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Better Safe Than Sorry

Navigating Department of Occupational Safety and
Health Inspections and Potential Citations

Presented by

Jennifer L. Truong, Reinisch Wilson Weier PC
and Steve Heist, Approach Management Services

Agenda: Steve

- What's behind the new penalties: history
- New WISHA penalties: how and how much
- Staying out of trouble: best practices
- New: Federal penalties also increasing

Health Of Industry In Washington State

- Current fatalities and trends
- Citation's being cited
- Rules

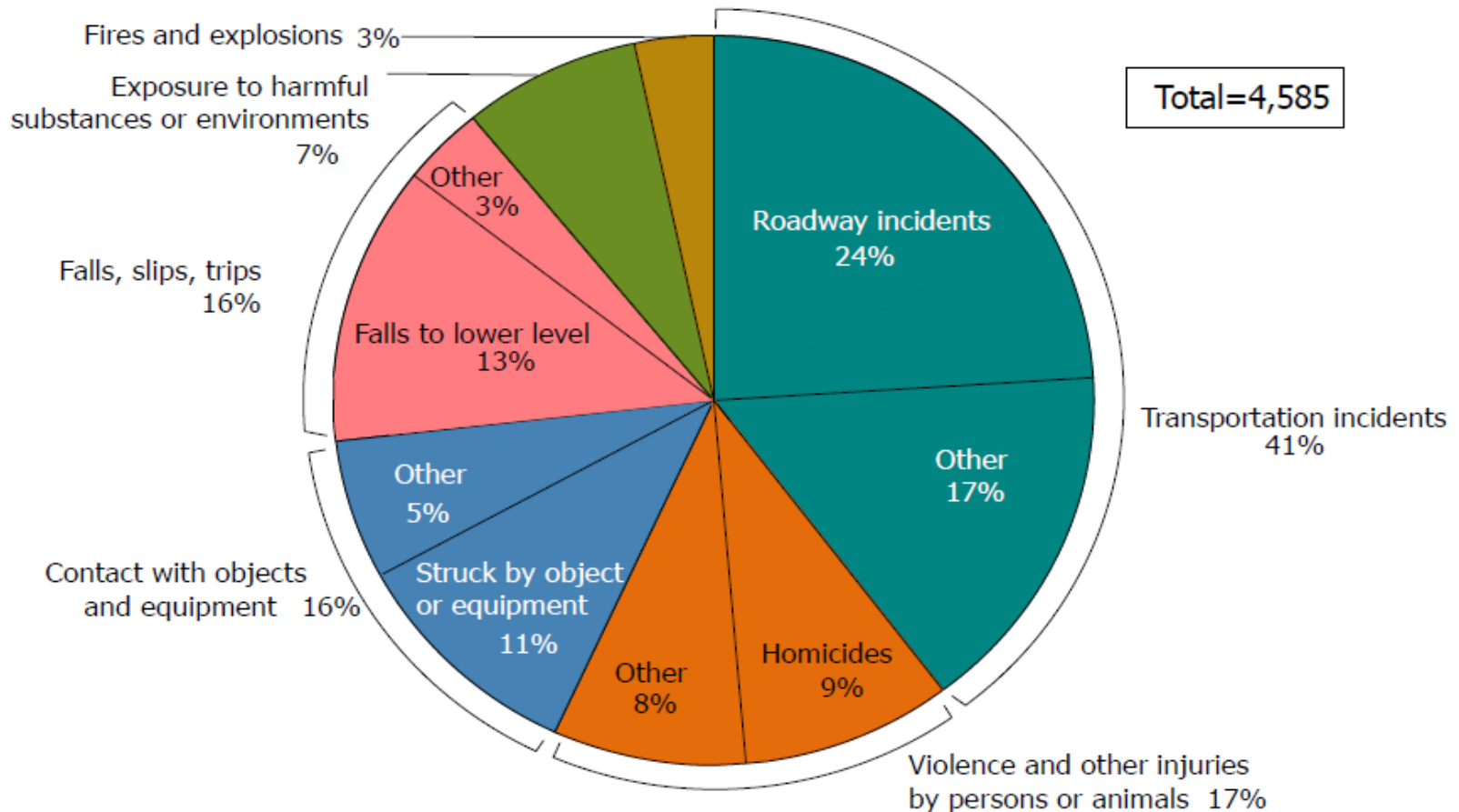
Washington fatalities

1/12/2015	Plumbing, Heating, and Air-Conditioning Contractors	Accidental falls - Fall on or from ladders or scaffolding - Fall from ladder	A journeyman plumber working at a construction site fell 4 feet from a step ladder, injuring his left leg. He died 18 days later due to injury complications.	KING
3/12/2015	Highway, Street, and Bridge Construction	Accidental falls - Fall on or from ladders or scaffolding - Fall from scaffolding	A journeyman carpenter fell from a platform suspended below a bridge that was under construction and landed 60 feet below on a concrete dock.	KING
3/31/2015	Roofing Contractors	Accidental falls - Fall from or out of building or other structure	A roofer fell 19 feet from a roof and landed on a concrete surface below. He had unhooked from his fall protection system. He died of his injuries twelve days later.	KING

3

Current Totals for Construction 2015 = 9

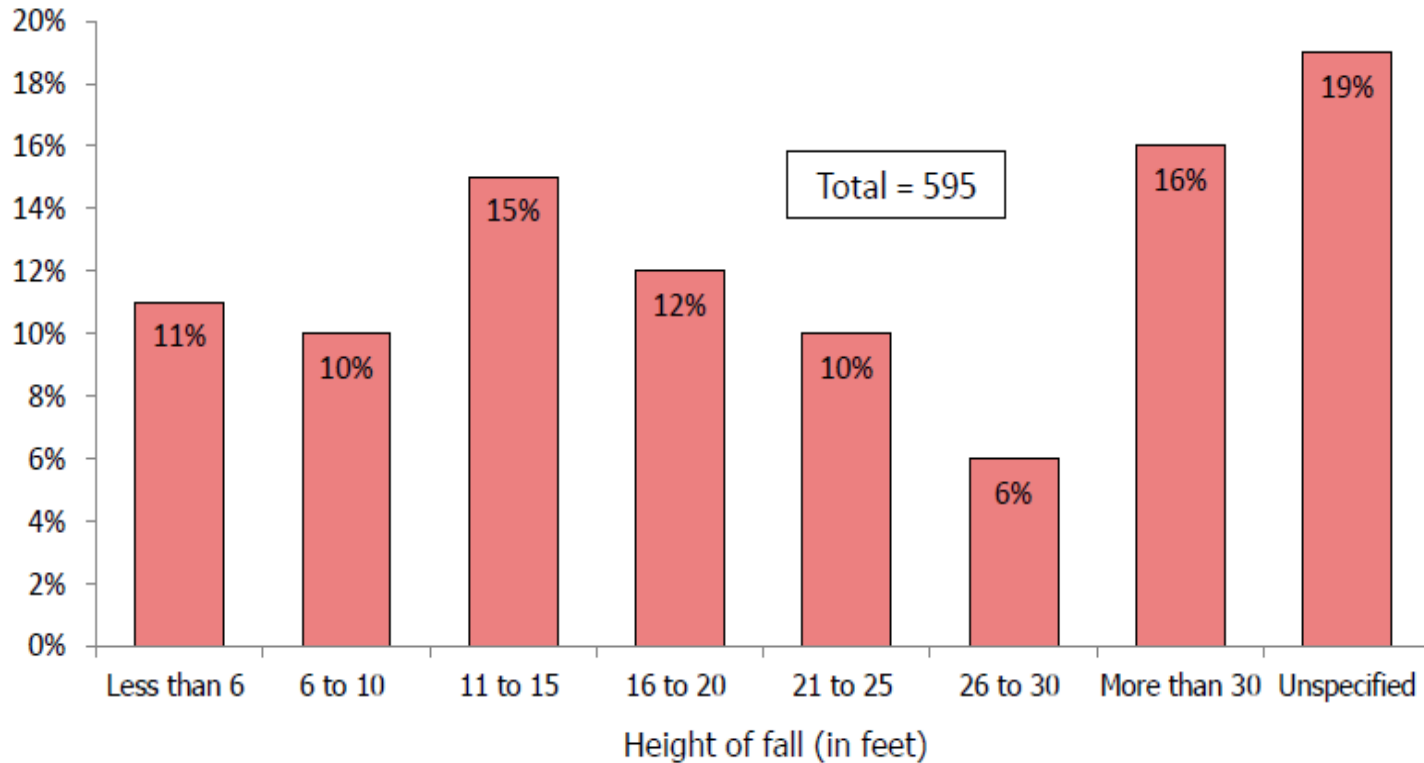
Fatalities by event (2013)



More fatal work injuries resulted from transportation incidents than from any other event in 2013. Roadway incidents alone accounted for nearly one out of every four fatal work injuries.

Fatal falls (2013)

Percent of fatal falls to lower level



In 2013, falls to lower level accounted for 595 fatal work injuries. Of the cases where height of fall was known (480 cases), 3 out of every 5 were falls of 20 feet or less. One in five cases involved falls from more than 30 feet.

November (serious and general)

<i>Rank</i>	<i>WAC Text</i>	<i>Times Cited</i>
1	APP	61
2	Fall protection	33
3	First-aid training & certification	25
4	General requirements for PPE	7
5	Signaling and flaggers	5

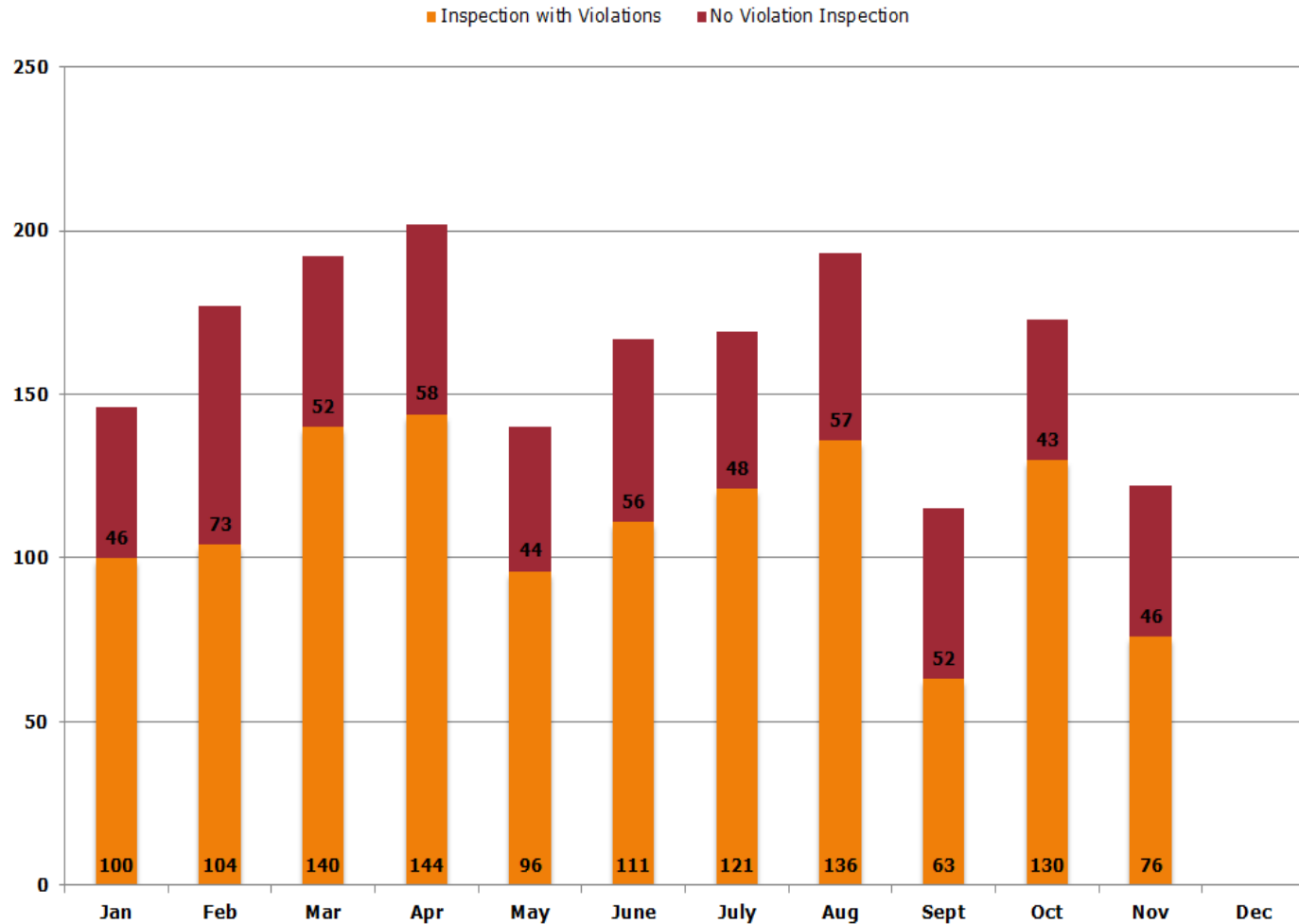
November - serious

<i>Rank</i>	<i>WAC Text</i>	<i>Times Cited</i>
1	Fall protection	32
2	APP	12
3	Use of portable ladders	11
4	Head protection	8
5	Asbestos activities in construction	8

All Industries

<i>Rank</i>	<i>WAC Text</i>
1	GHS – Hazard Communication
2	Electrical Rules
3	Safety Committee/Meetings
4	Personal Protective Equipment – Fall Protection
5	Accident Prevention Program

Construction inspection (CY 2015)



New rule activity

- New penalty calculations
 - Adopted June 9th
 - Effective = enforced: September 1st 2015

Pushed by Federal OSHA

- Federal Plan
 - Use Federal Rulings
- State Plans
 - States may institute stricter rules

What is it going to cost

- Current citation structure not in compliance with Federal OSHA
- New rule writing – citations have increased significantly

Table of severity

3	<ul style="list-style-type: none">• Death• Injuries involving permanent disability• Chronic, irreversible illness
2	<ul style="list-style-type: none">• Disability of a limited nature• Injuries or reversible illnesses resulting in hospitalization
1	<ul style="list-style-type: none">• Injuries or temporary, reversible illnesses resulting in serious physical harm• May require removal from exposure or supportive treatment without hospitalization for recovery

Table of probability

3	Death Injuries involving permanent disability Chronic, irreversible illness
2	Disability of a limited nature Injuries or reversible illnesses resulting in hospitalization
1	If the factors considered indicate the likelihood of injury or illness would be relatively low

Gravity-based penalty - serious

Severity x Probability = Gravity

9 (high)	\$7,000 (max. by statute)
6	\$6,000
4	\$4,000
3	\$3,000
2	\$2,000
1	\$1,000

Minimum penalty for a serious violation = \$100

(A penalty is required by statute for a serious violation; where adjustments would result in a penalty below the minimum, the minimum will be applied.)

Repeat violations

Increases the adjusted base penalty, after willful assessment

1 st violation	x	2
2 nd violation	x	5
3 rd violation	x	8
4 th violation	x	12
5 th violation	x	15

Three year look-back period

Maximum statutory penalty = \$70,000

Willful violations

- Multiply the adjusted base penalty by 10
 - No adjustment is given for good faith, history or abatement quick-fix
 - For repeat willful violations, the repeat adjustment is taken after the willful assessment

Reduction in penalty

- <10 employees (70% reduction)
- 11 – 25 employees (60% reduction)
- 26 – 100 employees (40% reduction)
- 101 – 250 employees (20% reduction)
- 251 or more employees (No reduction)

Reduction in penalty

No reduction would be given if the violations are classified as:

- willful,
- repeat,
- failure to abate,
- or contributing to an inpatient hospitalization or fatality.

Also added language that **no reduction** would be given for blatant violations that are easily corrected or abated.

Abatement quick-fix reduction

- Immediate correction of hazard, provided such corrective action is substantial and not temporary or superficial

-15%

What should you do?

Agenda: Jennifer

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When it all goes wrong...

- Sad, but true!
- Criminal Investigation
- Workers' Compensation Claim
- DOSH
- Audit

Inspection priorities

- Priority

- 1st Imminent Danger
- 2nd Fatality/Catastrophe Investigation
- Complaints/Referrals
- Follow-up or Monitoring
- Programmed Inspections

Do you have a plan?

- Yes? Perfect, follow it!
- No? Time to develop a plan with the following for your consideration.
 - Employer notice
 - Department request for access
 - Employer inspection involvement
 - Follow-up communication with the Department
 - Preliminary employer report (incident details)
 - Was inspection triggered by an injury (medical, site & equipment secure, fatality notice, media, family)?
 - Employee notice

A DOSH investigation

- Department representatives
- Opening
- Walk-around
- Photos
- Samples
- Records request
- Employee safety equipment usage
- Interviews
- Duration

Should I seek counsel when an inspection is initiated?

- Employer policy
- General contractor consideration
- Repeat violation
- Willful violation
- Document retention (photos, notes, memos)
- Experts
- Interviews
- Management
- Employee(s): private interview, counsel or union representative
- Preparation: tell the truth, no speculation, waiver

Closing conference

- Investigation complete
- No violations? Great!
- Proposed violation
- Not a time for argument
- Be on the look-out for the Citation and Notice

Citation

- Violation(s) issuance per WAC 296-900-13005
- Inspection results
- Penalties
- Date of citation receipt
- Employee and union notification
- Abeyance deadlines

Should I seek counsel after receiving the citation?

- If unsure, appeal.
- Monetary penalty increase v. cost of litigation
- Repeat violation
- Willful violation
- Ability to bid for work
- Impact on your EMR
- Written appeal within 15 business days.

Department determination after citation appeal

Re-assumption Hearing or Direct Board Appeal

- Informal hearing
- Recorded
- Objective: vacate, reduce penalty, change classification?
- Department standard statement regarding purpose
- Presentation of Department findings
- Opportunity for Employer presentation
- Corrective Notice of Redetermination (CNR)
- Written appeal required!

The Board of Industrial Insurance Appeals

- Counsel advised to level the playing field
- Department representation via Assistant Attorney General
- Rules of Evidence
- Rules of Civil Procedure
- Initial Board contact
- Mediation IAJ assignment
- AAG Notice of Appearance
- Jurisdictional history

Mediation

- No counsel? In person.
- With counsel? Via phone.
- Players
- Confirm jurisdiction
- Confirm employer Notice of Posting requirements
- Discussion of potential resolution
- Duration, in practice can be extended up to 3 months
- If no resolution, trial IAJ

Scheduling Conference

- Notice of assigned hearings IAJ
- Issues on appeal: prima facie burden, affirmative defense(s), penalty, classification
- Lay witnesses
- Expert witnesses
- Location
- Trial date(s)
- Discovery deadlines
- Interlocutory Order

Discovery

- WA Rules of Civil Procedure
- Interrogatories
- Request for Admissions
- Discovery depositions

Preliminary Motions

- WA Rules of Civil Procedure
- Motion to strike witnesses
- Motion to exclude evidence
- Pre-admission of exhibits
- Summary judgment

Trial

- Live testimony before the Board
- Witness unavailability
- Department for WISHA violations have the prima facie burden of proof
- Employer case-in-chief
- Post-hearing brief

Decision by The Board

- Duration – up to 90 days
- Proposed Decision and Order
- Petition for Review – grant or denial

Appeals

- Superior Court
- Court of Appeals

Final Thoughts

- Plan ahead
- Consider your business objectives
- Legal counsel does not mean direct appearance

OSHA Penalty Increases, Impact of the Federal Budget Agreement

- OSHA catch-up” increase to compensate for more than two decades without increases.
 - Current maximum \$70,000 fine for Repeat and Willful violations could grow to \$125,438
 - Current \$7,000 maximum fine for Serious and Failure-to-Abate violations could increase to \$12,744.
 - The initial penalty increases must become effective August 1, 2016; expect Federal Office of Management and Budget guidance by January 31, 2016.
 - OSHA must also publish an interim final rule by July 1, 2016, allowing the adjustment to take effect by August 31.

Questions?



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Jennifer L. Truong

JENNIFER TRUONG is a litigator in the firm's Washington practice. Jennifer provides defense services under the Washington Workers' Compensation and Washington Industrial Safety and Health acts. Before joining the firm, Jennifer represented employers before the Board of Industrial Insurance Appeals and Superior Courts and also provided corporate counsel services to a broad range of industries including hospitality, construction, transportation, staffing and healthcare. Jennifer joined Reinisch Wilson Weier PC in 2015.

Jennifer graduated from the University of Washington where she received a bachelor's degree in Communications with a minor in Political Science. She then attended Seattle University School of Law where she received her Juris Doctorate with honors.

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Steve Heist

Steve Heist Steve Heist is the Safety Director for Approach Management Services, a third party administrator. Steve comes from a construction background, as a safety professional in the field. He was with Division of Occupation Safety and Health (DOSH) as the Statewide Technical Specialist in Standards/Technical Services program for construction. He assisted with rule promulgation of DOSH safety and health requirements, provide technical interpretation for LNI staff and outside customers, inspected and wrote variances to the Washington Administrative Code and was one of the technical trainers for the training of LNI staff. Steve works with local attorneys assisting clients with regulatory compliance inspections and risk assessments helping reduce incidents, claims and cost for those whom he represents.

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