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**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

LANZCE G. DOUGLASS, INC.,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR AND INDUSTRIES**

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I. INTRODUCTION

General Contractor Lanzce G. Douglass, Inc. (Douglass, Inc.) supervised a construction site where subcontracted framers worked on an unprotected elevated platform and faced other fall hazards that could have caused serious injury. A concerned neighbor reported the hazardous work to the Department of Labor and Industries. Douglass, Inc. admits its subcontractor violated the Washington Industrial Safety and Health Act (WISHA). Appellant Brief (AB) 1. So Douglass, Inc. failed in its duty as a general contractor to establish, supervise, and enforce a safe workplace for workers on the jobsite. The Department properly cited the company for a serious workplace safety violation, and the Board of Industrial Insurance Appeals and superior court both correctly affirmed.

II. ISSUE

General contractors must establish, supervise, and enforce a safe and healthful work environment in a manner that is effective in practice. WAC 296-155-100(1)(a). Douglass, Inc. admits its subcontractor violated three WISHA regulations that put employees at Douglass, Inc.'s worksite at risk of harm. Did Douglass, Inc. establish, supervise, and enforce a safe and healthy workplace?

III. STATEMENT OF THE CASE

A. Douglass, Inc. Hired a Subcontractor to Frame a House in Spokane

General contractor, Douglass, Inc., uses subcontractors to build houses. AR Douglass 59-60.¹ Lance Douglass is the company's president. AR Douglass 57-58. He has operated the company for over 20 years and has been involved in hundreds of projects. AR Douglass 58, 62. The company employs five to 10 people and constructs around seven houses at any given time. AR Douglass 59, 101.

In 2014, Douglass, Inc. began to build a house at 1415 Cypress Court in Spokane. AR Douglass 70; AR Neilson 10. It acted as the project's general contractor. AR Douglass 69-70.

Brad Sollie was Douglass, Inc.'s project foreman. AR Douglass 65. He managed several other projects simultaneously. AR Douglass 64. He hired subcontractors, ordered materials, and visited the projects to monitor work. AR Douglass 81-82. Sollie reported directly to Douglass and the two met three to four mornings per week to discuss the progress of various projects and any significant issues. AR Douglass 65, 69. Sollie visited the 1415 Cypress Court jobsite every two to three days. AR Douglass 82.

¹ All cites to the administrative record (AR) are to the consecutively paginated transcript from the October 22, 2015 hearing date, unless otherwise indicated.

Sollie hired a subcontractor, Richard Neilson, Inc. (Neilson, Inc.) to frame the 1415 Cypress Court house. AR Douglass 69-70; AR Neilson 10. Richard R. Neilson was the president and owner of Neilson, Inc. AR Neilson 7. The two verbally agreed for Neilson, Inc. to do the work. AR Neilson 10-11. Neilson, Inc. had parts of a manual outlining its employee safety program, but did not have a full manual. AR Neilson 23, 55; *see* Ex. 14-15. However, Neilson, Inc. did not provide this partial safety manual to Douglass, Inc. for the 1415 Cypress Court project. *See* AR Neilson 55.

B. A Department Inspector Saw a Worker Exposed to Fall Hazards on an Unprotected Platform

On December 17, 2014, a neighbor in the Cypress Court neighborhood e-mailed a photograph of a man working on the 1415 Cypress Court house to a safety supervisor at the Department. AR Hadwiger 129-30. The photograph, taken from across the street, depicted a man on a platform lifted up by a Skytrak forklift. *See* Ex. 5; AR Hadwiger 129. The platform did not have a guardrail. Ex. 5; AR Hadwiger 129. WISHA requires guardrails for work platforms raised with forklifts and for working surfaces over four feet above the ground. WAC 296-863-40060(1)(b); WAC 296-155-24609(2)(a).

Because it was already dark outside, Department inspector Sheri Hadwiger visited the site the next morning. AR Hadwiger 130. As she approached the site, she saw a man working on an elevated platform on a Skytrak forklift without a guardrail. AR Hadwiger 133-36; Ex. 3 at 1-6. She recognized this work as being consistent with the neighbor's referral from the day before. AR Hadwiger 140. She saw the man taking measurements with a tape measure. AR Hadwiger 135-36; Ex. 3 at 5. He also had a nail gun on the platform. AR Hadwiger 136; Ex. 3 at 4-5.

Hadwiger photographed the site from the road. AR Hadwiger 133-34. Besides the man on the Skytrak platform, she photographed another man working on the ground directly underneath the platform. AR Hadwiger 134-35; Ex. 3 at 2-3. He was cutting trim and handing it up to the man on the platform. AR Hadwiger 135; Ex. 3 at 2-4.

As Hadwiger was taking these photos, she saw a white truck pull into the site and pull up in front of the house. AR Hadwiger 134; Ex. 3 at 1-2. The truck said "Lanzce Douglass" on the side. AR Hadwiger 132.

Hadwiger approached the construction site and identified herself to the man up on the Skytrak platform. AR Hadwiger 140, 142. She noted the platform was over 12 feet in the air. AR Hadwiger 142. She asked the man on the platform to come down. AR Hadwiger 140.

Hadwiger inspected the Skytrak platform. AR Hadwiger 138; Ex. 3 at 8. She saw that the platform worker had rounds of nails stacked on the platform for his nail gun. AR Hadwiger 138; Ex. 3 at 8. She also confirmed the platform had no basket or guardrail. AR Hadwiger 138; Ex. 3 at 8.

Hadwiger then walked around the site to identify any other potential safety hazards. AR Hadwiger 146. She observed a large unprotected edge on the house's backside where an opening for a slider door had been framed over four feet above the ground. AR Hadwiger 147, 156; Ex. 6. This edge lacked a guardrail, and the unprotected edge was readily observable to anyone who walked by.² AR Hadwiger 147-48, 157-58; Ex. 6.

Hadwiger then inspected the house's interior. *See* AR Hadwiger 163. There were no handrails on the stairs leading to the house's second story. AR Hadwiger 163; Ex. 8 at 1. The walking area on the second level lacked a mid-guardrail. AR Hadwiger 163; Ex. 8 at 1. Finally, the step leading to the garage was over the permissible height for not having a ramp or step. AR Hadwiger 163-64; Ex. 8 at 2. These safety hazards were all readily observable to Hadwiger. AR Hadwiger 165.

² As Hadwiger was conducting her inspection, one of the workers installed a guardrail in an attempt to abate the violation. AR Hadwiger 147, 158.

Following the inspection, the Department cited Neilson, Inc. for the WISHA violations that Hadwiger saw during her inspection.³

AR Hadwiger 185.

The next day—December 19, 2014—Hadwiger opened an inspection to determine whether Douglass, Inc. had met its duty as a general contractor to ensure a safe workplace. AR Hadwiger 190, 192.

As part of her investigation, she spoke with Douglass.

AR Hadwiger 191. Hadwiger asked Douglass for several documents to determine whether he had met his duty of care, including information on the subcontractor, any safety contracts with the subcontractor, safety programs, and accident prevention programs. AR Hadwiger 192-94. She also asked if he had performed job inspections, when the last inspection occurred, and if he had documented the inspections. AR Hadwiger 207-08. Though Douglass said he would provide this information, he never did, despite Hadwiger's repeated attempts to obtain it. AR Hadwiger 195-97, 202-04.

At an unknown point after the inspection, Neilson provided two documents to the Department, each dated November 12, 2014.

AR Hadwiger 205, 220; AR Neilson 54; Ex. 12-13. The first document

³ Douglass, Inc. concedes Neilson, Inc. "committed the violations." AB 1.

was a "Sub-Contractor's Warranty Statement," in which Neilson, Inc. warrantied to Douglass and Douglass, Inc. that its work and materials would be free from defects for one year. Ex. 12. The next document was a "Sub-Contractor's Safety Statement," in which Neilson, Inc. certified to Douglass and Douglass, Inc. "that all employees working on site ha[d] been instructed in company safety policy and procedures, and [that Richard Neilson, Inc. was] in compliance with safety requirements in and for the State of Washington." Ex. 13.

C. The Department Cited Douglass, Inc. for a Violation of WAC 296-155-100(1)(a) Because It Did Not Establish, Supervise, and Enforce a Safe Workplace

Following Hadwiger's inspection, the Department cited Douglass, Inc. for one violation of WAC 296-155-100(1)(a), based on its failure to establish, supervise, and enforce a safe and healthful work environment for its subcontractors in a manner effective in practice. Ex. 2. In citing Douglass, Inc., the Department found that Douglass, Inc. exposed workers to three hazards: (1) the elevated platform of the Skytrak forklift at a height of 10 feet where the worker worked without a guardrail or bucket, violating WAC 296-863-40060; (2) the unprotected edge on the backside of the house where the framers worked, violating WAC 296-155-24609(2)(a); and (3) the lack of a handrail on the stairway leading to the

second floor of the structure, violating WAC 296-155-477(3).⁴ Ex. 2 at 3; AR Hadwiger (Oct. 23, 2015) 5-7.

D. Douglass, Inc. Appealed to the Board, Which Affirmed the Citation

Douglass, Inc. appealed the citation to the Board. AR 42-43. At the hearing, the Department called Richard Neilson. AR Neilson 4. Neilson did not know if he had a site-specific fall protection plan for the 1415 Cypress Court project, as required by WAC 296-155-24611(2). AR Neilson 21. He testified that he had a general fall protection plan, but admitted he did not post it at the jobsite.⁵ AR Neilson 21, 23.

Neilson testified that he had portions of the required written accident prevention plan.⁶ AR Neilson 23-24, 55. He believed his full accident prevention plan was in a trailer of his that had been stolen, which had contained all of his paperwork from over the years. AR Neilson 23-24. He had not recently provided this plan to Douglass, Inc. AR Neilson 55.

⁴ WAC 296-863-40060(1)(b) requires standard guardrails for forklifts that are used to lift workers. WAC 296-155-24609(2)(a) requires guardrails for unprotected sides and edges of walking and working surfaces four or more feet above the ground. WAC 296-155-477(3) requires stairways with either four or more risers or that rise over 30 inches to have (1) at least one handrail and (2) one stair rail system along each unprotected side or edge.

⁵ A site-specific fall protection work plan must be available at the jobsite when workers are exposed to fall hazards of 10 or more feet. *See* WAC 296-155-24611(2)(a)(vii).

⁶ Employers must develop formal written accident prevention plans that are tailored to the needs of their particular operations and to the hazards involved at those operations. *See* WAC 296-800-14005.

Neilson further testified that he had purchased a basket for the Skytrak forklift, which attached to the machine's lift mechanism. AR Neilson 30. The basket's purpose was to safely lift people who needed to work at an elevated height. AR Neilson 30-31. Neilson testified that someone had stolen the railings for the basket, which had left the standing platform unprotected. AR Neilson 33; *see* Ex. 3 at 8. He testified that the theft occurred before Neilson, Inc. began work on the 1415 Cypress Court house and that he had not replaced the railings. AR Neilson 33.

Neilson estimated the Skytrak forklift was at the jobsite without a basket for 10 days. AR Neilson 34. He further estimated that completing the 1415 Cypress Court house would have taken roughly 13 to 14 days total. AR Neilson 37. He believed the workers had about three or four days of work remaining when Hadwiger inspected the site. AR Neilson 38.

Next, the Department called Douglass. AR Douglass 56. Douglass testified that he was "somewhat" familiar with Washington's rules and regulations relating to construction safety. AR Douglass 62. He acknowledged that Department employees had come to his office and educated the company on WISHA standards. AR Douglass 63. He also agreed that as the general contractor for a project, he was ultimately responsible for worker safety on the jobsite. AR Douglass 63. The

Department had told him that Douglass, Inc. has this same responsibility even when it hires subcontractors to perform the actual work.

AR Douglass 64. He testified that Douglass, Inc.'s foreman, Sollie, was in charge of subcontractors' safety. AR Douglass 64.

Douglass testified that Douglass, Inc. required all of its subcontractors to sign a statement that they were aware of and would comply with Washington safety regulations. AR Douglass 70. He identified these documents as the "Sub-Contractor's Warranty Statement" and "Sub-Contractor's Safety Statement." AR Douglass 71, 73; Ex. 12-13.

Besides these two documents, Douglass testified that Neilson, Inc. had provided him a copy of its safety manual several years beforehand. AR Douglass 70-71, 104-05; Ex. 14-15. He testified he had found the manual in the file he maintained for Neilson, Inc. AR Douglass 104. In the stack of papers, Richard Neilson had signed one document on July 11, 2001. Ex. 14.

WISHA requires a written site-specific fall protection plan where fall hazards of 10 feet or more exist. WAC 296-155-24611(2). Neilson, Inc. did not provide Douglass, Inc. one. WISHA also requires a written accident prevention program. WAC 296-800-14005. Neilson, Inc. did not provide Douglass, Inc. with a current one. AR Neilson 23, 55.

Besides the two 2014 subcontractor documents and Neilson, Inc.'s old safety manual, Douglass testified there were no other documents regarding responsibility for safety at the construction site. AR Douglass 73, 78. He further agreed that other than those three documents and an internal safety program for Douglass, Inc.'s five to 10 employees, the company did nothing to establish a safe and healthy working environment at the 1415 Cypress Court jobsite. AR Douglass 77-78.

He testified he had no conversations with Neilson regarding safety expectations at the jobsite, and did not know if anyone else at his company did. AR Douglass 74. He testified that Neilson was responsible for safety, but also agreed Douglass, Inc. "would be responsible also." AR Douglass 76. He stated there were no documents specifying what Neilson, Inc. would be responsible for and what Douglass, Inc. would be responsible for. AR Douglass 76.

Douglass testified that Douglass, Inc. had a general internal safety plan for all its jobsites. AR Douglass 78-79. He testified he did not previously know where this general internal safety plan was, and had stated he would have had to "scour" his office to find it. AR Douglass 79-80. He testified that Sollie ended up having it. AR Douglass 79-80. He stated he was not sure what was supposed to be in the safety plan, as he was "not totally up on a hundred percent of the law." AR Douglass 80-81.

In a proposed decision, the hearings judge affirmed the citation. AR 24, 39. In the decision, the hearings judge determined that exhibits 12 and 13 (the two subcontractor documents), and 14 and 15 (Neilson, Inc.'s old safety plan) were not credible. AR 32-35.

The judge concluded that Douglass, Inc. established no program to ensure a safe work environment that was effective in practice. AR 35. The judge reasoned that the violations were obvious and occurred in plain view for anyone to see. AR 35-36. The judge also pointed out that the neighbor reported the same violation the day before the inspection. AR 35. The judge noted Neilson's testimony that the workers had used the Skytrak to lift materials to the second floor, and determined this established that workers commonly used the Skytrak in its dangerous condition. AR 36.

The hearings judge entered several findings of fact, including:

- Douglass, Inc. "did not take effective steps to discover and correct violations of safety rules related to the use of: guardrails on [the] platform of a SkyTrak boom lift vehicle; inadequate guardrail systems on open-sided walking and working surfaces; and, inadequate stair-rails." AR 38 (FF 5).
- Douglass, Inc. "did not adequately communicate its safety rules to workers on its jobsite at 1415 Cypress Court, in Spokane, Washington, regarding use of the SkyTrak boom lift vehicle or construction and use of guardrail and stair-rail systems." AR 38 (FF 7).

- Douglass, Inc. “knew or, through the exercise of reasonable diligence, could have known of the presence of the three jobsite events[.]” AR 38 (FF 6).

The Board denied Douglass, Inc.’s petition for review and adopted the proposed decision as its final decision. AR 3; *see* WAC 263-12-145(5)(a)(i). The superior court affirmed. CP 7-10, 57-64. Douglass, Inc. appeals. CP 11.

IV. STANDARD OF REVIEW

In WISHA appeals, appellate courts review a Board’s decision directly, based on the record that was before the agency. *Frank Coluccio Const. Co. v. Dep’t of Labor & Indus.*, 181 Wn. App. 25, 35, 329 P.3d 91 (2014). The Board’s findings of fact are conclusive if substantial evidence supports them. *Id.*; RCW 49.17.150(1). Evidence is “substantial” when it is enough to persuade a fair-minded person of the truth of a declared premise. *Coluccio*, 181 Wn. App. at 35. Under substantial evidence review, appellate courts do not reweigh the evidence even though they “might have resolved the factual dispute differently.” *Zavala v. Twin City Foods*, 185 Wn. App. 838, 867, 343 P.3d 761 (2015) (citation omitted); *see also Potelco, Inc. v. Dep’t of Labor & Indus.*, 194 Wn. App. 428, 434, 377 P.3d 251, *review denied*, 186 Wn.2d 1024, 383 P.3d 1014 (2016). Rather, courts view the evidence in the light most favorable to the prevailing party at the Board—here, the Department. *See Coluccio*, 181

Wn. App. at 35. When substantial evidence supports the Board's findings, this Court then determines whether those findings support the Board's legal conclusions. *Id.*

Washington courts liberally construe WISHA to achieve its stated purpose of ensuring safe and healthful working conditions for all Washington workers. *Coluccio*, 181 Wn. App. at 35-36. Courts must construe WISHA to "protect not only an employer's own employees, but *all* employees who may be harmed by the employer's violation of the regulations." *Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 672, 709 P.2d 774 (1985).

V. ARGUMENT

Douglass, Inc. admits its subcontractor violated WISHA, so this Court need go no further than that to find a violation of WAC 296-155-100(1)(a). AB 1. Having fall protection violations on the jobsite does not establish, supervise, and enforce, in a manner that is effective in practice, a safe and healthful working environment. *See* WAC 296-155-100(1)(a). Douglass, Inc.'s innate supervisory authority of the worksite as a general contractor establishes knowledge of Neilson, Inc.'s WISHA violations.

A. General Contractors Have a Nondelegable, Specific Duty to Protect All Workers on a Jobsite

The Legislature created WISHA so workers could perform jobs safely with as little risk of serious injury or death as reasonably possible. RCW 49.17.010. To achieve safe workplaces, general contractors like Douglass, Inc. have a nondelegable, specific duty to ensure compliance with all applicable WISHA regulations for “every employee on the jobsite,” not just its own employees. *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 456, 463-64, 788 P.2d 545 (1990); *accord Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 122, 52 P.3d 472 (2002). A general contractor’s duty to protect workers on the jobsite extends to “any employee who may be harmed by the employer’s violation of the safety rules.” *Afoa v. Port of Seattle*, 176 Wn.2d 460, 471, 296 P.3d 800 (2013). As our Supreme Court explained, “[t]he *Stute* court imposed the per se liability as a matter of policy: ‘to further the purposes of WISHA to assure safe and healthful working conditions for every person working in Washington.’” *Kamla*, 147 Wn.2d at 122 (quoting *Stute*, 114 Wn.2d at 464).

The basis for a general contractor’s expansive duty to all workers on the jobsite arises from its “innate supervisory authority,” which “constitutes sufficient control over the workplace.” *Stute*, 114 Wn.2d at 464. A general contractor has authority to influence work conditions at a

construction site. *Kamla*, 147 Wn.2d at 124. As *Stute* explained, general contractors “as a matter of law” have “per se control over the workplace,” which places them “in the best position to ensure compliance with safety regulations.” 114 Wn.2d at 463-64. Because a general contractor is in the best position—financially and structurally—to ensure WISHA compliance, “the prime responsibility for safety of all workers should rest on the general contractor.” *Stute*, 114 Wn.2d at 463.

Douglass, Inc. failed in its duty.

B. At the Board, the Department Proved Douglass, Inc. Violated the Safe Workplace Duty; Substantial Evidence at This Court Does Not Show Otherwise

At the Board, the Department bears the initial burden of proving a WISHA violation, here WAC 296-155-100. *Express Constr. Co. v. Dep’t of Labor & Indus.*, 151 Wn. App. 589, 597, 215 P.3d 951 (2009); WAC 263-12-115(2)(b). WAC 296-155-100 sets forth management’s responsibilities for ensuring safety for construction work:

(1) It is the responsibility of management to establish, supervise, and enforce, in a manner which is effective in practice:

(a) A safe and healthful working environment.

...

WAC 296-155-100(1). To establish a prima facie case that an employer violated WAC 296-155-100(1)(a), the Department must “show that the requirement—to establish, supervise, and enforce, in a manner

which is effective in practice, a safe and healthful working environment— was not met.” *Express Constr. Co.*, 151 Wn. App. at 598; *J.E. Dunn v. Dep’t of Labor & Indus.*, 139 Wn. App. 35, 50, 156 P.3d 250 (2007).

The Department may satisfy its affirmative burden of proving a general contractor violated WAC 296-155-100 by presenting evidence of a subcontractor’s underlying WISHA violations. *Mediterranean Pac. Corp.*, No. 06 W0162, 2007 WL 3054885, at *3 (Wash. Bd. Ind. Ins. App. June 28, 2007), available at <http://biia.wa.gov/SDPDF/06W0162.pdf>.⁷ In *Mediterranean Pacific Corp.*, a general contractor (Mediterranean Pacific Corporation) was engaged in building a house. *Id.* at *3. The general contractor hired a siding subcontractor. *Id.* at *2. A Department inspector visited the jobsite and saw a subcontractor’s employee preparing to side the house while being exposed to a fall hazards. *Id.* The inspector also saw workers on a scaffold that did not have a complete guardrail system, open-sided work surfaces that were not protected with a guardrail system, and stairways with four or more risers that were not protected with stair rails

⁷ The Board publishes “significant decisions,” which appellate courts treat as nonbinding, persuasive authority. *Potelco*, 194 Wn. App. at 437. Appellate courts give “great deference” to the Board’s interpretation of regulations within its areas of expertise. See *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991); see also *Robinson v. Dep’t of Labor & Indus.*, 181 Wn. App. 415, 428 n.4, 326 P.3d 744 (2014); *Lynn v. Dep’t of Labor & Indus.*, 130 Wn. App. 829, 836, 125 P.3d 202 (2005).

along the unprotected side. *Id.* The general contractor also had not developed and implemented a written fall protection work plan. *Id.* at *3.

The Department cited the general contractor for violating WAC 296-155-100(1)(a), based on its failure to establish, supervise, and enforce in a manner that was effective in practice, a safe and healthful working environment. *Mediterranean Pac. Corp.*, 2007 WL 3054885 at *1. The Department alleged that the general contractor allowed the employees of its subcontractors to be subjected to hazards at the jobsite. *Id.*

The Board affirmed. *Id.* In doing so, the Board acknowledged that the Department has the affirmative burden to prove a contractor's failure to establish, supervise, and enforce, in a matter that is effective in practice, a safe and healthful working environment. *Id.* at *1-2 (citing *J.E. Dunn*, 139 Wn. App. 35). But in determining that the Department satisfied its affirmative burden of proving that Mediterranean Pacific Corp. violated WAC 296-155-100 by presenting evidence of the subcontractor's underlying WISHA violations, the Board reasoned that under *Stute*, "[t]he general contractor at a construction site has a duty to comply with WISHA regulations in regard to the oversight of all employees on the site." *Mediterranean Pac. Corp.*, 2007 WL 3054885 at *1-2 (citing *Stute*, 114

Wn.2d 454). The Board further reasoned that “[t]he number, seriousness, and the general nature of the hazards that [the inspector] observed at the work site clearly demonstrate that Mediterranean Pacific Corp. did not take workplace safety seriously.” *Id.* at *3. Thus, the Board concluded that the evidence of the *subcontractor*’s WISHA violations were “sufficient to establish that Mediterranean Pacific Corp. violated the provisions of WAC 296-155-100(1)(a) by failing to establish, supervise, and enforce a safe and healthful working environment which was effective in practice.” *Id.*

In light of *Mediterranean Pacific Corp.*, the reason why the Department only needs to show the subcontractor’s violations of WISHA is twofold: (1) the safety violation’s very presence at the workplace shows the work environment was unsafe and (2) the general contractor has per se liability for these violations.

First, the fact that workers did not have adequate fall protection alone made the worksite not a “safe and healthful working environment.” *See* WAC 296-155-100(1)(a). The safety program certainly is not “effective in practice” when a subcontractor violates WISHA.

Second, the per se liability for WISHA violations admits an unsafe workplace. “RCW 49.17.060(2) imposes on general contractors a

nondelegable specific duty to ensure WISHA compliance for the protection of all employees on the jobsite.” *Neil v. NWCC Invs. V, LLC*, 155 Wn. App. 119, 125-26, 229 P.3d 837 (2010) (citing *Stute*, 114 Wn.2d at 463-64); accord *J.E. Dunn*, 139 Wn. App. at 48 (“[T]he general contractor at a construction site has a duty to comply with WISHA regulations in regard to its oversight of all employees on the site, not just its own employees.”). “The *Stute* court imposed the per se liability as a matter of policy.” *Kamla*, 147 Wn.2d at 122. This per se liability follows from the general contractor’s per se control over the workplace. *Stute*, 114 Wn.2d at 464.

Here, the underlying violations included a worker standing on an elevated platform without fall protection (WAC 296-863-40060); an unprotected edge of a walking working surface (WAC 296-155-24609(2)(a)); and, lack of a stair rail system (WAC 296-155-477(3)(a)). *See* Ex. 2 at 3; AR Hadwiger (Oct. 23, 2015) 5-7. By the presence of these violations, Douglass, Inc. failed its duty as the general contractor to establish, supervise, and enforce a safe working environment effective in practice. *See Kamla*, 147 Wn.2d at 122; *Stute*, 114 Wn.2d at 464.

Douglass, Inc. concedes that Neilson did not comply with the fall protection standards. AB 1. So the Department has met its burden to show

that Neilson did not “establish, supervise, and enforce, in a manner which is effective in practice . . . A safe and healthful working environment.”

WAC 296-155-100(1), (1)(a). Douglass, Inc. argues that the Board improperly shifted the burden of proof to it and required it to prove that it had established and enforced a safe working environment, rather than requiring the Department to prove that it did not. *See* AB 4, 8. This is incorrect. By showing the violations of WISHA, the Department met its burden to show the workplace was unsafe.

Douglass, Inc. also argues that WAC 296-155-100(1)(a) does not impose strict liability on a general contractor for a subcontractor’s workplace safety violations and so “it is not enough for the Department to merely show that a subcontractor violated a safety standard.” AB 12. The Department agrees that WAC 296-155-100(1)(a) is not a strict liability regulation. Douglass, Inc. had the opportunity to refute that Neilson, Inc. committed its violations. It did not. In these circumstances, there is no strict liability. The presence of the violations at the workplace is enough for the Department to prove that the subcontractor violated WISHA because their presence shows that the work environment was not safe.

C. Ample Additional Evidence Supports the Board's Conclusion That Douglass, Inc. Failed to Establish or Enforce a Safe and Healthful Work Environment

Even had Douglass, Inc. been able to prove that Neilson, Inc. did not commit the underlying violations, the Department can show the employer's safety program was not effective by other means. *See Express Constr. Co.*, 151 Wn. App. at 598.

First, substantial evidence supports the Board's finding that Douglass, Inc. did not take effective steps to discover and correct safety rule violations. *See* AR 38 (FF 5). Neilson, Inc. only had an incomplete accident prevention plan. AR Neilson 23-24, 55; *see* WAC 296-800-14005. It did not provide a copy of this plan to Douglass, Inc. AR Neilson 55. The copy of the accident prevention plan Neilson, Inc. had provided years earlier was outdated (signed in 2001). Ex. 14. A general contractor cannot discover defects in a subcontractor's safety plan if the general contractor does not even ask for the plan.

Additionally, Douglass, Inc.'s foreman visited the 1415 Cypress Court jobsite every two to three days and a Douglass, Inc. company truck was present when Hadwiger inspected the jobsite. *See* AR Douglass 82; AR Hadwiger 132. As the Board reasoned, if Douglass, Inc. had been taking effective steps to discover and correct safety rule violations

throughout the project, it would have rectified the multiple violations before the inspection. AR 32.

Second, substantial evidence supports the Board's finding that Douglass, Inc. failed to adequately communicate its safety rules to workers on the jobsite about the Skytrak forklift, guardrails, and stair handrails. *See* AR 38 (FF 7). Douglass had no conversations with Neilson about safety expectations at the jobsite, and did not know if anyone else at his company did. AR Douglass 74. Other than the "subcontractor's safety statement"—which Douglass never discussed with Neilson, none of the workers signed, and the Board expressly found was not credible—Douglass had no current agreements with Neilson, Inc. about responsibility for safety at the construction site. AR Douglass 73-74; Ex. 13; AR 32-25. Douglass also admitted that—apart from the two subcontractor documents, the old safety plan, and an internal safety program for Douglass Inc.'s own five to 10 employees—the company did nothing to establish a safe working environment at the 1415 Cypress Court jobsite. AR Douglass 77-78.

Douglass, Inc. argues that Hadwiger did not personally observe any of its acts or omissions relating to its attempts to establish a safe work environment. AB 6-7. It argues, for example, that Hadwiger did not have personal knowledge of the steps Douglass, Inc. took to review Neilson,

Inc.'s compliance with safety requirements, the processes it used to enforce safety rules and correct violations, and whether its foreman was present at the jobsite after the violations occurred. AB 6-7.

While it is true that Hadwiger did not personally observe Douglass, Inc.'s various acts or omissions, the Department presented evidence through Neilson, Douglass, and Hadwiger that Douglass, Inc. generally failed to establish adequate safety protocols at its jobsite. Douglass, Inc. implies, without citing to authority, that the Department may only prove WISHA violations through the personal firsthand observations of its inspectors. But WISHA does not require this. Douglass, Inc.'s argument goes to the weight and credibility of Hadwiger's testimony, which was for the Board to determine. This determination is beyond the scope of appellate review. *Zavala*, 185 Wn. App. at 867.

Substantial evidence supports the Board's determination that Douglass, Inc. did not establish a safe working environment in two independent ways: 1) Neilson, Inc. committed three WISHA violations and 2) Douglass, Inc. did not take steps to ensure an effective safety plan or communicate it.

D. Douglass, Inc. Admits to Knowledge by Conceding the Underlying Violations and by Knowing Workers Were Working at Dangerous Heights

To establish a serious WISHA violation, the Department must show the employer knew or, through exercising reasonable diligence, could have known of the violative condition. RCW 49.17.180(6); *see also SuperValu, Inc. v. Dep't of Labor & Indus.*, 158 Wn.2d 422, 433, 144 P.3d 1160 (2006). Here, by conceding the underlying violations, including knowing that the workers would be working at dangerous heights, Douglass, Inc. has conceded knowledge.

RCW 49.17.180(6) finds a serious violation if the employer “could have known” of the violation with reasonable diligence. Douglass, Inc. authorized Neilson, Inc. to work at dangerous heights that require fall protection. Because of the innate supervisory authority over such work, Douglass, Inc. “could have known” of the violations. This per se liability follows from the general contractor’s per se control over the workplace. *Stute*, 114 Wn.2d at 464.

If the subcontractor knows of the violation, so does the general contractor. *Cf. Potelco, Inc.*, 194 Wn. App. at 440 (WISHA imputes knowledge when a supervisor has knowledge of a safety violation). Allowing Douglass, Inc. to avoid its per se liability would mean that it impermissibly delegated safety protection to its subcontractor. Such an

approach is contrary to *Stute* and to the required interpretation of WISHA to further worker safety. *See Coluccio*, 181 Wn. App. at 35-36.

E. Ample Additional Evidence Supports the Board's Finding That Douglass Knew, or Could Have Known, of the Violative Conditions

Even if WISHA required more evidence about knowledge, ample evidence supports the Board's finding.

To establish the knowledge element, the Department need only show that the employer could have known of the violative condition if it exercised reasonable diligence. RCW 49.17.180(6); *Wash. Cedar & Supply Co. v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 914, 83 P.3d 1012 (2003). "Reasonable diligence involves several factors, including an employer's obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence." *Erection Co. v. Dep't of Labor & Indus.*, 160 Wn. App. 194, 206-07, 248 P.3d 1085 (2011) (quoting *Kokosing Constr. Co. v. Occupational Safety & Hazard Review Comm'n*, 232 Fed. Appx. 510, 512 (6th Cir. 2007)).

Douglass, Inc. could have known of the violations in the exercise of reasonable diligence and therefore had constructive knowledge. *See BD Roofing, Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 98, 108-09, 161 P.3d 387 (2007) (constructive knowledge proves knowledge and

management officials need not be present to witness the violations). When a violation is readily observable or in a conspicuous location in the area where employees are working, there is constructive knowledge of the violation. *Erection Co.*, 160 Wn. App. at 206-07. When a hazardous condition is in the open and visible to any bystander, that condition is constructively known. *Potelco, Inc.*, 194 Wn. App. at 439-40.

Here, the Board found that Douglass either knew, or through exercising reasonable diligence could have known, of the presence of the three violations. AR 38 (FF 6). The worker's use of the forklift platform without guardrails occurred in plain view. The day before the inspection, a neighbor photographed a worker on the elevated platform without a guardrail from across the street. Ex. 5; AR Hadwiger 129. The next morning, Hadwiger also observed the violation in plain view—from across the road, she saw a worker working from the elevated forklift platform without a guardrail. AR Hadwiger 133-36; Ex. 3 at 1-6. Both the large opening on the backside of the home and the absence of rails on the steps were also readily observable. AR Hadwiger 147-48, 157, 165; Ex. 6.

Further, Neilson testified that the Skytrak forklift had been in use on the jobsite without a basket for at least 10 days. AR Neilson 33-35, 50. It is reasonable to conclude that additional violations had occurred in plain view within that time period. It is also reasonable to infer that since

Douglass, Inc.'s truck was at the jobsite during Hadwiger's inspection, Douglass, Inc. could have known that the workers had been working on the unprotected lift platform. Because the violations were readily observable and in conspicuous locations where the employees were working, Douglass, Inc. constructively knew of the violations. *See Potelco, Inc.*, 194 Wn. App. at 439-40; *Erection Co.*, 160 Wn. App. at 207.

Douglass, Inc. argues there was no evidence that the violations were visible "for a period even as long as a single day." AB 10. But the legal standard for constructive knowledge does not require the Department to prove the violations existed for that long. The standard is simply that the violations be readily observable or in a conspicuous location in the area where employees are working. *Erection Co.*, 160 Wn. App. at 206-07; *Potelco, Inc.*, 194 Wn. App. at 439-40 (knowledge shown when a hazardous condition is in the open and visible).

The violations here were readily observable in a conspicuous location in the area where Neilson, Inc.'s employees were working, which meets the standard for constructive knowledge. Douglass, Inc.'s suggestion that the Department (or a neighbor) would have to observe a dangerous work condition for a lengthy period would require inspectors

(or concerned neighbors) to leave workers in hazardous positions in order to prove a violation. This would undermine WISHA's purpose to ensure safe and healthful working conditions for everyone working in Washington. See RCW 49.17.010; *Potelco v. Dep't of Labor & Indus.*, 191 Wn. App. 9, 21, 361 P.3d 767 (2015).

In any event, the Department presented evidence that the workers used a platform without a guardrail from an unsafe height for more than two days. Neilson testified that the Skytrak had been in use at the site without the basket for at least 10 days. AR Neilson 33-34, 50. Hadwiger estimated the stairs had been in place for at least a week before the inspection. AR Hadwiger (Oct. 23, 2015) at 60, 62. So Douglass, Inc. could have discovered these violations with reasonable diligence.

Also relevant to reasonable diligence is the duty to adequately supervise a worksite. See *Erection Co.*, 160 Wn. App. at 206-07 (reasonable diligence includes inspecting work area); *N & N Contractors, Inc. v. Occupational Safety & Health Review Comm'n*, 255 F.3d 122, 127 (4th Cir. 2001) (reasonable diligence includes supervision).⁸ Douglass, Inc. argues that it could not have had constructive knowledge of the

⁸ Although Washington may have stricter standards, courts often look to federal case law in WISHA matters. See *Aviation W. Corp. v. Dep't of Labor & Indus.*, 138 Wn.2d 413, 424, 980 P.2d 701 (1999); *Asplundh Tree Expert Co. v. Dep't of Labor & Indus.*, 145 Wn. App. 52, 60, 185 P.3d 646 (2008).

underlying WISHA violations “unless it had a duty to be present on the site on a daily basis.” AB 12. It cites WAC 296-155-110(9)(a), which requires employers to conduct walk-around safety inspections at jobsites “at least weekly.”

WAC 296-155-110(9)(a) sets a floor for the required number of walk-around safety inspections, but the reasonable diligence standard may require more. *See Erection Co.*, 160 Wn. App. at 206. In other words, a contractor may avoid a citation under WAC 296-155-110(9)(a) if it conducts a weekly inspection, but reasonable diligence is a separate question that the Board resolved against Douglass, Inc.

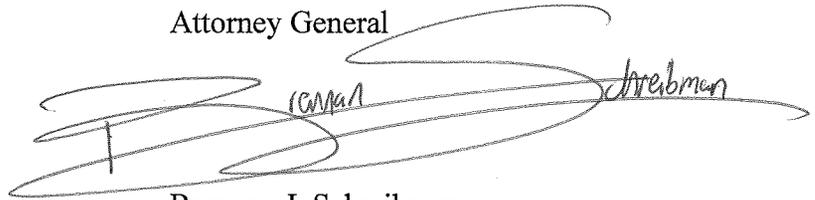
Because Douglass, Inc. admits to Neilson, Inc.’s violations, this Court need not inquire further in determining that Douglass, Inc. violated WAC 296-155-100(1)(a). But even if it does, ample evidence supports the Board’s finding that Douglass, Inc. either knew, or through the exercise of reasonable diligence could have known, of the presence of the three violations.

VI. CONCLUSION

Douglass, Inc. failed in its duty to protect workers on its jobsite. The Department proved, and the Board correctly found, that Douglass, Inc. did not establish, supervise, and enforce a safe work environment in a manner that was effective in practice, as WAC 296-155-100(1)(a) requires. This Court should affirm.

RESPECTFULLY SUBMITTED this 10 day of January, 2018.

ROBERT W. FERGUSON
Attorney General

A large, stylized handwritten signature in black ink, appearing to read 'Schreibman', is written over the printed name and title of Brennan J. Schreibman. The signature is written in a cursive, flowing style.

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