

## **Ledcor Industries**

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### **SAFETY AND HEALTH**

#### **Order on agreement of parties**

In an employer's appeal from a WISHA citation, the Board will decline to enter an order on agreement of parties if the employees of the employer object to the entry of the order and the objection is made in good faith and not for an improper purpose. ....*In re Ledcor Industries*, BIIA Dec., 91 W058 (1993)

Scroll down for order.

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

1     **IN RE: LEDCOR INDUSTRIES**                     )     **DOCKET NO. 91 W058**  
2   )  
3     **CITATION AND NOTICE NO.**                     )  
4     **111450060**   )     **ORDER ON REMAND FROM SUPEROR COURT**  
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6 **APPEARANCES:**

7             Employer, Ledcor Industries, by  
8             Preston Thorgrimson et al, per  
9             William T. McKay  
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11             Employees of Ledcor Industries, by  
12             International Brotherhood of Electrical Workers No. 46 and  
13             International Association of Bridge, Structural and Ornamental  
14             Iron Workers Local No. 114, by  
15             Schwerin, Burns, Campbell and French, per  
16             Cheryl A. French  
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18             Department of Labor and Industries, by  
19             Office of the Attorney General, per  
20             Elliott S. Furst, Assistant  
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22             This is an appeal filed by the employer, Ledcor Industries (Ledcor), on March 15, 1991, from  
23             Citation and Notice No. 111450060 issued by the Department of Labor and Industries (Department) on  
24             February 21, 1991. In its Citation and Notice, the Department alleged that Ledcor had committed two  
25             willful, two serious, and two general repeat violations of regulations promulgated under the authority of  
26             the Washington Industrial Safety and Health Act (WISHA). The Citation and Notice assessed  
27             penalties in the sum of \$50,780.00 and set an abatement date of February 13, 1991 for all violations.  
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29             The Department and Ledcor proposed to settle the appeal by requesting the Board to enter an  
30             Order on Agreement of Parties which would modify the Citation and Notice to: reduce each of the two  
31             alleged willful violations to serious violations and reduce each of the associated penalties; vacate the  
32             first of the alleged serious violations; reword the second alleged serious violation and increase the  
33             penalty therefor; affirm each of the two alleged general repeat violations; and, thus, assess a total  
34             modified penalty of \$10,900.00. This proposed settlement is opposed by employees of Ledcor  
35             through two unions and their counsel.  
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1 On June 5, 1992, this Board entered its Order Denying Motion to Enter Order on Agreement of  
2 Parties. The case was referred to our mediation and hearing process for further proceedings. The  
3 Department and Ledcor sought interlocutory review of our June 5, 1992 order in the Superior Court for  
4 Thurston County, Cause Nos. 92-2-00624-1 and 92-2-00616-0. On January 6, 1993, the Honorable  
5 Richard A. Strophy entered an Agreed Order remanding this matter to the Board and ordering in part:  
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9 4. . . . On remand, the Board shall consider the justification of the  
10 employer and the Department for entering into the agreement, and it shall  
11 consider the bases for the Unions' objection to that agreement as it relates  
12 to the facts of the case and the law relating to enforcement of penalties  
13 and assessments of penalties, or classification of violations. The Board's  
14 representative shall allow or direct Ledcor and the Department to present  
15 facts and arguments supporting Board approval of the settlement and  
16 shall allow or direct the Unions to have the opportunity to rebut or impeach  
17 opposing arguments or evidences.  
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19 5. The Board shall issue Findings of Fact and Conclusions of Law as to  
20 each determination ordered in Paragraph No. 4, above. If the Board finds  
21 that the Agreement is in accordance with the law and the facts, the Board  
22 shall issue an order in conformity with the agreement. If the Board finds  
23 that the agreement is not in accordance with the law and the facts, the  
24 Board shall schedule further proceedings.  
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26 Pursuant to the court's order, this Board, en banc on March 5, 1993, heard evidence and  
27 argument in favor of, and in opposition to, the proposed settlement. After careful consideration of the  
28 court's order, the evidence presented, the arguments of counsel, and the records and files herein, we  
29 decline to enter the Order on Agreement of Parties requested by the Department and Ledcor in their  
30 proposed settlement.  
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33 Major points of disagreement of the employees with the proposed settlement concern the  
34 proposed reduction of the two alleged violations, now characterized as "willful", to "serious" violations  
35 with associated lesser total penalties. The employees contend that each of these same two alleged  
36 violations are supportable under the facts and the law and properly characterized as "willful". One of  
37 these charged violations alleges that Ledcor allowed equipment to come within 10 feet of an  
38 energized electrical power line rated 50 kv or below, in violation of WAC 296-155-525(2)(e)(i). The  
39 other of these relates to the attendant fatality accident and charges that Ledcor moved equipment  
40 involved in an immediate or probable fatality accident prior to release of the equipment by the  
41 Department's safety inspector, in violation of WAC 296-24-020(3)(b).  
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1 Ledcor and the Department argued that the proposed settlement reached between them is  
2 founded in part on the risk that one or both of these violations may be vacated or reduced to "serious"  
3 should Ledcor be afforded a full hearing on the merits. The unions, however, presented actual prima  
4 facie evidence at the March 5, 1993 proceeding which was supportive of each of these two violations  
5 as cited under respective sections of the Washington Administrative Code and also supportive of the  
6 characterization of each of the alleged violations as "willful" under RCW 49.17.180. In addition, the  
7 unions presented further offers of proof argued to be supportive of the violations as cited. Therefore,  
8 in response to the Superior Court's directive, we cannot find that the agreement between Ledcor and  
9 the Department is in accordance with the law and the facts, even when considering only the actual  
10 evidence presented. The Superior Court order indicates we should also give attention to additional  
11 circumstances surrounding the proposed settlement, including the other justifications for, and bases of  
12 opposition to, the proposed settlement as raised by the parties. The Department expressed a belief  
13 that the total penalty assigned in the proposed settlement may be greater than the amount found if the  
14 case were fully heard. It argues the proposed settlement might therefore better deter future violations.  
15 The unions responded with evidence and additional offers of proof to the effect that the "willful"  
16 characterizations, which the Department would abandon in the proposed settlement, provide an  
17 additional economic deterrent beyond any specified penalty. This is due to the disadvantage in  
18 competitive bidding for major construction contracts which inheres in having a history of "willful"  
19 violations.

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22 The Department also stated that the proposed settlement furthers efficient use of limited  
23 Department litigation resources. Similarly, Ledcor indicated its interest in limiting litigation costs,  
24 including attorney fees and the diversion of employee and management resources from the ongoing  
25 business of the firm. From their conduct in the March 5, 1993 proceeding, it appears that the  
26 attorneys and representatives of the employees are prepared, capable and otherwise motivated to  
27 adequately litigate their position at any future hearing, thus leaving the Department free to commit  
28 whatever portion of its litigation resources it might consider appropriate to the hearings process.

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30 We assume that direct and indirect costs of further litigation operate so as to provide all parties  
31 some motivation to reach an otherwise acceptable settlement if possible. The Department and Ledcor  
32 had an opportunity for bilateral settlement of this matter, over any protest of the employees, and  
33 thereby the opportunity to avoid further litigation costs, prior to the Department relinquishing its original  
34 jurisdiction by transmittal of Ledcor's appeal to the Board where the employees can participate as a  
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1 formal party. It is also true that the Department and Ledcor presented their signed agreement to the  
2 Board over employee objection to that agreement without having first requested mediation services  
3 from the Board to determine if a compromise agreement between all parties could be reached. Each  
4 party has expended further resources in litigation in an effort by the Department and Ledcor to obtain  
5 the Board's approval of an agreement over the objection of the employees.  
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9 We cannot say that litigation costs should be a significant factor in this case in determining  
10 whether, based on the law and the facts, an order should issue from this Board on the proposed  
11 bilateral agreement between the Department and Ledcor over employee objection. Nor is the  
12 Department's reluctance to expend further resources a significant factor in light of the obvious  
13 willingness and preparedness of the employees to go forward with evidence in support of the two  
14 "willful" violations as alleged in the Citation and Notice.  
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18 Finally, Ledcor has asserted that union objection to the proposed settlement is in part  
19 collaterally motivated by the propagandistic goal to harm or to gain advantage in dealings with Ledcor,  
20 including those involving present and potential Ledcor contractors. Nonetheless, as indicated earlier,  
21 the unions presented evidence that the "willful" characterization of violations as cited by the  
22 Department promotes economic deterrence against further safety violations. In any event, both  
23 Ledcor and the unions agree that their difference over whether two of the violations were properly  
24 characterized as "willful" is a significant point of dispute, both factually and legally. The modification  
25 which the agreement between Ledcor and the Department would make to the Citation and Notice  
26 must be viewed as substantial.  
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30 We have a strong interest in ensuring that all parties are fairly and effectively heard in both our  
31 mediation and hearings processes once this Board is vested with jurisdiction over a WISHA appeal.  
32 We also believe, as stated, in our earlier order of June 5, 1992, that objections made by employees to  
33 the entry of an Order on Agreement of Parties in a WISHA appeal "must be made in good faith and not  
34 for an improper purpose, . . . ." Order Denying Motion to Enter Order on Agreement of Parties, at p. 4,  
35 l. 27 to p. 5, l. 1.  
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39 We have followed the directive of the Superior Court with the belief stated above also in mind.  
40 The belief is consistent with that directive. Upon considering the evidence and arguments presented  
41 by the parties and our files in this case, we cannot find that the bilateral agreement between the  
42 Department and Ledcor is in accordance with the law and the facts as presented to us. Pursuant to  
43 RCW 51.52.095(1) we cannot enter or issue an agreed order under such circumstances. We would  
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1 further note that the point of disagreement is over substantial, rather than trivial, differences with the  
2 proposed agreement, and the objection of the unions is, in fact, founded both upon fact and law.  
3 Although the stated justifications for the agreement are not otherwise improper if taken alone, it is  
4 likewise true that the unions have presented good faith, proper bases and motivations for their  
5 objection to an order in conformity with the agreement.  
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9 We do not otherwise comment upon the appropriateness of the agreement proposed by the  
10 Department and Ledcor. Nothing in this order should prejudice the merits of Ledcor's appeal from the  
11 Citation and Notice issued by the Department. With that understanding, and solely in accordance with  
12 the order of the Superior Court, we make the following:  
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### 14 **FINDINGS OF FACT**

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16 1. On February 21, 1991, the Department of Labor and Industries issued  
17 Citation and Notice No. 111450060, under the authority of the Washington  
18 Industrial Safety and Health Act (WISHA), which alleged that the  
19 employer, Ledcor Industries (Ledcor), had committed willful violations of  
20 WAC 196-24-020(3)(b) and WAC 296-155-525(2)(e)(i), serious violations  
21 of WAC 296-155-025(1)(f)(iii) and WAC 296-155-040(4)(c), and general  
22 repeat violations of WAC 296-155-400(1)(j) and 296-155-400(1)(i), and  
23 which assessed penalties in the total sum of \$50,780.00 and set an  
24 abatement date of February 13, 1991 for all violations.  
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26 On March 15, 1991, Ledcor filed an appeal with the Safety Division of the  
27 Department from Citation and Notice No. 111450060. The Department  
28 forwarded the appeal to this Board on April 5, 1991. The appeal was  
29 assigned Docket No. 91 W058.

30 The Department and Ledcor submitted a proposed agreement to the  
31 Board. Ledcor's employees through two unions, objected to the  
32 agreement. The Department and Ledcor requested this Board to issue an  
33 Order on Agreement of Parties in this appeal in conformity with the  
34 bilateral agreement between the Department and Ledcor. On June 5,  
35 1992 this Board entered an Order Denying Motion to Enter Order on  
36 Agreement of Parties. The Department and Ledcor sought interlocutory  
37 review of this Board's June 5, 1992 order in the Superior Court for  
38 Thurston County, Cause Nos. 92-2-00624-1 and 92-2-00616-0. On  
39 January 6, 1993, the Honorable Richard A. Strophy, entered an Agreed  
40 Order which remanded this matter to the Board to conduct further  
41 proceedings and to issue a further order, including Findings of Fact and  
42 Conclusions of Law regarding the Order on Agreement of Parties  
43 requested by the Department and Ledcor should be entered by the Board.  
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2. The Department and Ledcor entered into their proposed agreement due to perceived risks that one or more of the violations alleged in the Citation and Notice might be vacated or reduced from "willful" to "serious" or lesser violations, that the penalties provided in the Citation and Notice might be reduced, should Ledcor have a full hearing on the merits of its appeal, and in order to conserve and reduce litigation costs and resources.
  3. The employees and unions, International Brotherhood of Electrical Workers Local No. 46 and the International Association of Bridge, Structural and Ornamental Iron Workers Local No. 114, object to the entry of the presently requested Order on Agreement of Parties in this appeal because the proposed agreement modifies both the penalties and characterization of the violation Nos. 1 and 2 in Citation and Notice no. 111450060. This is a significant point of disagreement between Ledcor and the unions, over a substantial, rather than insubstantial or trivial, proposed modification of the Citation and Notice.
  4. The employees' and unions' objection to the proposed settlement is founded upon prima facie evidence supportive of the two "willful" violations as alleged by the Department in its Citation and Notice. The unions believe that, given the facts and the law, the proposed settlement does not best further the interests of employee safety in the work place in that both the characterization of a violation as "willful" as well as assigned penalties have the effect of deterring future safety violations. The unions and their attorneys are willing and able to present their case supportive of the "willful" violations as alleged in the Citation and Notice should hearings be held on the merits of the appeal by Ledcor.
  5. Ledcor alleges that the unions are motivated to object to the proposed settlement in part by union interest in harming Ledcor in its dealings with its existing and potential contractors and with its employees. Ledcor has not shown that the ultimate union goals in opposing the proposed settlement are other than the promotion of a safe work place for workers.

### **CONCLUSIONS OF LAW**

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1. The Board of Industrial Insurance Appeals has jurisdiction to consider the issues raised in this appeal pursuant to RCW 49.17.140.
  2. The employees and unions, International Brotherhood of Electrical Workers Local No. 46 and the International Association of Bridge, Structural and Ornamental Iron Workers Local No. 114, have a good faith basis to object to the proposed Order on Agreement of Parties in this appeal. Their objection to the entry of the order is not for an improper purpose.
  3. The Order on Agreement of Parties proposed by Ledcor and the Department is not in conformity with the law and the facts within the meaning of RCW 51.52.095(1), and this Board will not enter an order based on that agreement; further this appeal is referred to our

1 mediation/hearing process for the scheduling of further proceedings  
2 pursuant to WAC 263-12-093.

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4 It is so ORDERED.

5 Dated this 1<sup>st</sup> day of April, 1993.  
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7 BOARD OF INDUSTRIAL INSURANCE APPEALS  
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10  
11 /s/  
12 S. FREDERICK FELLER Chairperson

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15 /s/  
16 FRANK E. FENNERTY, JR. Member

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20 PHILLIP T. BORK Member  
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