

CONCISE EXPLANATORY STATEMENT
Chapter 296-900 WAC, Administrative Rules (Abatement)

Public Hearings: November 30, 2011 and December 2, 2011

Adoption: January 3, 2012

Effective Date: July 1, 2012

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I. Purpose of Rulemaking

During the 2011 legislative session, the Legislature passed Chapter 91, Laws of 2011 (Engrossed Substitute Senate Bill 5068) regarding the abatement of serious safety and health violations during appeal of a Washington Industrial Safety and Health Act citation. Engrossed Substitute Senate Bill (ESSB) 5068 requires employers to abate violations classified and cited as serious, willful, repeated serious or failure to abate a serious violation during an appeal unless a stay of abatement is granted by the Department of Labor and Industries (department) or the Board of Industrial Insurance Appeals (BIIA). The department conducted two stakeholder meetings to gather input from business and labor stakeholders for use in developing the draft rules. The department conducted two public hearings on the proposed rules.

A. Distinction Between the Definition of Serious Violation Under RCW 49.17.180(6) and the Department's Standard for Granting Stay of Abatement Requests

Under both the Occupational Safety and Health Act (OSH Act) and the Washington Industrial Safety and Health Act (WISHA), a serious violation requires “a substantial probability that death or serious physical harm could result”. 29 U.S.C. § 666(k); RCW 49.17.04.180(6). Federal and state case law has consistently held that it is not necessary to prove that there is a substantial probability that an accident will occur, rather it is only necessary to prove that an accident is possible and death or serious physical harm could result.

It is well-settled that, pursuant to § 666(k), “when the violation of a regulation makes the occurrence of an accident with a substantial probability of death or serious physical harm possible, the employer has committed a serious violation of the regulation.” *Bethlehem Steel Corp. v. OSHRC*, 607 F.2d 1069, 1073 (3d Cir.1979) (emphasis added). The “substantial probability” portion of the statute “refers not to the probability that an accident will occur but to the probability that, an accident having occurred, death or serious injury could result,” *Ill. Power Co. v. OSHRC*, 632 F.2d 25, 28 (7th Cir.1980), even in those cases in which an accident has not occurred or, in fact, is not likely to occur, *Cal. Stevedore & Ballast Co. v. OSHRC*, 517 F.2d 986, 987 (9th Cir.1975); see also *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir.1984); *Usery v. Hermitage Concrete Pipe Co.*, 584 F.2d 127, 131-32 (6th Cir.1978).

Secretary of Labor v. Trinity Industries, Inc., 504 F.3d 397, 401 (2007)

Washington courts have adopted this interpretation, holding that the language in RCW 49.17.180(6) regarding “substantial probability”, which is nearly identical to the Occupational Safety and Health Administration’s (OSHA) statutory language, does not refer to the probability that harm will occur but instead “refers to the likelihood that, should harm result from the violation, that harm could be death or serious physical harm.” *Lee Cook Trucking and Logging v. State, Dept. of Labor and Industries*, 109 Wn.App. 471,482, 36 P.3d 558 (Wash.App. Div. 2 2001).

The critical issue for the determination of an abatement stay is whether in the absence of abatement there is a substantial probability that death or serious physical harm *will actually occur*. It is therefore clear that the ESSB 5068's reference to "a substantial probability of death or serious physical harm" directs the department to consider the likelihood that death or harm will actually occur, a different analysis than whether a citable serious violation existed. It is equally clear that the legislature intended for there to be stay granted for some violations that are appropriately classified as serious. The department is to make the decision based on the determination of whether the preliminary evidence shows a substantial probability that death or serious harm will occur in the absence of abatement during the appeal period.

II. Changes to the Rules (Proposed rule versus rule adopted):

As a result of written and oral comments received, the department concluded that the new "reasonable person" test should be either further clarified or deleted entirely, as it is the department's obligation is to have a reasonable basis for its decisions whether or not it was stated in the rule. The department decided to change the following section as indicated below. In addition, there were two changes for housekeeping purposes.

WAC 296-900-17006 Stay of abatement date requests.

In subsection (3), the department deleted the sentence: DOSH will make its determination based on what a reasonable person would conclude based on the same circumstances.

In subsection (6), "stay of violation date" was changed to "stay of abatement date".

WAC 296-900-17010 Appealing a corrective notice of redetermination (CNR).

Clarification that the requirement to appeal a CNR within fifteen working days after it was received applies to employers as well as employees and their representatives.

III. Summary of Comments Received and Department Response

General Comments	Department Response
<p>The statutory change made by the legislation creates a situation for a pre-trial outside the courtroom because the information that is going to have to be revealed here could be significant information as part of the employer's defense. The legislation also does not specify who at the Board of Industrial Insurance Appeals will hear the stay requests.</p> <p>I'd like to say that the entire concept of the abatement date being, I don't know how to say this -- I guess I could say that the correction of an alleged violation prior to the formality of taking it to a hearing at whatever various level it's going to go through, but to me it seems like the action of correcting an alleged violation ahead of time is more or less a tacit indication of guilt. In other words, the employer in this particular case is being coerced into fixing something that they may not really believe needs to be fixed, or correcting a situation that they may not necessarily agree needs to be corrected. So, the basic premise in this country is you are innocent until proven guilty, and this particular concept, this methodology of what we are doing here, sort of runs contrary to that particular concept.</p>	<p>The department appreciates the time taken to provide this comment and recognizes the concerns and opinions presented. No changes were made based on this comment.</p> <p>This request would require legislative action to amend the statute. ESSB 5068 and RCW 49.17.140(4) require the abatement of violation classified as serious, willful, repeated serious violation, and failure to abate a serious violation unless a stay request is granted by the department or the BIIA.</p>
<p>The proposed rule would force companies to engage in abatement procedures before being afforded an opportunity to complete the appeal process, regardless of the merits of the appeal. Such a provision will reduce or eliminate in any a meaningful way the ability of an employer to challenge a citation through the administrative process by requiring immediate abatement. At its core, this approach is unjustified and amounts to an outrageous trampling of due process rights.</p> <p>Abatement is more than protecting against a hazard; it also entails accepting responsibility for a violation. Mandating abatement before the employer can exhaust the adjudicative process is tantamount to requiring the defendant in a criminal or civil matter defendant to pay a fine or serve a sentence before the trial. Such a provision is intended to discourage employers, particularly smaller employers who lack resources, from challenging certain citations that they may</p>	<p>The department appreciates the time taken to provide this comment and recognizes the concerns and opinions presented. No changes were made based on this comment.</p> <p>This request would require legislative action to amend the statute. ESSB 5068 and RCW 49.17.140(4) require the abatement of violation classified as serious, willful, repeated serious violation, and failure to abate a serious violation unless a stay request is granted by the department or the BIIA.</p>

<p>believe in good faith are incorrect or improperly imposed by the agency in the first place.</p> <p>The provision also highlights the subjectivity inherent in many citations. What constitutes a serious hazard is ill-defined at best and whether a hazard is serious can be a largely subjective decision by an inspector.</p> <p>For the foregoing reasons, AMI respectfully requests that the proposed rule be withdrawn.</p>	
<p>ESSB 5068 violates an employer's right to due process by requiring abatement before an employer is even entitled to vindicate their rights on the alleged volatile condition. Unfortunately, the new proposed procedures permitting employers to request a stay of abatement is insufficient to resolve these due process concerns for a number of reasons. The end result is that ESSB 5068 and these proposed rules turn American jurisprudence on its head-employers in Washington state are now guilty until proven innocent.</p> <p>The proposed regulations impose significant practical burdens and costs on Washington employers and employees. Under the proposed rules, Washington employers will be forced to make significant capital expenditures to fix alleged violations that may well not even exist. Even in the most robust economic climate this approach would be wrong. In light of the economic headwinds facing employers and employees, this burden is simply untenable. The proposed regulations will also substantially increase the costs and time required for Washington employers, employees, and L&I to litigate alleged violations. In a time of steep budget cuts nationwide and in Washington state, the proposed regulations create a new layer of administrative proceedings and costs for the state. Moreover, an administrative system originally intended to be a cost effective process, easily navigable by lay people, will have yet another layer of complex procedure and expense added. This will have the perverse effect of lengthening the time needed to resolve appeals, which proponents of ESSB 5068 cited as one justification in favor the law.</p>	<p>The department appreciates the time taken to provide this comment and recognizes the concerns and opinions presented. No changes were made based on this comment.</p> <p>This request would require legislative action to amend the statute. ESSB 5068 and RCW 49.17.140(4) require the abatement of violation classified as serious, willful, repeated serious violation, and failure to abate a serious violation unless a stay request is granted by the department or the BIIA.</p>
<p>"Substantial probability" should be defined to mean "more likely than not," so as to harmonize DOSH's standard for granting a stay of abatement with the</p>	<p>The department appreciates the time taken to provide this comment and recognizes the concerns and opinions presented. No changes were</p>

<p>Board of Industrial Insurance Appeals' standard for doing the same. Under SB 5068, in evaluating whether a stay of abatement is appropriate DOSH is to consider whether the alleged violation presents a “substantial probability of death or serious physical harm to workers.” The proposed rule simply mirrors this language, without setting forth what "substantial probability" means. So as to put the regulated community on notice as to when the agency will grant requests to stay abatement, DOSH should take the opportunity in this rulemaking to define "substantial probability." Any such definition should harmonize the treatment of requests for stays of abatement at the DOSH reconsideration level with the manner in which those requests are to be treated at the Board of Industrial Insurance Appeals level. At the BIIA level, requests are to be granted unless it is "more likely than not that a stay would result in death or serious physical harm to a worker." SB 5068 sec. 1(4)(e). Thus, to frame the question consistently at both the DOSH and BIIA levels, DOSH should define "substantial probability" to mean "more likely than not." Doing so will promote consistency between DOSH and the Board in evaluating requests for stays of abatement. Consistency in a decisional framework in this regard can be expected to reduce the burden on the Board to unnecessarily re-evaluate stay requests. A reduction in the number of stay requests re-evaluated will clearly save all involved- the Board, DOSH, and the regulated community- time and expense. Moreover, use of the same standards by both DOSH and the Board in evaluating stay requests will minimize the number of cases in which DOSH's initial decision to deny a stay request is reversed at the Board level. Over time, this consistency in decision-making between the two agencies can be expected to reduce the frequency of employer challenges to DOSH decisions to deny a stay request. That is, where employers can be reasonably certain that the Board will answer the question of the appropriateness of a stay in the same manner as DOSH has answered the question, employers will be less likely to challenge DOSH denials of stays.</p>	<p>made based on this comment.</p> <p>The term “substantial probability” is taken directly from RCW 49.17.140(4) and is also used in several other sections of both the Occupational Health and Safety Act (OSH Act) and the Washington Industrial Safety and Health Act (WISHA). The department’s standard for consideration of stay requests - that a stay will be granted where DOSH cannot determine that the preliminary evidence shows a substantial probability of death or serious physical harm - is taken directly from ESSB 5068 and RCW 49.17.140(4). The department does not believe this statutory term needs any further clarification.</p>
<p>"Serious physical harm" should be defined. DOSH should also take this opportunity to define the statutory phrase "serious physical harm." This phrase is used not only in SB 5068, but also in existing law, e. g., RCW 49.17.130. There is no definition for "serious physical harm" in existing Washington law. The absence of a clear definition promotes uncertainty as to the phrase's meaning. Under the new statutory framework requiring abatement of "serious" violations pending appeal, it is critical that the regulated community be put on notice as to what sorts of violations will give rise to an immediate abatement</p>	<p>The department appreciates the time taken to provide this comment and recognizes the concerns and opinions presented. No changes were made based on this comment.</p> <p>The term “serious physical harm” is not specifically defined. However, under WAC 296-900-14010, Table 3, there is a description of the injury, illness, or diseases that are associated with serious violations which are assigned a severity rating of 4-6.</p>

<p>requirement, which ones will not, and why. Defining "serious physical harm" will help in providing that notice. Additionally, it will promote consistency in decision-making throughout DOSH as to when it is and when it is not appropriate to grant stay requests. The following definition of "serious physical harm"-borrowed from an Oregon rule (OAR 43 7-00 1-0050)-is suggested to more clearly delineate what alleged violations are "serious" and which ones are "more likely than not to result in death or serious physical injury to a worker," such that a stay request would not be appropriate: Serious physical harm: (a) Injuries that could shorten life or significantly reduce physical or mental efficiency by inhibiting, either temporarily or permanently, the normal function of a part of the body. Examples of such injuries are amputations, fractures (both simple and compound) of bones, cuts involving significant bleeding or extensive suturing, disabling burns, concussions, internal injuries, and other cases of comparable severity. (b) Illnesses that could shorten life or significantly reduce physical or mental efficiency by inhibiting, either temporarily or permanently, the normal function of a part of the body, even though the effects may be cured by halting exposure to the cause or by medical treatment. Examples of such illnesses are cancer, pneumoconiosis, narcosis, or occupational infections (caused by biological agents), and other cases of comparable severity. Although the list of conditions in this definition is not exhaustive, it provides appropriate guidance to the regulated community, to DOSH, and to the Board as to which alleged violations are sufficiently significant so as to require immediate abatement. The current absence of a meaningful definition for "serious physical harm" will promote employers' requests for Board review of decisions denying stays of abatement. DOSH should instead strive to reduce uncertainty in the regulated community and in so doing reduce unnecessary litigation by providing a meaningful, rule-based framework for evaluating what constitutes "serious physical harm."</p>	<ul style="list-style-type: none"> • Injuries involving permanent severe disability • Chronic, irreversible illness • Permanent disability of a limited or less severe nature • Injuries or reversible illnesses resulting in hospitalization • Injuries or temporary, reversible illnesses resulting in serious physical harm • May require removal from exposure or supportive treatment without hospitalization for recovery
<p>We support completely the draft rule as it's opposed as proposed. We feel the best way to protect workers is to prevent injuries before they occur. We feel abatement on appeal does that. We feel abatement on appeal will create safer working environments and reduce injuries to workers.</p>	<p>The department appreciates the time taken to provide this comment and recognizes the concerns and opinions presented. No changes were made based on this comment.</p>
<p>Allowing reassumption and the issuing of a corrective notice, allows DOSH to be sloppy on their initial investigations and citations. It requires a company to</p>	<p>The department appreciates the time taken to provide this comment and recognizes the concerns and opinions presented. No changes were</p>

<p>investigate, gather info and statements and provide to DOSH. Then DOSH, after hearing the company defenses, allows DOSH to rewrite the citation(s). The process then starts again: Sort of double-jeopardy.</p>	<p>made based on this comment.</p> <p>This request would require legislative action to amend the statute. RCW 49.17.140(3) permits the department to reassume appeals. RCW 49.17.140(3) permits the department to reassume jurisdiction of appeals and make a redetermination, permitting the department to review whether the C&N was appropriately issued.</p>
<p>Change the language in RCW 49.17.120 to more closely mirror 29 CFR 1903.16 and 29 CFR 1903.18.</p>	<p>The department appreciates the time taken to provide this comment and recognizes the concerns and opinions presented. No changes were made based on this comment.</p> <p>This request would require legislative action.</p>
<p>It doesn't make sense as to why a company would not be allowed to appeal any C&N abatement date, including general (other-than-serious) or regulatory citation abatement dates? DOSH can be just as misinformed or in error with those citations and cite a company for something that doesn't really need abating or for a regulatory issue that may take longer to resolve.</p>	<p>The department appreciates the time taken to provide this comment and recognizes the concerns and opinions presented. No changes were made based on this comment.</p> <p>Under RCW 49.17.140(4), abatement dates and requirements are automatically stayed when an employer appeals violations classified as general, including regulatory violations if classified as general. The requirement to comply with abatement dates and requirements during appeal unless a stay is requested and granted is only for violations classified as serious, willful, repeated serious, or failure to abate a serious violation.</p>
<p>I don't disagree with the concept of the willful, repeat serious, and failure to abate being included in with this. But I do have a disagreement with serious being included. And in order to understand my disagreement, I'll take you back many, many years here as to the way the rules were enforced, in that in previous years, the use of a general violation was much more prevalent. And what we have graduated to now is you very seldom ever see anything that's a general violation. And where we have gravitated to is everything is serious. And I've seen some things, I'm not going to go through detail by detail, but I have seen some things that were cited as serious that just absolutely made no sense. And if we do have criteria like that, where everything is going to begin at serious, then this abatement process, or these stays and everything else, you know, we're beating the ants with a pretty big hammer for this. So, what I'm saying here, and that's why I disagree with the serious. Now, if you want to make it serious, okay, I'll go along with that, but let's truly make it a serious violation. And if it</p>	<p>The department appreciates the time taken to provide this comment and recognizes the concerns and opinions presented. No changes were made based on this comment.</p> <p>This request would require legislative action to amend the statute. ESSB 5068 and RCW 49.17.140(4) require the abatement of violation classified as serious, willful, repeated serious violation, and failure to abate a serious violation unless a stay request is granted by the department or the BIIA.</p>

<p>isn't, then let's not call it that, just for the sake of keeping the numbers of serious violations up in the range where some people like to see it. So, I disagree with the idea of serious being in there.</p>	
<p>Let's assume that a stay is requested, and the stay is denied, and that whatever methods or means to correct the violation are taken. And it is at a cost to the employer. And as the appeal goes through and as it goes through the normal court proceedings that the employer prevails. Well, if it costs an employer five, 10, 15, \$20,000 to abate a particular violation, and then later on, in order to, because a stay was not granted, and then later on the employer prevails, is he going to be reimbursed for this cost? And if so, by who? This is one of the main questions I had regarding the legislation as it was written.</p>	<p>The department appreciates the time taken to provide this comment and recognizes the concerns and opinions presented. No changes were made based on this comment.</p> <p>The statutory changes enacted by the legislature in ESSB 5068 do not contain provisions for reimbursement. Any changes to existing statutes require legislative action and are not within the department's authority.</p> <p>The effect of a final order on appeal vacating a violation on the employer's obligation to comply with the safety and health standard cited in the violation is dependent on the specific findings contained in the final order. There are many circumstances in which a final order on appeal relieves an employer of the administrative sanction and/or penalty but does not address whether the employer has a duty to comply with the standard. One example is where a violation is vacated based on a finding that the employer did not have actual or constructive knowledge of the violation at the time cited, where by virtue of being cited, the employer would have obtained knowledge and would still have a duty to abate the hazard.</p>
<p>The proposed mandatory abatement requirements create a situation in which an employer's private property will be taken for a "public use." Washington employers will be required to undertake abatement measures, frequently consisting of costly alterations to their workplaces, based simply on an allegation of an alleged safety violation by a government agency. In short, a Washington employer's private property will effectively be "taken" for the purported "public use" of abating an alleged, but unproven work safety violation. At a minimum, a provision requiring DOSH to reimburse employers for the reasonable costs associated with mandated abatement in cases where the employer later prevails on appeal and the citation is not affirmed. Such a provision would provide "just compensation" for any unlawful "takings" for public use. It would also help ensure that DOSH will only deny employer</p>	<p>The department appreciates the time taken to provide this comment and recognizes the concerns and opinions presented. No changes were made based on this comment.</p> <p>The statutory changes enacted by the legislature in ESSB 5068 do not contain provisions for reimbursement. Any changes to existing statutes require legislative action and are not within the department's authority.</p> <p>The effect of a final order on appeal vacating a violation on the employer's obligation to comply with the safety and health standard cited in the violation is dependent on the specific findings contained in</p>

<p>abatement requests in cases where they are truly confident that the "preliminary evidence" supports a conclusion that there is a substantial probability of death or serious physical harm to employers.</p>	<p>the final order. There are many circumstances in which a final order on appeal relieves an employer of the administrative sanction and/or penalty but does not address whether the employer has a duty to comply with the standard. One example is where a violation is vacated based on a finding that the employer did not have actual or constructive knowledge of the violation at the time cited, where by virtue of being cited, the employer would have obtained knowledge and would still have a duty to abate the hazard.</p>
<p>If a citation is appealed, reassumed, then denied, you might clarify the affect on the original abatement date, especially if the original abatement date has passed.</p>	<p>The department appreciates the time taken to provide this comment and recognizes the concerns and opinions presented. No changes were made based on this comment.</p> <p>Under WAC 296-900-17005, the correction date is the date listed on either the C&N or the CNR. Under the proposed rule, abatement is required by the abatement date listed in the C&N for violations classified as serious, willful, repeated serious violation, or failure to abate a serious violation unless the employer files a timely appeal and requests a stay of abatement. When the department reassumes an appeal, any violation affirmed in a corrective notice of determination CNR the abatement date assigned in the C&N will be listed for all serious, willful, repeated serious violation, or failure to abate a serious violation for which no stay was requested, and new abatement dates will be listed for general violations and those violations for which a stay request was made. In the event the CNR is appealed, the abatement dates for any general violations will be automatically stayed, however, abatement will required for any serious, willful, repeated serious violation, or failure to abate a serious violation according to the date listed in the CNR unless the employer renews the stay request in their notice of appeal of the CNR. Abatement is not required while a stay request is pending at either the department or the BIIA. In the event a stay request is denied at the BIIA, the department will send the employer an updated abatement date.</p>
<p>Is the CNR appeal timeframe 15 days after company receipt of the DOSH CNR response? The 15 day sentence is below the "Employees or their Reps Must" sentence, so it is a little unclear. Please consider clarifying whether the 15 days means the postmark date or DOSH receipt or what.</p>	<p>The department appreciates the time taken to provide this comment and recognizes the concerns and opinions presented. The department has changed the rule based on this comment.</p>

<p>Why restrict responses to “snail mail”? In these days of technology I recommend allowing email or fax within the 15 days (to be followed by hard signature copy if needed). This is allowed elsewhere.</p>	<p>Under RCW 49.17.140(3) and WAC 296-900-17010, an employer wishing to appeal a CNR must do so within 15 working days after it was received by the employer. In order to clarify this, the department has changed the language to be consistent with requirement for appealing a C&N under WAC 296-900-17005.</p> <p>CNRs are typically sent by certified mail, return receipt mail and the 15 day timeframe starts from the date the certified mail receipt is signed.</p> <p>WAC 296-900-17010 requires the appeal of a CNR be mailed to the BIIA with copies to the department sent by mail or fax or delivered in person to any department service center. Alternative methods of mailing acceptable to the BIIA must be done in compliance with the BIIA’s rules.</p>
<p>WAC 296-900-17006</p>	
<p>Only one area of concern remains, for which we propose a brief and hopefully constructive amendment. In proposed new section WAC 296-900-170006(3), extra-statutory language is inserted that “DOSH will make its determination [whether the preliminary evidence shows a substantial probability of death or serious physical harm to workers] based on what a reasonable person would conclude based on the same circumstances.” On the one hand, the reasonable person standard goes without saying. All agency action must be reasonable. On the other hand, since it is being said, something must be intended by it. Our concern is that it could mean a “man on the street” lay person’s view of the circumstances could guide this key determination. Industry in Washington is diverse. Workplaces and the panoply of safety and health practices and regulations found in them vary from industry to industry. Many of these practices and standards are complex and specialized, and not necessarily evident to the lay person. When the Department makes its critical determination on stay of abatement, and a complicated, specialized, industry-specific safety standard or practice is at issue, we do not believe the mere “reasonable person” standard is sufficient to guide that determination. Accordingly, we would propose an appropriate parameter be added – that the determination be based on what “a reasonable person with knowledge of the industry” would conclude based on the same circumstances. We therefore propose that new WAC 296-900-170006(3) read: <i>DOSH will review requests for stay of abatement dates for each violation requested. DOSH will stay the abatement date when an appeal is</i></p>	<p>The department appreciates the time taken to provide this comment and recognizes the concerns and opinions presented. The department has changed the rule based on this comment.</p> <p>DOSH Reassumption Hearings Officers (RHO) are the presiding officers at informal conferences for DOSH Citation and Notice (C&N) and have the qualifications and experience necessary to adjudicate appeals in the reassumption process, including consideration of stay requests. The department agrees that its obligation is to have a reasonable basis for its decisions whether or not specifically stated in the rule. The statement that stay determinations will be based on what a reasonable person would conclude based on the same circumstances has been removed from the rule.</p>

<p><i>filed for any serious, willful, repeat serious, or failure to abate serious violation where DOSH cannot determine that the preliminary evidence shows a substantial probability of death or serious physical harm to workers. DOSH will make its determination based on what a reasonable person with knowledge of the industry would conclude based on the same circumstances.</i></p>	
<p>We feel that the reasonable person standard as it's included in the proposed rule before us is a little too broad and vague. What we would like to see is language that qualifies that a little bit more so that the reasonable person must have professional experience or knowledge of the effected industry or work site. This would ensure that the person granting or denying the stay would have a working knowledge of the industry being regulated and could make an informed judgment based on the pros and cons of that case or what the industry may or may not need and would encourage you to consider that language.</p>	<p>The department appreciates the time taken to provide this comment and recognizes the concerns and opinions presented. The department has changed the rule based on this comment.</p> <p>DOSH Reassumption Hearings Officers (RHO) are the presiding officers at informal conferences for DOSH Citation and Notice (C&N) and have the qualifications and experience necessary to adjudicate appeals in the reassumption process, including consideration of stay requests. The department agrees that its obligation is to have a reasonable basis for its decisions whether or not specifically stated in the rule. The statement that stay determinations will be based on what a reasonable person would conclude based on the same circumstances has been removed from the rule.</p>
<p>The reasonable person language could be further defined.</p>	<p>The department appreciates the time taken to provide this comment and recognizes the concerns and opinions presented. The department has changed the rule based on this comment.</p> <p>DOSH Reassumption Hearings Officers (RHO) are the presiding officers at informal conferences for DOSH Citation and Notice (C&N) and have the qualifications and experience necessary to adjudicate appeals in the reassumption process, including consideration of stay requests. The department agrees that its obligation is to have a reasonable basis for its decisions whether or not specifically stated in the rule. The statement that stay determinations will be based on what a reasonable person would conclude based on the same circumstances has been removed from the rule.</p>
<p>The sentence "DOSH will make its determination based on what a reasonable person would conclude based on the same circumstances." I have a lot of problem with that particular sentence, because as I look at it, and I read it, and it just seems to be -- it doesn't really say anything, and it's the sentence, the verbiage used in that particular sentence, pretty much will allow anybody to determine or to make a determination on whatever they want it to be. That</p>	<p>The department appreciates the time taken to provide this comment and recognizes the concerns and opinions presented. The department has changed the rule based on this comment.</p> <p>DOSH Reassumption Hearings Officers (RHO) are the presiding officers at informal conferences for DOSH Citation and Notice (C&N)</p>

<p>particular sentence I think needs to be -- it needs some rewording.</p>	<p>and have the qualifications and experience necessary to adjudicate appeals in the reassumption process, including consideration of stay requests. The department agrees that its obligation is to have a reasonable basis for its decisions whether or not specifically stated in the rule. The statement that stay determinations will be based on what a reasonable person would conclude based on the same circumstances has been removed from the rule.</p>
<p>Regarding the reasonable person definition, our research shows that's a common standard that we feel is clearly defined; and we're fine with that as proposed in the rule.</p>	<p>The department appreciates the time taken to provide this comment and recognizes the concerns and opinions presented. No changes were made based on this comment.</p>
<p>Add text to WAC 296-900-17006(3) to include factors L&I may consider when reviewing requests for a stay of abatement. It is critical to include the factors for a stay so that employers can describe their circumstances as they relate to the factors when they apply. Otherwise, there are no stated parameters for how the department will judge a request for a stay. This would be detrimental to the department and employers.</p>	<p>The department appreciates the time taken to provide this comment and recognizes the concerns and opinions presented. No changes were made based on this comment.</p> <p>The department chose not to include a list in the proposed rule language based on stakeholder input during development of the proposed rule language that if a list of possible factors was in the rule, it could be interpreted as an exhaustive list of factors. There was also input that a list in the rule would not helpful as the relevant factors are determined on a case by case basis.</p>
<p>Add text WAC 296-900-17006 (3) to clarify that DOSH will base its determinations on the conditions as they existed at the time of the inspection. We think it is only fair that conditions as they existed at the time of inspection be the basis for making a stay determination. This will ensure that the decisions are based on the documented information.</p>	<p>The department appreciates the time taken to provide this comment and recognizes the concerns and opinions presented. No changes were made based on this comment.</p> <p>Because circumstances and conditions subsequent to the inspection date could impact the likelihood of injury the department concluded that restricting the decision about abatement could unfairly limit the ability to grant a stay.</p>
<p>WAC 296-00-17006 does not clearly indicate which party bears the burden on a stay request. Both logic and fundamental fairness dictate that this burden should be squarely on DOSH. The denial of a stay request will require Washington employers to expend significant resources to abate a problem that has not yet even been proven. Accordingly, DOSH should bear the burden of establishing, by substantial and undisputed evidence that a stay request must be denied in order to protect employee safety. Short of this showing, stay requests should be</p>	<p>The department appreciates the time taken to provide this comment and recognizes the concerns and opinions presented. No changes were made based on this comment.</p> <p>The department's standard for consideration of stay requests - that a stay will be granted where DOSH cannot determine that the preliminary evidence shows a substantial probability of death or</p>

<p>granted.</p>	<p>serious physical harm - is taken directly from ESSB 5068 and RCW 49.17.140(4). Therefore, the burden is on the department to determine that the preliminary evidence shows a substantial probability of death or serious physical harm. The requirement in ESSB 5068 and RCW 49.17.140(4) is for the department to make its determination based on preliminary evidence not undisputed evidence.</p>
<p>There is also no basis in ESSB 5068 to include the "reasonable person" standard found in proposed WAC 296-900-17006(3) ("DOSH will make its determination based on what a reasonable person would conclude based on the same circumstances."). Given the costly implications and rights lost in the event a stay request is denied, this is an inappropriate standard to apply. Rather, DOSH should be obligated to make its finding based on a "clear and convincing evidence" standard.</p>	<p>The department appreciates the time taken to provide this comment and recognizes the concerns and opinions presented. Changes were made based on this comment.</p> <p>DOSH Reassumption Hearings Officers (RHO) are the presiding officers at informal conferences for DOSH Citation and Notice (C&N) and have the qualifications and experience necessary to adjudicate appeals in the reassumption process, including consideration of stay requests. The department agrees that its obligation is to have a reasonable basis for its decisions whether or not specifically stated in the rule. The statement that stay determinations will be based on what a reasonable person would conclude based on the same circumstances has been removed from the rule.</p> <p>The department's standard for consideration of stay requests - that a stay will be granted where DOSH cannot determine that the preliminary evidence shows a substantial probability of death or serious physical harm - is taken directly from ESSB 5068 and RCW 49.17.140(4). Employers have the right to appeal any CNR and may renew any stay request denied by the department when they appeal the CNR.</p>
<p>There are also substantial problems with the proposed provision governing the standard DOSH is to apply to stay requests. In ruling on a stay request, DOSH is ordered to review the "preliminary evidence" to decide whether there is a "substantial probability of death or serious physical harm to workers." See proposed WAC 296-800-17006(3). In essence, DOSH will be in the position of deciding whether there is sufficient evidence to support its own just issued decision to classify the underlying, alleged violation as "serious." It is difficult to see how DOSH could ever be a fair and neutral arbiter of the "preliminary evidence" in such a setting. Indeed, if DOSH were ever to conclude that the evidence was insufficient to require mandatory abatement under the standard</p>	<p>The department appreciates the time taken to provide this comment and recognizes the concerns and opinions presented. No changes were made based on this comment.</p> <p>RCW 49.17.140(3) permits the department to reassume jurisdiction of appeals and make a redetermination, permitting the department to review whether the C&N was appropriately issued. This process has a long history. Under ESSB 5068 and RCW 49.17.140(4)(b) the reassumption process includes the consideration of stay requests.</p>

<p>described above DOSH would essentially be admitting that it should not have classified the underlying violation as serious. For this reason, the possibility of obtaining a stay from DOSH appears largely illusory under this process. This massive conflict of interest is only compounded by the fact that the "preliminary evidence" before DOSH at this stage will consist almost entirely of DOSH's own investigation of the employer. It will not be surprising when this "evidence" will be weighted heavily against the employer, given that DOSH will have just relied on this "evidence" to issue a serious or greater citation. The entire proposed process is prejudicial to employers.</p>	<p>According to RCW 49.17.180(6), a serious violation requires "a substantial probability that death or serious physical harm could result". The critical issue for the determination of an abatement stay is whether in the absence of abatement there is a substantial probability that death or serious physical harm will actually occur. It is therefore clear that the bill's reference to "a substantial probability of death or serious physical harm" directs the department to consider the likelihood that death or harm will actually occur, a different analysis than whether a citable serious violation existed.</p>
<p>WAC 296-900-17006 also forces employers to make evidentiary disclosures, while not requiring DOSH to do the same. Employers are required to provide "the reason for the stay request" as a part of its appeal and request for a stay. <i>See</i> proposed WAC 296-800-17006(2) (b). However, DOSH is not likewise obligated to disclose its evidence to employers prior to deciding whether to grant or deny a stay request. This proposed arrangement violates yet another fundamental principle of American jurisprudence: that an accused party is provided the evidence against it prior to any decision being rendered</p>	<p>The department appreciates the time taken to provide this comment and recognizes the concerns and opinions presented. No changes were made based on this comment.</p> <p>The purpose of the reassumption process is to allow for an informal process in which disputed issues are resolved, and as such, the employer and employees are afforded an opportunity to provide any information they wish to be considered by the RHO, but there is no requirement for employers to provide additional information. Employers have the right to appeal any CNR and may renew any stay request denied by the department when they appeal the CNR. Under ESSB 5038 and RCW 49.17.140(4), the BIIA's makes an independent decision on any stay request.</p> <p>The department's inspection file is available to employers through public disclosure requests, however some stakeholders commented that this process was too slow. Based on stakeholder input, the department will be implementing policy changes to provide employers with a copy of the department's inspection file in an expedited manner when an appeal is received containing a stay request. The department believes this concern can be adequately addressed in policy and does not need to be in the rules.</p>
<p>WAC 296-900-17010</p>	
<p>If the request for the stay going into the reassumption hearing is not granted, then if the -- and correct me if I'm wrong here; then the process goes on to the Board of Industrial Insurance Appeals, then if it's going to do that, you can either let it lie, but if you want the stay to be in place after it's been refused, then</p>	<p>The department appreciates the time taken to provide this comment and recognizes the concerns and opinions presented. No changes were made based on this comment.</p>

<p>you have to renew the request. Am I correct in saying that? Why? What's the purpose for that? My question I don't understand. It doesn't make -- If the stay was requested once, the verbiage for the stay is probably not going to change for the next request.</p>	<p>This request would require legislative action to amend the statute. ESSB 5068 and RCW 49.17.140(4)(b) require an employer renew the request for stay of abatement in any direct appeal of a CNR.</p>
<p>The proposed regulations should be revised to make clear that where an employer renews an abatement request as a part of a direct appeal to the BIIA, that request will be handled under the BIIA's procedures. As presently written, the regulations simply say that a request must be renewed at this juncture, but does not provide how an employer makes such a request to BIIA and how such requests will be handled. <i>See</i> proposed revision to WAC 296-900-17010. This section should make explicit that such requests to BIIA will be handled under BIIA's procedures</p>	<p>The department appreciates the time taken to provide this comment and recognizes the concerns and opinions presented. No changes were made based on this comment.</p>