a safety hazard that was properly rated at 6 on a scale
45 of 6 regarding the severity of the hazard because the result of the hazard
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1 would be death or physical harm and was properly measured at 5 on a
2 scale of 6 regarding the probability that the violation would result in a
3 worker's death or physical injury. By adding the probability with the
4 severity, the Department accurately assessed the gravity of the violation
5 at 30, which dictated that the base penalty for which North Coast was
6 liable was \$6,500. North Coast's good faith and history were average,
7 which did not adjust the base penalty but its size was 25 employees or
8 fewer, which led to a \$3,900 reduction in the base penalty. The adjusted
9 penalty for the violation was \$2,600. Because it accurately determined
10 that North Coast's safety violation was willful, the Department properly
11 multiplied the adjusted penalty by 10 and reached an accurate total
12 penalty of \$26,000, which it assessed as Item No. 1.1 in Citation and
13 Notice No. 316961911, dated July 2, 2014.

- 14 6. On January 3, 2014, North Coast did not document and keep on file the
15 training that its employees had undergone so that it did not retrain
16 Mr. Lemieux and Mr. Adair on the proper use of a Fraco scaffold and
17 vertical lifelines, which the workers had not previously used. Their prior
18 training was obsolete.
- 19 7. The Department properly determined that the hazard created by North
20 Coast's failure to document and keep on file the training that its
21 employees had undergone created a hazard that it properly rated at a
22 severity of 6 because it could lead to death or physical injury of an
23 employee and a probability of an injury resulting from the hazard at 5.
24 The gravity of the violation was 30, which resulted in a base penalty of
25 \$6,500. The Department used the same ratings for good faith, history,
26 and size that it used for the adjusted base penalty regarding Item No. 1.1
27 and for this violation that was identified as Item No. 1.2, the adjusted base
28 penalty was \$2,600. Because the Department considered the safety
29 violation to be willful, it multiplied the adjusted base penalty by 10 and
30 assessed a penalty against North Coast of \$26,000.
- 31 8. On January 3, 2014, North Coast did not ensure that its workers who were
32 working on the Fraco scaffold were given specific training to understand
33 the hazards associated with use of the scaffold and the knowledge to work
34 safely on the scaffold.
- 35 9. The Department properly assessed the severity of the hazard created by
36 North Coast's failure to properly train its employees on the use of the
37 Fraco scaffold at 6 because the violation could result in death or physical
38 injury and the probability of death or injury resulting at 5. That led to a
39 base penalty of \$6,500. The Department used the same ratings for good
40 faith, history, and size that it used for the adjusted base penalty regarding
41 Item Nos. 1.1 and 1.2 and for this violation which was identified as
42 Item No. 1.3, the adjusted base penalty was \$2,600. Because the
43 Department considered the safety violation to be willful, it multiplied the
44 adjusted base penalty by 10 and assessed a penalty against North Coast
45 of \$26,000.
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- 1 10. On January 3, 2014, North Coast did not ensure that Arthur Ayers was
2 provided with and used an appropriate system of fall protection while he
3 worked on the roof of the building at the company's work site. He stepped
4 over the guardrail at the edge of the building while not using any fall-
5 protection system and was exposed to a hazard that could result in death
6 of physical injury.
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- 8 11. The Department properly assessed the severity of the hazard created by
9 North Coast's failure to ensure that Mr. Ayers had and used an adequate
10 system of fall protection at 6 because the violation could result in death
11 or physical injury and the probability of death or injury resulting at 1. That
12 led to a base penalty of \$1,000. The Department did not adjust the base
13 penalty based on North Coast's history, but it increased the penalty by
14 \$200 because of the employer's poor faith. It decreased the base penalty
15 by \$600 based on the employer's size. For this violation that was
16 identified as Item No. 2.1a, the adjusted base penalty was \$600, which
17 was also the total penalty assessed for Item No. 2.1a.
- 18 12. On January 3, 2014, North Coast did not develop and implement a written
19 fall-protection plan that was specific to each area of its work place where
20 fall hazards of at least 10 feet existed.
- 21 13. The Department grouped the violation for failure to develop and
22 implement a site-specific fall-protection plan, which it identified as Item
23 No. 2.1b, with the penalty it assessed for Item No. 2.1a and no penalty
24 was assessed for the specific violation.
- 25 14. On January 3, 2014, North Coast did not ensure that the Fraco scaffold
26 and its components were inspected for visible defects by a competent
27 person before work on the scaffold began that day.
- 28 15. The Department properly assessed the severity of the hazard created by
29 North Coast's failure to have the Fraco scaffold inspected by a competent
30 person at 6 because the violation could result in death or physical injury
31 and the probability of death or injury resulting at 5. That led to a base
32 penalty of \$6,500. The Department did not adjust the base penalty for
33 the company's history but it added \$1,300 to the base penalty for the
34 employer's poor faith. It reduced the base penalty by \$3,900 based on
35 North Coast's size. For the violation, which was identified as Item No. 2.2,
36 the adjusted base penalty and assessed penalty was \$3,900.
- 37 16. On January 3, 2014, North Coast did not ensure that the vertical lifelines
38 that its workers on the Fraco scaffold were using were protected from
39 sharp edges and abrasion where they were tossed over the side of the
40 building.
- 41 17. For the failure to protect the lifelines, which it identified as Item No. 2.3,
42 the Department assessed the severity of the hazard created by the safety
43 violation at 6 because the hazard could lead to death or physical injury,
44 and it assessed the probability that such a result would ensure at 3. The
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1 base penalty of \$4,500 was not adjusted for the employer's history, but
2 the penalty was increased by \$900 for the employer's poor faith. The
3 penalty was reduced by \$2,700 because of North Coast's size. The
4 adjusted base penalty and the total penalty the Department assessed
5 against North Coast for the violation was \$2,700.

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7 18. North Coast did not conduct walk-around safety inspections of its work
8 site before it began work at the beginning of the project and it did not do
9 so on January 3, 2014.
- 10 19. The Department did not assess a penalty against North Coast for its
11 general violation of safety regulations, which it identified as Item No. 3.1.

12 **CONCLUSIONS OF LAW**

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14 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
15 and subject matter in this appeal.
- 16 2. On January 3, 2014, North Coast committed a willful violation of
17 WAC 296-874-20054, as alleged as Item No. 1.1 in Citation and Notice
18 No. 316961911 issued by the Department of Labor and Industries on
19 July 2, 2014.
- 20 3. On January 3, 2014, North Coast committed a willful violation of
21 WAC 296-155-24621(01), as alleged as Item No. 1.2 in Citation and
22 Notice No. 316961911 issued by the Department of Labor and Industries
23 on July 2, 2014.
- 24 4. On January 3, 2014, North Coast committed a willful violation of
25 WAC 296-874-20072, as alleged as Item No. 1.3 in Citation and Notice
26 No. 316961911 issued by the Department of Labor and Industries on
27 July 2, 2014.
- 28 5. On January 3, 2014, North Coast committed a serious violation of
29 WAC 296-155-24609(1), as alleged as Item No. 2.1a in Citation and
30 Notice No. 316961911 issued by the Department of Labor and Industries
31 on July 2, 2014.
- 32 6. On January 3, 2014, North Coast committed a serious violation of
33 WAC 296-155-24611(2), as alleged as Item No. 2.1b in Citation and
34 Notice No. 316961911 issued by the Department of Labor and Industries
35 on July 2, 2014.
- 36 7. On January 3, 2014, North Coast committed a serious violation of
37 WAC 296-874-20034, as alleged as Item No. 2.2 in Citation and Notice
38 No. 316961911 issued by the Department of Labor and Industries on
39 July 2, 2014.
- 40 8. On January 3, 2014, North Coast committed a serious violation of
41 WAC 296-874-20060, as alleged as Item No. 2.3 in Citation and Notice
42 No. 316961911 issued by the Department of Labor and Industries on
43 July 2, 2014.
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- 1 9. On January 3, 2014, North Coast committed a general violation of
2 WAC 296-155-110(9)(a), as alleged as Item No. 3.1 in Citation and Notice
3 No. 316961911 issued by the Department of Labor and Industries on
4 July 2, 2014.
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6 10. Citation and Notice No. 316961911 of the Department of Labor and
7 Industries dated July 2, 2014 is correct and it is affirmed.

8 Dated: September 7, 2016.

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10 BOARD OF INDUSTRIAL INSURANCE APPEALS

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14 /s/ _____
15 DAVID E. THREEEDY Chairperson

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19 /s/ _____
20 FRANK E. FENNERTY, JR. Member

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**Addendum to Decision and Order
In re North Coast Iron Corp.
Docket No. 14 W1086
Citation & Notice No. 316961911**

Appearances

Employer, North Coast Iron Corp., by AMS Law, P.C., per Aaron K. Owada
Department of Labor and Industries, by The Office of the Attorney General, per Sarah E. Kortokrax and W. Martin Newman

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The employer and Department filed timely Petitions for Review of a Proposed Decision and Order issued on June 7, 2016, in which the industrial appeals judge modified the Department order dated July 2, 2014. The employer filed a reply to the Department's response to employer's Petition for Review on August 30, 2016.

Evidentiary Rulings

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.