Jeld-Wen of Everett

SAFETY AND HEALTH

Amendment of citation

The corrective notice of redetermination may be amended to conform to the evidence absent a showing of prejudice to the employer. **….*In re Jeld-Wen of Everett,* BIIA Dec., 88 W144 (1990)**

"Employee misconduct" defense

In order to establish the affirmative defense of employee misconduct, an employer must show that it has established work rules designed to prevent the violation, has adequately communicated those rules to its employees, has taken steps to discover violations, and has effectively enforced the rules when violations have been discovered. **….*In re Erection Co.* (II), BIIA Dec., 88 W142 (1990); *In re Jeld-Wen of Everett,* BIIA Dec., 88 W144 (1990)**

"Unpreventable employee misconduct" defense is only relevant when an unsafe action or practice of an employee results in a violation. It is not a defense to a machine guarding violation. **….*In re Jeld-Wen of Everett,* BIIA Dec., 88 W144 (1990)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: JELD-WEN OF EVERETT	**)**	**DOCKET NO. 88 W144**
	)	
CORRECTIVE NOTICE OF	**)**	
REDETERMINATION NO. 404600	**)**	**DECISION AND ORDER**

APPEARANCES:

Employer, Jeld-Wen of Everett, dba Nord Door, by
Brian L. Pocock (Withdrawn), and by
Douglas B.M. Ehlke

Employees of Jeld-Wen of Everett, by
none

Department of Labor and Industries, by
The Attorney General, per
Ronald L. Lavigne, Elliott S. Furst and Aaron K. Owada, Assistants

This is an appeal filed by the employer, Jeld-Wen of Everett, on November 7, 1988 from a Corrective Notice of Redetermination No. 404600 issued by the Department of Labor and Industries on October 22, 1988, which affirmed as modified Citation and Notice No. 404600 dated July 22, 1988 and which cited Jeld-Wen of Everett for two general violations and two serious violations of WISHA regulations, with a total penalty assessment of $440.00. **AFFIRMED AS MODIFIED**.

PROCEDURAL AND EVIDENTIARY MATTERS

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on timely Petitions for Review filed on behalf of the employer and the Department of Labor and Industries to a Proposed Decision and Order issued on February 21, 1990 in which the Corrective Notice of Redetermination dated October 22, 1988 was modified to vacate Item Nos. 1 and 2, to vacate Item No. 3 and the penalty assessed therefor, amend Item No. 5 to allege a violation of WAC 296-78-84003(1), and affirm Item No. 5 and the $240.00 penalty assessed therefor, as amended.

In an interlocutory order dated July 5, 1989, our Industrial Appeals Judge assessed costs and attorneys' fees against the Department of Labor and Industries for failure to respond in a timely manner to discovery requests. Following review occasioned by an interlocutory appeal, the Board's Chief Industrial Appeals Judge entered an order on July 18, 1989 which affirmed the Industrial Appeals Judge's order of July 5, 1989 with a reduction of the costs and attorneys' fees assessed from $1,371.85 to $750.00. The Department's tardy response to the employer's request for production of

documents occasioned the motion to compel production of documents. The facts surrounding the motion to compel production of documents, as revealed in the record and the affidavits of the parties, serve as justification for assessment of costs and attorneys' fees pursuant to the provisions of CR 37(a)(4). We affirm our Chief Industrial Appeals Judge's decision to assess the sum of $750.00 against the Department of Labor and Industries as costs and attorneys' fees necessary to the employer's motion to compel discovery.

The Board has also reviewed the evidentiary rulings contained in the Proposed Decision and Order and in the record of proceedings and finds that no prejudicial error was committed and said rulings are hereby affirmed.

DECISION

The issues presented by this appeal and the evidence presented by the parties are accurately and thoroughly set forth in the Proposed Decision and Order. We are in agreement with our Industrial Appeals Judge's resolution of these issues. We have nevertheless granted review in order to address a question frequently raised in the course of WISHA appeals. This is the question of the parties' respective burdens in establishing, or disproving, the defense of "unpreventable employee misconduct." [1] In the absence of Washington appellate decisions on this issue we rely upon federal decisions made in connection with the administration of 29 U.S.C. Sec. 651 et seq., the Occupational Safety and Health Act (OSHA). Decisions reached in different circuits of the U.S. Court of Appeals conflict. There is some confusion and disagreement as to where the burden of establishing or disproving this defense lies. Careful consideration of the federal decisions convinces us that we should follow the line of federal cases which determine this is an affirmative defense and that the burden to establish "unpreventable employee misconduct" rests with the employer. Before we address the burdens related to this defense with regard to Item No. 3, however, we discuss two preliminary issues. These concern the advisability of amending the pleadings to cite different enumerated WAC regulations on Item Nos. 1, 2 and 5, and whether the defense of unpreventable employee misconduct is relevant at all to Item No. 5, regardless of where the burdens lie.

[1] This defense has also been referred to as "isolated occurrence", "isolated incident", "isolated misconduct", and "employee misconduct". While different terms have been used by appellate courts in describing this defense, it does not appear to reflect a substantive difference and we will refer to the defense throughout as "unpreventable employee misconduct".

On June 13, 1988 William Stites was pulled into a moving conveyor belt and crushed to death. After learning of Mr. Stites' death, the Department of Labor and Industries, through two of its safety inspectors, conducted an inspection of Jeld-Wen of Everett's plant. As a result of the inspection, the Division of Industrial Safety and Health at the Department of Labor and Industries issued Citation and Notice No. 404600 on July 22, 1988. This Citation and Notice alleged two general, two serious, and one serious repeated violations of Chapter 296-24 WAC. Following reassumption of jurisdiction, the Department issued a Corrective Notice of Redetermination which affirmed the violations alleged under Item Nos. 1, 2 and 3, vacated Item No. 4, and modified Item No. 5 from a serious repeated violation to a serious violation. Neither of the parties in their Petitions for Review raised any question regarding the vacation of Item Nos. 1 and 2 as ordered by the Proposed Decision and Order. The decision to vacate Item Nos. 1 and 2 is very thoroughly discussed in the Proposed Decision and Order. Accordingly, we will limit our discussion to Item Nos. 3 and 5.

Item No. 5 of the Corrective Notice of Redetermination alleges a serious violation of WAC 296-24-21515 and assesses a penalty of $240.00. In connection with this item, as with Item Nos. 1 and 2, the employer contends that the violations were cited to incorrect WISHA regulations and vacation of the items is therefore required. The Department cited the employer for violations of the general safety regulations, Chapter 296-24 WAC. The employer argues that its business is wood products which brings it under the vertical standards of WAC 296-78-500, et seq. The Department believes this employer is not within the wood products industry as defined by WAC 296-78-500, or in the alternative, the Corrective Notice of Redetermination should be amended to conform to the evidence.

WAC 296-78-500 states, in relevant part:

> . . . The chapter 296-78 WAC shall apply to and include safety requirements for all installations where the primary manufacturing of wood building products takes place .... These operations shall include but are not limited to log and lumber handling, sawing, trimming and planing, plywood or veneer manufacturing, canting operations, waste or residual handling, operation of dry kilns, finishing, shipping, storage, yard and yard equipment, and for power tools and affiliated equipment used in connection with such operation . . .

While the evidence shows that Jeld-Wen is a "hybrid" operation in that its plants include operations that are not mentioned within WAC 296-78-500, many of the operations specifically listed by that regulation are performed at Jeld-Wen. In fact, the operations performed within the Jeld-Wen cutting

department are included in the WAC 296-78-500 list of "primary manufacturing of wood building products" operations. These are the operations of lumber handling, sawing and trimming. Immediately adjacent to the cutting department were operations of planning and drying lumber in dry kilns which also fit within the WAC 296-78-500 list. Under the circumstances, Jeld-Wen is a "woodworking" plant.

WAC 296-78-500(2) states, in relevant part:

> This standard shall augment the Washington state general safety and health standards, . . . which are applicable to all industries governed by chapter 80, Laws of 1973, Washington Industrial Safety and Health Act. In the event of any conflict between any portion of this chapter and any portion of any of the general application standards, the provisions of this chapter 296-78 WAC, shall apply.

We note this provision mirrors what our courts have described as "a basic rule of statutory construction .... When there is a conflict between one statutory provision which treats a subject in a general way and another which treats the same subject in a specific manner, the specific statute will prevail." Pannell v. Thompson, 91 Wn.2d 591, 597, 589, P.2d 1235 (1979).

In alleged violation No. 1, the cited regulation, WAC 296-24-020(1)(c), contains essentially the same language as WAC 296-78-515(1)(c). In alleged violation No. 2, the cited regulation, WAC 296-24-040(1)(a), contains essentially the same language as WAC 296-78-525(1)(a). In alleged violation No. 5, the cited regulation, WAC 296-24-21515, contains essentially the same language as WAC 296-78-84003(1). (There is no vertical regulation within Chapter 296-78, WAC, which corresponds to the general regulations cited within alleged violation No. 3.) Obviously, if no conflict exists both regulations are applicable to this employer. Equally obvious is that the employer may not be cited simultaneously under both provisions. We interpret the rules regarding the applicability of specific regulations as opposed to general regulations to mean that when either a specific regulation or a general regulation could be cited, the specific regulation should be cited. This would be appropriate pursuant to the language in WAC 296-78-500(2) that the vertical standards "shall augment" the general safety and health standards (Chapter 296-24, WAC). As to alleged violation No. 3, inasmuch as there is no corresponding vertical regulation within Chapter 296-78 WAC, the citation of the general regulation by the Department was proper.

The fact that the Department incorrectly cited the general regulations in this matter does not require that the three violations involved be vacated. Instead, we may amend the Corrective Notice of

Redetermination to conform to the evidence presented at the hearing. This may be done on the request or motion of the Department. Such a request was made in the Department's November 22, 1989 letter/memorandum of authorities. Such an amendment is specifically allowed by CR 15(b) which states that, "Such amendment of the pleadings as may be necessary to cause them to conform to the evidence . . . may be made upon motion of any party at any time, even after judgment; . . . ."

The practice of a judicial (or quasi-judicial) amendment of a safety citation is recognized by the federal courts in OSHA matters. See, Donovan v. Williams Enterprises, Inc., 744 F. 2d 170 (D.C. Cir. 1984). Administrative pleadings are very liberally construed and very easily amended. National Realty & Constr. Co. v. OSHRC, 489 F.2d 1257 (D.C.Cir.1973). The question is whether or not the employer is prejudiced by the amendment of the citation. There is no indication of any prejudice to Jeld-Wen if the Department's Corrective Notice of Redetermination is amended in the ways indicated. The regulatory language involved is essentially the same. The issues are the same. There is no new evidence which would need to be produced. Amending the Corrective Notice of Redetermination does not affect the affirmative defenses available to the employer. Most important, the employer had notice of the subject matter of the violations from the Corrective Notice of Redetermination, even though it cited incorrect regulations. Therefore, Corrective Notice of Redetermination No. 404600 is amended so that violation No. 1 alleges a general violation of WAC 296-78-515(1)(c); violation No. 2 alleges a general violation of WAC 296-78-525(1)(a); and violation No. 5 alleges a serious violation of WAC 296-78-84003(1).

WAC 296-78-84003(1), the regulation cited in amended Item No. 5, states:

> Construction, operation, and maintenance of conveyors shall be in accordance with American National Standard B20.1-1957, Safety Code for Conveyors, Cableways and related equipment.

Section 6 of the ANSI Standard incorporated by reference in the WAC regulation reads in part:

> Safety guards shall be provided on all types of equipment at driving mechanisms, terminals and take-ups where the unguarded parts may constitute a hazard to the operating personnel. (Emphasis added).

Exhibit No. 33.

Jeld-Wen first argues that the ANSI standard is for design use only and is merely voluntary. It is true that these standards were intended for design only and were to be voluntary. However, when the Department incorporated this standard into WAC 296-78-84003(1) it became mandatory for all employers. The regulation uses the mandatory "shall" which removes any voluntary aspect to the use

of the ANSI standard. Crown Cascade, Inc. v. O'Neal, 100 Wn.2d 256, 261, 668 P.2d 585 (1983). Also, the regulation adopting the ANSI standards indicates that its scope includes "[c]onstruction, operation, and maintenance" of conveyors. Therefore, these processes, and not just conveyor design, are covered by the ANSI standard.

As the manner of death of William Stites amply illustrates, the unguarded nip point between the conveyor's return strand and the end spool is a hazard from which a substantial probability of death or serious physical harm could result. The employer contends that the nip point was "guarded by location" in that it was 11 feet, 6 inches from the offbearer's (William Stites') work station. The ANSI standard recognizes the concept of guarding by location:

> Pulleys, Sprockets, Sheathes, Drums and Blocks. All of these when located in a working area where operators (other than maintenance men) are present, shall be arranged to prevent the possibility of injury due to hands or parts of clothing being caught between the belt and pulley . . . When these units are located in areas where authorized personnel only have access, then such arrangements of frames or guards will not be required if provisions are made to stop and lock out the power before work is performed on the conveyor . . . .

Section 6-602, ANSI Standards, Exhibit No. 33. It should be noted, however, that guarding by location is in reference to "authorized personnel only," such as maintenance, which cannot be read to mean workers at nearby work stations.

WISHA is remedial legislation designed to protect the health and safety of all workers. See, RCW 49.17.010. As a result, any language or safety standards enacted thereunder should be accorded an interpretation to further these purposes. See, e.g., Stute v. P.B.M.C., Inc., 114 Wn.2d 454, 464, 788 P.2d 545 (1990). We conclude that the employer had knowledge of the hazard created by the unguarded nip point. The location of the conveyor itself and of the work stations indicates that the nip point created at the contact point between the rip saw conveyor's return strand and the end spool was intended to be guarded by location. This fact allows us to impute knowledge to the employer that the nip point in question (not completely guarded by a physical barrier before the accident) was a hazard.

Jeld-Wen knew that employees would be around the end spool during the course of their duties. The fact that the employees could be nearby is sufficient to show employer knowledge that the nip point at that end spool was no longer guarded by location from all employees. Mr. Negrete admitted that wood might accumulate by the end spool of the conveyor belt. Mr. Phillips testified that

work areas around the conveyor belt included areas where bins of wood are located. In some of the photos used as exhibits (Exhibit Nos. 15, 17, 35 and 36) bins are seen to be adjacent to the end spool. Mr. Lewis noted that wood in bins was stacked near the northern end spool, which is where the accident occurred. Mr. Lewis also noted that a full-time employee would have to clear jams from around the end spool. Mr. Beckman testified that isolation means putting the potential hazardous place out of the normal work path and out of a place where people are passing. As indicated by Mr. Lewis, if an employee can get into a nip point, that nip point is not guarded by isolation. Although Mr. Stites had to get in an unusual position to be caught in the nip point, he could have come in contact with it while reaching for wood jammed in the return strand. He did not have to disable or remove a physical barrier in order to contact the nip point.

The fact that this conveyor was not cited by the Department in an earlier inspection does not prove that the employer lacked knowledge of the unsafe condition. All it means is that, if a mistake was made by the Department at one or another of these inspections, that mistake was not citing the violation at the earlier inspection.

No affirmative defense is available to relieve the employer of its liability for this violation. The affirmative defense of "unpreventable employee misconduct," is not a defense to a machine guarding violation. That sort of an affirmative defense is relevant only when an unsafe action or practice of an employee results in a violation. The hazard which constitutes violation No. 5 was present regardless of employee conduct or the occurrence of the fatal accident which resulted in the inspection.

The employer presented no evidence disputing the amount of the penalty calculated and proposed by the Department for violation No. 5. The Department's calculation of the gravity of the violation as well as the type and amount of adjustments to the penalty are reasonable and will not be disturbed. Accordingly, the violation under Item No. 5 as amended to allege a serious violation of WAC 296-78-84003(1) and assessing a $240.00 penalty for this violation is affirmed as modified.

This leaves for resolution Item No. 3, which alleged a serious violation of WAC 296-24-15007 and assessed a penalty of $200.00. WAC 296-24-15007 states:

> All power-driven machinery shall be stopped and brought to a complete standstill before any repairs or adjustments are made or pieces of material or refuse removed, except where motion is necessary to make adjustment.

The parties agree that William Stites reached into the moving return strand of the rip saw conveyor, in violation of this regulation. The evidence shows that this unsafe action by Mr. Stites was a hazard to

him from which arose a substantial probability that death or serious physical harm could -- and unfortunately did -- result. However, the employer contends that it should not be cited for a serious violation of this regulation because the Department did not prove Jeld-Wen had actual or constructive knowledge of this unsafe practice. Jeld-Wen argues the employee's misconduct is therefore a defense to such a violation.

Unlike many violations of specific safety regulations, this violation involves an unsafe action or practice of an employee. RCW 49.17.110 recognizes that an employee must be responsible for his or her own safety. However under WISHA, the employer, not the employee, is penalized for an unsafe act or practice. The question thus becomes, to what extent and under what circumstances should an employer be liable for violations of WISHA regulations resulting from the unsafe actions, conduct or practices of its employees.

The federal courts have tended to focus on two aspects of these situations: (1) whether the employer lacked knowledge of the employee's unsafe conduct; or (2) whether an unsafe act by an employee may constitute the affirmative defense of "unpreventable employee misconduct". The choice of focus as between these two options has significantly affected the burden of proof as well as the type of proof required. Furthermore, the federal appellate courts, ruling on this issue, have arrived at varying positions. In Brennan v. OSHRC & Raymond Hendrix d/b/a Alsea Lumber Co., 511 F.2d 1139, 1142-1145 (9th Cir.1975), the court held the employer's knowledge of a violation is an element of both serious and nonserious violations and the Secretary of Labor has the burden to make at least a prima facie case of employer knowledge before the burden shifts to the employer. See also, National Steel and Shipbuilding Co. v. OSHRC, 607 F.2d 311, 315-316 (9th Cir.1979). This case primarily dealt with the definition of "willful" in enhanced penalty cases. However, in footnote number 6 the court clearly reaffirmed the just-stated rule from Brennan, supra.

Central of Georgia Railroad Co. v. OSHRC, 576 F.2d 620 (5th Cir.1978) dealt primarily with an employer's contention that it had no control of the premises where a violation affecting its employees occurred. The court did, however, agree with the allocation of burdens by the Occupational Safety and Health Review Commission (OSHRC). The Secretary has the initial burden only of establishing a prima facia case that a violation occurred which ordinarily entails a showing that (1) a specific standard applies, (2) there was failure to comply with the standard, and (3) the cited employer's employees had access to the hazard. The burden then shifts to the employer to rebut this prima facie case or to

establish an affirmative defense such as lack of control, protection by alternate measures or lack of employer knowledge, whether actual or constructive. Id. at 624.

In Brock v. L.E. Myers Co., High Voltage Div., 818 F.2d 1270 (6th Cir.1987), cert. denied 484 US 989, 108 S. Ct. 479,[2] the court stated that the proper focus in an employee misconduct case should be upon the effectiveness of the employer's implementation of its safety program. The defense is an affirmative defense: once the Secretary establishes a prima facie case of an employer's failure to implement an effective safety program, then the employer has the burden of proving that the violation was caused by unforeseeable employee misconduct rather than inadequacies in the enforcement of its safety program. 818 F.2d. at 1277. In so holding the court relied upon other cases which it characterized as holding that an allegation of unpreventable ("unforeseeable") misconduct constitutes an affirmative defense to be pleaded and proved by the employer. In sum, the court held that the burden is upon the employer, once the Secretary has made out a prima facie case of a violation of OSHA. Id. at 1276.

Review of decisions considering the issue of "unpreventable employee misconduct" convinces us that the appropriate rule to follow is that set forth by the U.S. Court of Appeals, Sixth Circuit, in Brock v. L.E. Myers Co., supra. This is the approach adopted by the majority of the courts which have considered this issue and places the burden of proof on the employer, once a prima facie case has been established by the citing authority. Thus, if the Department of Labor and Industries has established employer awareness of a potentially preventable hazard involving employee action, the burden of proof shifts to the employer to establish the defense of "unforeseeable employee misconduct". To place this burden on the Department of Labor and Industries, as would be done if we followed the opinions expressed by a substantial minority of the federal courts, would be inconsistent with the legislative purpose of the Washington Industrial Safety and Health Act.

RCW 49.17.010 sets forth the purpose of the Washington Industrial Safety and Health Act, which includes the provision of"... safe and healthful working conditions for every man and woman

[2]Justice White, with Justice O'Connor, dissented from this denial of certiorari. The dissent provides a concise account of contrasting views of the Circuits on this issue: (1) the Sixth Circuit view as described by Brock; (2) that of other Circuits that the employer bears the burden of proving it has implemented workplace safety rules that are effectively enforced without imposing an initial burden on the Government with respect to the defense; and, (3) that of yet other Circuits which places on the Government the burden of proving that the accident was not the result of unforeseeable employee misconduct. L.E. Myers Company, High Voltage Division v. Secretary of Labor, 484 U.S. 989, 108 S.Ct. 479 (1987).

working in the State of Washington ...." That section further states the legislative intent to do this by creating an industrial safety and health program which enforces standards equal to or exceeding those prescribed by the Occupational Safety and Health Act. Imposing additional elements of proof on the Department of Labor and Industries would not be consistent with this broad general purpose expressed by the legislature.

RCW 49.17.180(6), which otherwise defines serious violations, provides that, where a violation involves a substantial probability that death or serious physical harm could result, "a serious violation shall be deemed to exist ... unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." A reasonable interpretation of the referenced statute leads us to the conclusion that it does not impose upon the Department of Labor and Industries the unreasonable burden of proving a negative. The burden of proving "unpreventable employee misconduct" necessarily should rest with the employer. The employer has the necessary knowledge of workplace and work practices and is in the best position to establish the elements of this defense.[3] See Brock, supra, 818 F.2d. at 1277.

The burden faced by the employer in establishing this defense, which has also been referred to as "isolated occurrences," "isolated incident," "isolated misconduct," and "employee misconduct," is set forth in the Occupational Safety and Health Review Commission decision Jensen Construction Company, 7 OSHC 1477 (1979). In that decision, the Commission set forth a four-part test which must be met in order for an employer to successfully establish the unpreventable employee misconduct defense.

> In order to establish the affirmative defense of unpreventable employee misconduct, an employer must show that it has established work rules designed to prevent the violation, has adequately communicated these rules to its employees, has taken steps to discover violations, and has effectively enforced the rules when violations have been discovered.

Jensen Construction Company, supra, at 1479.[4]

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[3]For a brief but comprehensive discussion of this topic and citation of additional federal cases, see Rothstein, Occupational Safety and Health Law, 2d Ed., § 117, at 147 (1983).

[4]Sec. 117 of Rothstein at 143 through 147, contains a concise but thorough discussion of the elements contained in Jensen Construction Company, together with appropriate citations to federal decisions elucidating the various elements.

Careful consideration of the facts established in this case in light of the four-part test set forth in Jensen Construction Company convinces us that the unsafe actions of Mr. Stites, for which Jeld-Wen was cited under Item No. 3, constitute "unpreventable employee misconduct". As established by the evidence which was presented in connection with the violations alleged under Item Nos. 1 and 2, Jeld-Wen had established work rules designed to prevent this type of violation, and had adequately communicated these rules to its employees. The record clearly establishes that Jeld-Wen's No. 1 safety rule, "Do not reach into machinery while it is running " had been adequately communicated to its employees. A regular program of supervision of temporary employees, such as Mr. Stites, consisted of a reasonable manner in which to discover violations of the work rules and safety program, and had revealed no prior violations of this standard.

While there have been no prior violations to test the effectiveness of the employer's enforcement of its No. 1 safety rule, it is clear from the testimony of Bob Phillips, a supervisor, that any violation discovered would have been dealth with effectively and severely. The record establishes that Jeld-Wen, through the use of safety training, communication of work rules, and adequate supervision, took all the steps which were feasible to prevent the type of employee misconduct which resulted in Mr. Stites' death. Jeld-Wen of Everett has successfully established the required elements set forth in Jensen Construction Company, supra, and has established the affirmative defense of "unpreventable employee misconduct". Accordingly, the serious violation of WAC 296-24-15007 alleged in Item No. 3, and the $200.00 penalty assessed, are vacated.

After consideration of the Proposed Decision and Order, the Petitions for Review filed thereto on behalf of the Department of Labor and Industries and the employer, the employer's "Memorandum in Response to Division's Petition for Review (Limited to Item 3)," and a careful review of the entire record before us, we are persuaded that Item No. 5 of the Corrective Notice of Redetermination No. 404600, (as amended to cite the appropriate safety standard) is correct and should be affirmed. Item Nos. 1, 2, and 3 of the Corrective Notice of Redetermination are vacated.

FINDINGS OF FACT

1. On July 1, 1988 an inspection pursuant to the Washington Industrial Safety and Health Act was held at the Jeld-Wen of Everett plant in Everett, Washington. On July 22, 1988, the Department issued Citation and Notice No. 404600 which alleged the occurrence of two serious, two general and one serious repeat violations with penalties totaling $2,080.00. On July 27, 1988, the employer appealed and the Department reassumed jurisdiction. On October 22, 1988, the Department issued a

Corrective Notice of Redetermination which affirmed as modified Citation and Notice No. 404600 and cited the employer for two general and two serious violations with total penalties equalling $440.00. This Corrective Notice of Redetermination was mailed by the Department on October 24, 1988 and received by the employer on October 26, 1988. On November 7, 1988, the employer filed a notice of appeal with the Board of Industrial Insurance Appeals. This Board assigned the appeal Docket No. 88 W144 and directed that further proceedings be held.

2. Jeld-Wen of Everett is an employer of over 100 employees involved in the manufacture of doors using "green" lumber as the primary raw material. As part and parcel of the process of manufacturing doors, the Jeld-Wen plant is involved in the primary manufacturing of wood building products including the use of operations involving lumber handling, sawing, trimming and the operation of dry kilns and other equipment. Jeld-Wen's cutting department is involved in sawing and trimming lumber.

3. William Stites was an employee of Express Services, Inc., an agency that placed temporary workers at many different businesses, including Jeld-Wen of Everett. Mr. Stiles was paid by Express Services, Inc., but he worked at the Jeld-Wen plant and his duties were prescribed by Jeld-Wen. Jeld-Wen foremen supervised him. He received general safety training from Express Services, Inc., and Jeld-Wen, and specific on-the-job training from Jeld-Wen.

4. As of June 1988, the Jeld-Wen of Everett safety orientation program included on-the-job instructions on the safe use of powered materials handling equipment and machine tool operations. The Department manager and regular or full-time employees would identify safe practices and show new workers the locations of shut-off and lock-out switches. Temporary workers were trained only in these aspects of particular jobs because they were expressly not allowed to clear jams in machinery or otherwise repair machinery. The temporary workers at Jeld-Wen were identifiable by the requirement for them to wear different colored hardhats than the regular employees. The temporary employees at the Jeld-Wen cutting department did not use toxic materials and were not involved in the operation of utility systems. Jeld-Wen's safety orientation program was given to the temporary workers prior to their assignment to their jobs and involved supervision and on-going training through at least the first full day of their work.

5. The accident prevention program at Jeld-Wen of Everett as practiced by the cutting department involved providing new workers, before they were assigned to their jobs, with the company's safety rules and procedures for filling out accident reports, having them read these rules and procedures after which they were asked if they had any questions and the rules were discussed. These documents included how to report unsafe conditions and practices. These safety rules and procedures were not read to the new workers. The cutting department supervisor pointed out and

identified, among other things, fire extinguishers, emergency and fire exits from the building and hearing protection equipment from his second floor office, where the entire cutting department could be seen by the employees. New workers were not given a complete physical tour of the cutting department. Jeld-Wen had an active safety committee which held monthly safety meetings wherein safety committee members would talk about specific safety-related matters with the other employees within the plant.

6. "Do not reach into machinery while it is running..." is Jeld-Wen of Everett's No. 1 safety rule, and is contained within the safety pamphlet given to new employees.

7. On June 13, 1988, William Stites reached into the return strand of the rip saw conveyor belt and became caught in a nip point where the return strand of the belt came into contact with the end spool. Mr. Stites was pulled into the conveyor and crushed to death.

8. William Stites' action of reaching into the rip saw conveyor's moving return strand violated Jeld-Wen's No. 1 safety rule.

9. William Stites' action of reaching into the rip saw conveyor's moving return strand was a unique instance of an unsafe practice by an employee at Jeld-Wen which could not have been foreseen by the employer with the exercise of reasonable diligence.

10. The nip point created where the rip saw conveyor's return strand and end spool met did not have a physical guard or other barrier sufficient to prevent injury if hands or parts of clothing became caught therein.

11. The duties of the rip saw conveyor offbearer include removing pieces of wood of various sizes from the working strand of the rip saw conveyor, stacking them on pallets or bins and moving these pallets or bins as needed. Occasional clean-up duties were required. The pallets or bins loaded with wood by the offbearer could be moved by him or other employees to a location adjacent to the nip point created by the contact of the end spool and the return strand of the conveyor.

12. Employees of Jeld-Wen would have to clear wood jams in the return strand located near the end spool of the rip saw conveyor at Jeld-Wen.

13. The nip point created by the contact of the rip saw conveyor's end spool and its return strand was not physically guarded or adequately guarded by location.

14. The nip point where the return strand of the rip saw conveyor meets the end spool created a hazard to employees at Jeld-Wen of Everett from which there is a substantial probability that death or serious physical harm could result.

15. With the exercise of reasonable diligence, Jeld-Wen of Everett should have known of the presence of the unsafe condition created by the

inadequately guarded nip point created where the rip saw conveyor's return strand came in contact with the end spool.

16. As of June 13, 1988, it was technologically feasible for the nip point created by the contact of the rip saw conveyor's return strand with its end spool to be adequately guarded with physical barriers.

17. The severity of any industrial accident caused by the inadequate guarding of the rip saw conveyor's nip point is most adequately rated as a "5" on a scale of 1 to 5, where "5" indicates the most severe type of injuries. The probability of an accident occurring due to the inadequate guarding of the nip point on the rip saw conveyor is most adequately rated as a "1" on a scale of 1 to 5, where "1" equals a condition where an accident is least likely to occur.

18. In relation to the machine guarding violation (violation No. 5), Jeld-Wen of Everett's good faith and history is most adequately rated as good. The number of employees exposed to the inadequately guarded nip point on the rip saw conveyor was between one and four.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the subject matter and parties to this proceeding.

2. Jeld-Wen of Everett is an "employer" within the meaning of the Washington Industrial Safety and Health Act, that is involved in the primary manufacture of wood building products such that the safety standards of Chapter 296-78, WAC, are applicable.

3. The appropriate standard to be cited in violation No. 1 in Corrective Notice of Redetermination No. 404600 is WAC 296-78-515(1)(c).

4. The appropriate standard to be cited in violation No. 2 in Corrective Notice of Redetermination No. 404600 is WAC 296-78-525(1)(a).

5. The appropriate standard to be cited in violation No. 5 in Corrective Notice of Redetermination No. 404600 is WAC 296-78-84003(1).

6. William Stites' action of reaching into the moving return strand of the rip saw conveyor was an unsafe practice, in violation of RCW 49.17.110.

7. The on-the-job training program in occupational safety and health established by Jeld-Wen of Everett and practiced within its cutting department, satisfies WAC 296-78-515(1)(c).

8. The accident prevention program established by Jeld-Wen of Everett, and practiced within its cutting department, satisfies WAC 296-78-525(1)(a).

9. Violation Nos. 1 and 2 as cited within Corrective Notice of Redetermination No. 404600, and as amended within this decision and order, represent separate duties of the employer involving different aspects of safety training. Citation to both WAC 296-78-515(1)(c) and -515(1)(a) does not constitute a double citation for the same act, condition or hazard.

10. William Stites' unsafe action of reaching into the moving return strand of the rip saw conveyor was not foreseeable and preventable by Jeld-Wen of Everett.

11. The rip saw conveyor at the Jeld-Wen of Everett plant was not operated in accordance with American National Standards Institute B20.1-1957, Safety Code for Conveyors, Cableways and related equipment, in violation of WAC 296-78-84003(1).

12. Item Nos. 1 and 2, as amended to reflect the appropriate safety standard, of Corrective Notice of Redetermination No. 404600 are vacated.

13. Item No. 3, and the penalty therefor, of Corrective Notice of Redetermination No. 404600 is vacated.

14. Item No. 5, and the $240.00 penalty assessment therefor, of Corrective Notice of Redetermination No. 404600 is amended to include the appropriate safety standard, and, as amended, is affirmed.

15. Corrective Notice of Redetermination No. 404600 issued by the Department of Labor and Industries on October 17, 1988, is affirmed as modified herein.

It is so ORDERED.

Dated 22nd day of October, 1990.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

/s/_____
PHILLIP T. BORK Member