

NO. 739433

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

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HOWARD S. WRIGHT CONSTRUCTORS, LP,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF  
THE STATE OF WASHINGTON,

Respondents.

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**OPENING BRIEF OF APPELLANT  
HOWARD S. WRIGHT CONSTRUCTORS, LP**

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## **I. INTRODUCTION**

The matter before the Court involves a safety citation under the Washington Industrial Safety and Health Act, Ch. 49.17 RCW. The Department of Labor and Industries (“Department”) alleged that Howard S. Wright Corporation (“HSWC”), a general contractor, did not effectively supervise its construction worksite as required by WAC 296-155-100(1)(a) when two subcontractor employees of Corona Steel were working at a height less than ten feet. HWSC appealed. The Department alleged that under the walking/working surface rule for open sided floors, fall protection was required if there was exposure to a fall hazard greater than four feet pursuant to WAC 296-155-505. There was no dispute that the workers were working above four feet, but not above 10 feet. The Board of Industrial Insurance Appeals (“Board”) vacated the citation by holding that the workers were not on a “walking working surface” and that fall protection was not required because the employees were working at a height less than 10 feet. The Department appealed and the King County Superior Court held that there were no substantial facts in the record to support the Board’s Decision. The Employer now appeals.

## **II. ASSIGNMENTS OF ERROR**

1. Appellant respectfully asserts that the Superior Court erred in Findings of Fact Number 1.4 when it erroneously held that there were no sufficient facts to support the Board’s Finding of Fact Nos. 2 through 4.
2. Appellant respectfully asserts that the Superior Court erred in Finding of Fact Number 1.6 when it erroneously held that subcontractor employees Muniz and Woodruff were working on a surface more than 45 inches in all directions.

3. Appellant respectfully asserts that the Superior Court erred in Findings of Fact Number 1.8 when it erroneously held that there was substantial evidence to support a substantial probability that serious physical harm could result to Mr. Muniz and/or Mr. Woodruff if either or both fell from the surface on which they were working to ground below.
4. Appellant respectfully asserts that the Superior Court erred in Findings of Fact Number 1.10 when it erroneously found that the Department did not abuse its discretion in assessing a \$250 penalty against Howard S. Wright for the WISHA violation.
5. Appellant respectfully asserts that the Superior Court erred in Conclusion of Law Number 2.3 when it concluded that the Board's Conclusions of Law 2 and 3 are not correct.
6. Appellant respectfully asserts that the Superior Court erred in Conclusion of Law Number 2.4 when it erroneously concluded that since Howard S. Wright retained control over the work done at the job site, they have the ultimate responsibility to comply with safety regulations for both their own and their subcontractors' employees. *Afoa v Port of Seattle*, 176 Wn.2d 460, 477 (2013).
7. Appellant respectfully asserts that the Superior Court erred in Conclusion of Law Number 2.5 and 2.6 when it erroneously concluded that Howard S. Wright committed a serious violation of WAC 296-155-100(1)(a) with a penalty of \$250, and by further entering Judgment against Appellant.

### **III. STATEMENT OF FACTS**

Howard S. Wright Corporation (HSWC) was the general contractor building the Experience Music Project Administrative Offices in Seattle, Washington. Corona Steel was the steel subcontractor for this project. See Exhibit 1, the contract between HSWC and Corona Steel. On March 15, 2013 the Department of Labor and Industries conducted a drive by inspection. At that time, Corona Steel was welding "lintels" to connect precast panels to the building. Schoenle at page 12, lines 1 – 21. "Lintels" are shown in Photograph Exhibit No. 5. Schoenle at page 13,

lines 1 – 4, Schoenle at page 16, lines 13 – 19, Schoenle at page 17, lines 1 – 5. The precast panel has a steel embed, or a clip, that is used to connect the precast panel to the building. Spencer at page 103, line 23 – page 104, line 1.

Ed Spencer testified that he was the superintendent for the HSWC project. Spencer at page 50, lines 14 – 18. He testified that HSWC put up the guardrails to keep all employees away from the edge of the building, but that they were not put up only for the Corona Steel employees. Spencer at page 55, line 22 – page 56, line 1. Specifically, the purpose of the guardrail was to keep employees from falling off the surface as it would have been an open sided floor. Spencer at page 56, lines 6 – 8, Spencer at page 90, lines 11 – 26.

Mr. Spencer testified that the concrete slab shown in the photographs was the first floor. It was heavily used as a walkway to move through the building. Once the wall was built in, the guardrails would come down as they would no longer be necessary. Spencer at page 91, lines 4–6.

Greg Schoenle testified that he is the Safety Administrator for Corona Steel, Inc. Schoenle at page 11, lines 9 – 11. Corona Steel is a steel erector for buildings, miscellaneous steel projects, seismic retrofits, etc. Schoenle at page 11, lines 12 – 16.

Mr. Schoenle estimated that it would take Corona employees between 5 – 10 minutes to connect each lintel. Schoenle at page 18, lines 11 – 18.

Mr. Raymond Muniz was identified as one of the two Corona workers who was connecting the precast buildings on the day of the inspection. Muniz is shown sitting on top of the precast panel in Exhibit No. 5. Schoenle at page 19, lines 1 – 8. In Exhibit 7, Mr. Schoenle identified the second Corona Steel worker as Rob Woodruff. He is the employee with a tan shirt with his thumb hooked in his belt. Schoenle at page 19, lines 14 – 23. Neither of these workers were foremen or supervisors for Corona. Schoenle at page 20, lines 11 – 13. It is undisputed that Muniz and Woodruff were working on the outside of the guardrail.

Exhibit 9 shows the guardrail and the precast wall. CSHO Ryan Olsen testified that the distance between the guardrail and precast wall was about a foot. Olsen at page 153, line 21 – page 154, line 3. CSHO Olsen further agreed that based on his understanding of the term “walking/working surface” for an open sided floor, “a walking/working surface that is greater than 45 inches in all directions.” Olsen at page 154, lines 7 – 11. Officer Olsen didn’t have a problem with the guardrail until the workers went on the outside of the guardrail to perform their work. Olsen at page 155, lines 15 – 18.

Mr. Raymond Muniz testified that he was a journey level ironworker who was at the EMP project in Seattle for Corona Steel. Muniz at page 11. He confirmed that he is the person shown in the Exhibit 5. Muniz at page 12, lines 8 – 11. He was working on the outside of the guardrail. Muniz at page 13, line 2. He testified that he recalled the space between the guardrail and the edge where he was sitting to be

less than three feet. Muniz at page 13, lines 3 – 10. He was working on the edge for about five minutes. Muniz at page 14, lines 3 – 5. He said that you could either get to the outside of the guardrail by either crossing through the guardrail, or jump up from the ground. Muniz at page 14, lines 5 – 9. He said that he probably boosted himself up as the top of the precast panel was about at his chest level. Muniz at page 14, lines 12– 6.

Mr. Schoenle testified that he did not believe that his employees, as shown in Exhibit 5, were exposed to a fall hazard. Schoenle at page 35, lines 8 – 11. Mr. Schoenle testified that if employees are working on the outside of the guardrail then they are not protected by the guardrail. Schoenle at page 46, lines 7 – 10. Once the employee is outside of the area protected by the guardrail, Mr. Schoenle testified that the area is a walking/ working surface if that surface is more than 45 inches in all directions. If the area is less than 45 inches in any direction, then it is not a walking/working surface for purposes of determining whether to apply the four foot fall protection requirement. For areas that are not a walking/working surface, Mr. Schoenle testified that the ten foot fall protection rule would be applicable. Schoenle at page 46, lines 11 – 21.

Mr. Schoenle testified that it was also his understanding that the distance between the precast wall and the guardrail was less than 45 inches. Schoenle at page 33, line 26 – page 34, line 2. With that understanding, Mr. Schoenle further testified that the area outside of the guardrail would not be a walking/working surface. Consequently, the walking working surface fall protection requirement of four feet was not applicable, rather, the ten foot rule would be applicable. Schoenle at page

34, lines 7 – 15. Accordingly, Mr. Schoenle testified that had he seen the workers as depicted in Exhibit 5, he would not believe that anything was wrong. Schoenle at page 24, lines 17b – 21.

As Mr. Schoenle explained, the state’s statute is that the minute workers step over the guardrail onto a narrower portion of the same surface, it’s ok as long as it’s not greater than ten feet. Schoenle at page 48, lines 9 – 26.

Mr. Spencer was on the job on the day of the inspection, but he was not at the north side of the building when the Corona Steel employees were working on the lintels. He was called to the area after the inspection began. Spencer at page 92, lines 12 – 19. Once at the specific area, Mr. Spencer testified the area directly below Mr. Muniz, the employee shown in Exhibit 5, was soft dirt. Spencer at page 92, line 20 – page 93, line 3. Based on his observations, if Mr. Muniz were to fall from the location where he was working in Exhibit 5, he would fall a little less than four feet onto the soft dirt. Spencer at page 93, lines 4 – 8. On Exhibit 5, Mr. Spencer drew a circle on the soft dirt where Mr. Muniz would have landed if he had fallen. Spencer at page 94, lines 18 – 26.

Mr. Spencer further testified that Mr. Muniz needed to be in the area where he is shown in Exhibit 5 in order to connect the precast panel to the building. Spencer at page 104, lines 6 – 10.

Corona has worked with HSWC prior to the EMP project. Schoenle at page 26, lines 22 – 24. Mr. Schoenle testified that Corona Steel has a safety program that he is “quite proud of.” Corona is within the top six of all steel erectors in Washington. Schoenle at page 27, lines

5 – 15. For Worker’s Compensation premiums, Corona Steel has a low or good Experience Modification Rate (“EMR”). Schoenle at page 28, lines 13 – 17. Corona has had a very good working relationship with HSWC as it pertains to safety. Schoenle at page 29, lines 14 – 16.

HSWC had an office located in a residential building at the EMP site. Although part of construction project could be seen from the office, the north side of the construction project where the alleged violation occurred could not be seen from the office. As Mr. Spencer explained, if he wanted to see the north side of the building from his temporary office, he would have to walk outside, walk across Sixth Avenue and walk around a little bit to the north and then turn the corner. Spencer at page 59, lines 11–20.

Mr. Spencer testified that Exhibit 2 was the HSWC Safety Resource Manual. Spencer at page 60, lines 21 – 26. Under the Safety Resource Manual, Mr. Spencer made sure that: all employees (including all subcontractor employees) attended a safety orientation; all subcontractors submitted site safety plans and that HSWC reviewed them; and that all unsafe acts be corrected. Spencer at page 61, line 18 – page 62, line 19, and page 65, line 25 – page 66, line 10.

HSWC goes over all of the safety rules with its subcontractors at the safety orientation. Subcontractors are required to comply with all WISHA regulations. Spencer at page 96, lines 4 – 13. HSWC has a disciplinary program for safety violations: verbal warning, written warning, and then removal from the job. Spencer at page 97, lines 12 -17.

Paragraph 6.1F of the contract between HSWC and Corona Steel required Corona to observe all safety requirements, including 100% tie off protection. Spencer at page 64, line 26 – page 65, line 3. HSWC had three to four foreman assigned to this project. Spencer at page 67, lines 22 – 25. Additionally, Mr. Spencer, the foremen and the project engineer walked the job site on a daily basis. Spencer at page 70, lines 22 – 25.

Mr. Spencer also testified that he had not had any safety issues with Corona Steel. If he had prior safety problems with Corona Steel, or any other subcontractor, HSWC would not allow them to work for future projects as it would be a basis for disqualification. Spencer at page 89, line 15 – page 90, line 10.

HSWC performed job site inspections, audits, and walk arounds. These occurred many times each day, averaging an inspection every hour. Spencer at page 99, lines 6 – 18. Prior to the date of the inspection, Corona Steel had been on the project about a week. Mr. Spencer observed their work and believed that they were working very safely and that they were following all of the safety rules. Spencer at page 99, line 26 – page 100, line 8. CSHO Olsen had no knowledge as to whether or not HSWC failed to supervise the site, follow the code and perform walk around inspections. Olsen at page 160, lines 17 – 25.

Mr. Spencer testified that Mr. Muniz needed to be in the area where he is shown in Exhibit 5 in order to connect the precast panel to the building. Spencer at page 104, lines 6 – 10.

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#### IV. ARGUMENT

**A. The applicable standard of review requires the Court to accept all findings of fact made by the Board if they are supported by substantial evidence in the record.**

For WISHA cases, the standard of review is set forth in RCW 49.17.150(1). Findings of fact made by the Board are deemed conclusive if they are supported by substantial evidence in the record considered as a whole.

However, statutory interpretation of questions of law are reviewed by the appellate courts de novo. *Department of Labor and Industries v. Gongyin*, 154 Wn.2d 38, 44, 109 P.3d 816 (2005). An appellate court's prime construction objective is to "carry out the legislature's intent." *Department of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). To discern legislative intent, courts will look to the statute as a whole. *The Quadrant Corporation v. Growth Management Hearings Board*, 154 Wn.2d 224, 239, 110 P.3d 1132 (2005). Further, courts must harmonize statutes and rules to give effect to both. *State v. Ryan*, 103 Wn.2d 165, 178, 691 P.2d 197 (1984).

**B. The Superior Court erred in Findings of Fact Numbers 1.4, 1.6 and 1.8 because there were sufficient facts to support the Board's Finding of Fact Nos. 2 through 4.**

The Board made the following Findings of Fact:

2. On March 15, 2013, Corona Steel employees, Ray Muniz and Rob Woodruff, were installing lintels on a building being constructed at 120 Sixth Avenue North in Seattle. The surface where they were working was more than four feet off the ground, and no fall protection system was installed. The surface was part of a larger area that was more than 45 inches in all directions, but a guardrail had been placed parallel to the edge, so that the area between the guardrail and the edge was less than 45 inches wide.

3. No substantial probability existed that the two Corona employees exposed to the risk of falling described in Finding of Fact No. 2 above would be injured, or, if harm resulted, that it would be serious physical harm, including the possibility of fractures, paralysis, or death.
4. The Department did not present a prima facie case establishing Howard S. Wright Construction violated WAC 296-155-100(1)(a).

The Superior Court Finding of Fact Nos. 1.4, 1.6 and 1.8 erred by finding that there were no substantial facts to support the above Findings of Fact. For Board Finding of Fact No. 2, the photographs, Exhibits 5, 7, and 9, along with the testimony of all of the witnesses demonstrated that the first floor, the concrete slab, was more than 45 inches in all directions. The photographs clearly show that a guardrail was set up on the first floor. Mr. Spencer testified that they were set up for all employees, including the Corona Steel employees. The testimony from Mr. Olsen and Mr. Muniz, along with the photographs, support the Board's finding that the space between the guardrail and the edge was less than 45 inches. All of these findings were supported by substantial evidence in the record. In fact, there was no evidence submitted that controverts Board Finding of Fact No. 2. Pursuant to RCW 49.17.150, the finding that the surface where Mr. Muniz and Mr. Woodruff were working was less than 45 inches wide is a finding that is deemed conclusive. The Superior Court erred by finding that there were no substantial facts to support Board Finding of Fact No. 2.

With regard to Board Finding of Fact No. 3, the Board found that there was no substantial risk of injury or death if the employees were to fall from the areas they were working. Mr. Muniz testified that the level he was working at in Exhibit 5 was at his chest level. Muniz at page 14, lines 5 – 9. He said that he probably boosted himself up as the top of the precast panel was about at his chest level. Muniz at page 14, lines 12 – 16.

Mr. Spencer testified the area directly below Mr. Muniz, the employee shown in Exhibit 5, was soft dirt. Spencer at page 92, line 20 – page 93, line 3. Based on his observations, if Mr. Muniz were to fall from the location where he was working in Exhibit 5, he would fall a little less than four feet onto the soft dirt. Spencer at page 93, lines 4 – 8.

In conjunction with the photographs showing the position that Mr. Muniz was in to connect the precast panel, the height of the fall of a little bit less than four feet, and landing onto soft dirt, the Board had ample facts to find that the risk of falling was no substantial probability that serious injury or death would result. This Court has defined substantial evidence in *Peterson v. Koester*, 122 Wash. App. 351 (2004) as:

When “the trial court has weighed the evidence, our review is limited to determining whether substantial evidence supports the findings and, if so, whether the findings in turn support the trial court's conclusions of law and judgment.”<sup>1</sup> Substantial evidence exists when the evidence is in “sufficient quantum to persuade a fair-minded person of the truth of the declared premise.”<sup>2</sup>

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<sup>1</sup> *Ridgeview Property v. Starbuck*, 96 Wn2d. 716, 719 (1982)

<sup>2</sup> *Ridgeview Property v. Starbuck*, 96 Wn2d. 719

Not only could a fair minded person be persuaded that a fall of around four feet onto soft dirt below is not substantially likely to cause severe injury or death, the Board is the agency charged by the legislature to adjudicate WISHA citations. The Board also adjudicates Workers Compensation disputes involving injured workers under the Industrial Insurance Act, Title 51. Substantial evidence supports the Board's Finding of Fact No. 3. The Superior Court erred by finding that there were no substantial facts to support this finding.

With regard to Board Finding of Fact No. 4, there were sufficient facts for the Board to find that the Department did not establish a prima facie case that HSWC violated WAC 296-155-100(1)(a). The prima facie elements are set forth in RCW 49.17.180(6). In relevant part, RCW 49.17.180(6) declares:

(6) For the purposes of this section, a serious violation shall be deemed to exist in a work place if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use in such work place, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

Washington was granted authority by the federal government to administer the Occupational Safety and Health Act as a state plan administration. As such, the Washington State Department of Labor and Industries has statutory authority to issue a serious citation and levy a monetary penalty for serious violations of a WISHA safety or health code. However, the ability to issue a serious citation is not without limit. For the reasons set forth below, the Department failed to establish that the work being performed by the Corona Steel employees violated any WISHA safety standard.

**C. The Department failed to establish that fall protection was required because the employees did not work at heights greater than ten feet.**

The Department alleges that the two Corona Steel employees were exposed to a fall hazard greater than four feet and were not tied off. The Department further alleges that this constitutes a violation of WAC 296-155-100(1)(a), or in the alternative, WAC 296-155-505. The Board rejected the Department's argument by holding at page 3, lines 40 – 43 of the Proposed Decision and Order:

“HSW's argument that the guardrail changed the nature of the surface from a walking/working surface to one that did not require fall protection initially seemed illogical. Considering the testimony and the fall protection regulation itself, however, HSW's argument made sense.”

WAC 296-155-505 required that walking or working surfaces be protected by a guardrail or handrail. It stated:

WAC 296-155-505 Guardrails, handrails and covers.

(1) General provisions. This part applies to temporary or emergency conditions where there is danger of employees or materials falling through floor, roof, or wall openings, or from stairways, runways, ramps, open sided floors, open sides of structures, bridges, or other open sided walking or working surfaces.

The term, “walking working surface” is defined in WAC 296-155-24503:

Walking/working surface means for the purpose of this section, any area whose dimensions are forty-five inches or greater in all directions, through which workers pass or conduct work.

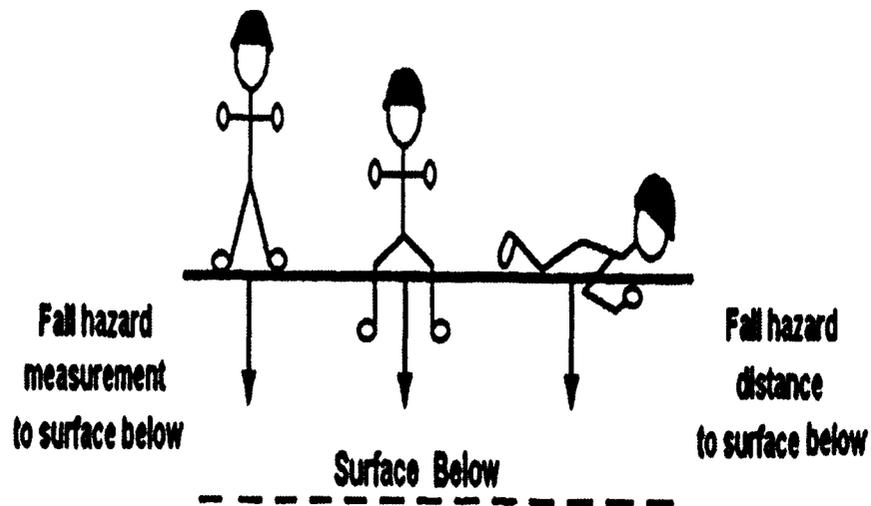
(Emphasis added).

When employees are not on a walking/working surface, then they must be protected against fall hazards greater than 10 feet. WAC 296-155-24510.

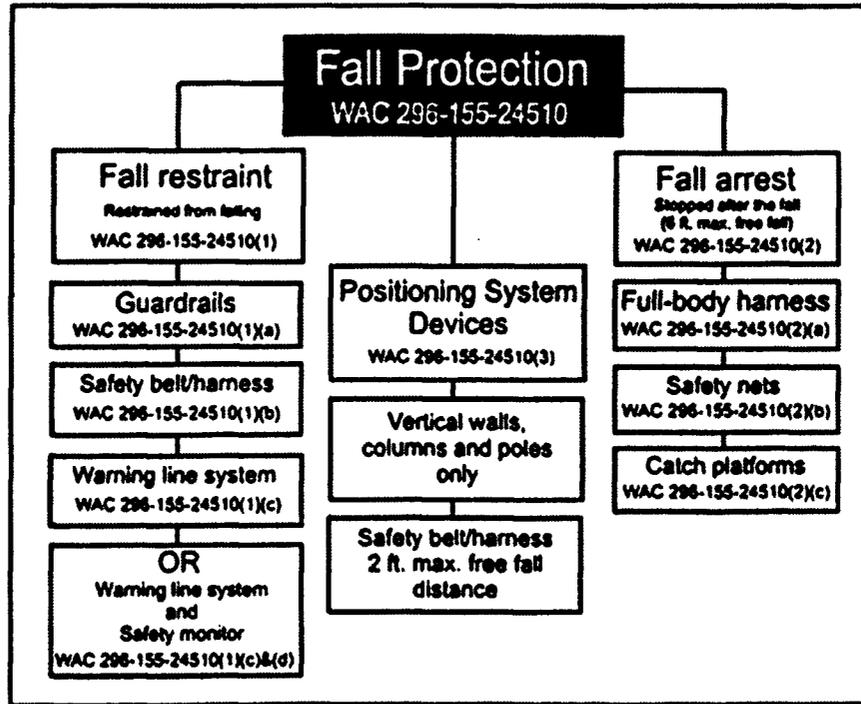
WAC 296-155-24510<sup>3</sup> requires employees to be protected against fall hazards greater than 10 feet. This WAC provides alternative methods of fall protection:

**Fall restraint, fall arrest systems.**

**When employees are exposed to a hazard of falling from a location *ten feet or more in height*, the employer shall ensure that fall restraint, fall arrest systems or positioning device systems are provided, installed, and implemented according to the following requirements.**



<sup>3</sup> The fall protection regulations that existed on May 9, 2012 were repealed effective April 1, 2013. Appendix A contains the relevant WAC provisions.



The above regulation and flow chart clearly demonstrates that Employers must protect employees who are at a working surface more than *ten feet* above the surface below. It is undisputed that the area on the outside of the guardrail was less than 45 inches in all directions. Thus, for purposes of WAC 296-155-505, no guardrails needed to be erected for the employees on the outside of the guardrail.

As the Corona Steel employees were not conducting work at a height greater than 10 feet, they were not required to be tied off pursuant to WAC 296-155-24510. As set forth under the general fall protection regulation, WAC 296-155-24510, this 10 feet requirement was not limited to any kind of construction work. The clear language of the regulation addresses construction that occurs more than 10 feet above the surface below.

It is interesting to note that the Department's interpretation not only ignores the provisions of WAC 296-155-24510, it is also inconsistent with the regulation it cites, WAC 296-155-505. Under the walking/working surface regulation, a guardrail or handrail is required, not a fall protection system such as fall arrest (using a full body harness and tying off with a lanyard.) The Department's position requires that the Corona Steel employees tie off using a fall protection system addressed by WAC 296-155-24510. This is consistent with the site conditions. In the limited space outside of the guardrail, the undisputed testimony was that it was not feasible to erect a guard rail outside of the guard rail.

This is consistent with the hierarchy of controls: engineering controls; administrative controls; and, Personal Protective Equipment. That is, where a hazard can be engineered out (by using a guardrail), employees in that area are protected without having to do anything. The next preferred method is administrative controls. Employees are directed not to be in that area. This is less effective as there is always a chance that employees will ignore directions and be in an area where they are not supposed to be. Last among protective controls is PPE, or personal protective equipment. This control is least effective because it requires an employee to both obtain and use the PPE.

The method of control in the walking/working surface, is most desirable because a guardrail is an engineered method of control. It is erected before employees are allowed on the walking working surface. Once it is in place, the employees are automatically protected against a fall hazard.

WAC 296-155-24510, by definition, applies when the working surface is less than 45 inches in all directions. Where it is less than 45 inches in all directions, it is not feasible to put in a guardrail, thus, a method of fall arrest or restraint is specifically allowed.

The Department failed to establish that its pre-April 1, 2013 fall protection regulations required employees at less than 10 feet above the ground to be protected against a fall hazard. The Department's application of the walking/working surface requirement of 4 feet is incorrect. The Department failed to establish that WAC 296-155-505 was applicable to the specific work being performed by the Corona Steel employees. The Board agreed and vacated the citation.

**D. Different fall protection standards apply based on the type of activity being performed.**

The Department argues that the first floor concrete slab is a walking working surface because it is greater than 45 inches in all directions as defined by WAC 296-155-505, and that it is the same surface where Corona Steel was performing work. There is no dispute that the area used as a walkway to travel through the building is in fact an open sided floor than needed to be guarded. For those walking on the inside of the guardrail they were protected against falling off the edge. The guardrail was required because the wall had not yet been built. Once the wall was erected, then the temporary guardrails would then be removed as they would no longer be necessary, and they would be in the way of the wall itself.

However, the undisputed testimony clearly showed that Mr. Muniz and Mr. Woodruff were not walking to pass from one portion of the building to another. They were connecting the precast panels to the building by welding the lintels to the clips. In order to perform this work, they needed to be on the outside of the guardrail.

As Mr. Muniz testified, he could have crossed through the guardrails or boosted himself up from the ground to get to the top of the precast panel as shown in Exhibit 5. For the sake of argument, if the wall had been erected and there were no guardrails, Mr. Muniz would still be on the same concrete slab if he had to perform work at his chest level. In that case, the area that he would be working from would not be a walking working surface (as it would not be an open sided floor), and the fall protection requirement of ten feet as set forth in WAC 296-155-24510 would be applicable. That is, if he is at a height greater than ten feet, then a fall protection system would be required.

As a matter of law, where WAC defines a walking working surface that is greater than 45 inches in all directions, and it was found that the surface area where Mr. Muniz and Mr. Woodruff was not greater than 45 inches in all directions, the four foot fall protection for open sided floors did not apply to the work being performed by Corona Steel.

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**E. The Board correctly found that HSWC did not violate its managerial duties as the general contractor.**

The only citation against HSWC was an alleged violation of WAC 296-155-100(1)(a). As such, the primary issue before the Board was whether the HSWC inspection protocol was adequate under the management's responsibility required by WAC 296-155-100(1)(a).

The Board held at page 4 of the Proposed Decision and Order:

HSW presented evidence that its employees, Ed Spencer, James Hydzik, and others regularly walked through the jobsite and looked for dangerous conditions, in keeping with the general contractor's duty to ensure a safe working environment for its own and others' employees. Considering that evidence, and because I do not agree that Corona Steel violated the fall protection regulation, I have concluded that HSW did not violate the regulation requiring it to ensure a safe and healthy working environment, HSW cannot be considered to have known of the violation."

The employer presented abundant testimony about its Safety Program, specifically its identification of fall hazards, and how daily safety inspections were made. Consequently, there were adequate facts in the record to support the finding that HSWC regularly walked through the jobsite to look for dangerous conditions as found by the Board. The Superior Court erred by concluding that there was no substantial evidence in the record to support the Board's finding that the Department failed to establish a prima facie case.

Case law requires a general contractor to take reasonable safeguards to promote a safe and healthy working environment. In *Stute v. PBMC*, 114 Wn.2d 454 (1990), the Washington Supreme Court removed any doubt that a general contractor has a non-delegable duty to either furnish safety equipment, or to contractually require its subcontractors to furnish

adequate safety equipment relevant to their responsibilities. *Stute* at 464. In *Stute*, a subcontractor employee was injured at a construction site after he slipped and fell off a roof three stories high. There was no scaffolding or other safety equipment to break the fall. *Id.* at 456. Moreover, the general contractor's construction supervisor recognized that the subcontractor was not economically able to install safety devices such as scaffolding. *Id.* at 463.

Prior to the *Stute* decision, there was a split in decisions in assessing the scope of a general contractor's responsibility under RCW 49.17.060. In *Straw v. Esteem Construction*, 45 Wn. App. 869 (1986), the court held that a general contractor did not have a non-delegable duty to furnish safety equipment to employees of subcontractors. However, in *Goucher v. Simplot*, 104 Wn.2d 662 (1985) the court held that an employer had a specific duty of care to provide for safe and healthy working conditions to all employees who may be harmed by a general contractor's violation of a WISHA standard.

A general contractor's duty of care owed to subcontractor employees was also established in *Kelley v. Howard S. Wright Construction Company*, 90 Wn.2d 323 (1978). At page 333, the court declared:

RCW 49.16.030, applicable at the time of the accident, imposed a duty on all employers to furnish a reasonably safe place of work, with reasonable safety devices, and to comply with state safety regulations. In *Bayne v. Todd Shipyards Corp.*, 88 Wn.2 917, 568 P.2d 771 (1977) we construed this statute to place a duty on employers to all workers lawfully on the premises. We agree with respondent's contention that the statute created a non-delegable duty on the part of a general contractor to provide a safe place of work for employees of subcontractors on the job site. This duty extends to providing reasonable safety equipment where necessary. (Emphasis added.)

Because a general contractor has authority to influence working conditions at a construction site, the *Stute* court adopted the public policy adopted by the Michigan Supreme Court in *Funk v. General Motors Corp.*, 392 Mich. 91, 220 N.W.2d 641 (1974). The Michigan court stated:

The policy behind the law of torts is more than compensation of victims. It seeks also to encourage implementation of reasonable safeguards against risks of injury.

Placing ultimate responsibility on the general contractor for job safety in common work areas will, from a practical, economic standpoint, render it more likely that the various subcontractors being supervised by the general contractor will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas. (Emphasis added).

In *Stute*, it is important to note that the general contractor was aware that the subcontractor was not able to provide the necessary equipment to protect subcontractor employees from fall hazards. Thus, in recognizing the statutory obligation to provide a healthy and safe working environment imposed by RCW 49.17.060, the court held that the general contractor must either require by contract the subcontractor to provide the necessary equipment (scaffolding), or to provide it for the subcontractor employees.

The Board agreed that the Department did not establish that HSWC failed to effectively enforce a safe and healthful working condition, it failed to establish the level of care that HSWC fell short of. In order to allege that conduct was inadequate, it must first demonstrate what conduct was required to provide an “effective in practice” safety program. The Department’s position would simply hold general contractors to a strict liability standard. That position is not the law of either the State of Washington or the federal courts.

The Superior Court erred in Conclusion of Law No. 2.4 because HSWC retained control over the work done at the job site, HSWC had the ultimate responsibility to comply with safety regulations for both their own and their subcontractors' employees pursuant to *Afoa v. Port of Seattle*, 176 Wn.2d 460, 477 (2013). Neither the Board nor the Superior Court made any finding that HSWC had retained control over Corona Steel's work at the EMP. Moreover, the Department did not allege in its Petition for Review that the Board erred for not making any finding that HSWC retained control over Corona Steel. This is because the Department presented no evidence of any control that HSWC had over the work performed by Corona Steel. That is, the Department presented no evidence whether HSWC exercised any control or direction over the means or methods of operation; the equipment, direction, or supervision of Corona Steel's work. With no evidence presented by the Department, there can hardly be a finding that HSWC controlled the Corona Steel work.

The Superior Court's reliance on *Afoa v Port of Seattle*, 176 Wn.2d 460 (2013) is misplaced. *Afoa* did not address whether a general contractor could be held responsible in tort for an injury to an employee of a business invitee. Rather, *Afoa* addressed whether a property owner could be held liable for a safety violation that causes injury to an employee of a business invitee.

In *Afoa*, the Supreme Court held that summary judgment was not appropriate as there were questions of material fact. As a legal matter, the Court held that property owners, like general contractors, could be held

responsible for injuries of business invitee employees if the property owner retained sufficient control over the workplace. The Court held at 176 Wn.2d at page 471:

These two distinct duties arise from RCW 49.17.060's two subsections. *See Goucher v. J.R. Simplot Co.*, 104 Wash.2d 662, 671, 709 P.2d 774 (1985). Subsection (1) creates a “general duty” to maintain a workplace free from recognized hazards; this duty runs only from an employer to its employees. *Id.* Subsection (2), on the other hand, creates a “specific duty” for employers to comply with WISHA regulations. *Id.* Unlike the general duty, the specific duty runs to *any* employee who may be harmed by the employer's violation of the safety rules. *Id.*; *see also Stute v. P.B.M.C., Inc.*, 114 Wash.2d 454, 460, 788 P.2d 545 (1990). We adopted this rule in *Goucher* and *Stute*, relying on the Sixth Circuit Court of Appeals' decision in *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799 (6th Cir.1984). That case interpreted the parallel clause in OSHA as extending the specific duty to all employees on the work site who may be affected by work safety violations, irrespective of any employer-employee relationship. *Id.* at 804–05.

But even the specific duty does not create per se liability for anyone deemed an “employer.” In *Kamla*, we held that although general contractors and similar employers *always* have a duty to comply with WISHA regulations, the ***person or entity that owns the jobsite is not per se liable for WISHA violations.*** *Kamla*, 147 Wash.2d at 125, 52 P.3d 472. Rather, jobsite owners have a duty to comply with WISHA only if they retain control over the manner in which contractors complete their work. *Id.* This rule recognizes the reality that not all jobsite owners are similarly knowledgeable about safety standards within a given trade. *Id.* at 124, 52 P.3d 472. (Emphasis added).

There is no authority that holds that a general contractor is ultimately responsible for any violation committed by its subcontractors. That is, neither *Stute* nor any of its progeny has ever held that a general contractor is strictly liable for violations committed by its subcontractors. The Board did not err as a matter of law that HSWC met its management responsibilities by creating its Safety Resource Manual (Exhibit 2);

requiring all employees to attend a safety orientation; requiring all subcontractors to submit a site specific safety plan and reviewing it to ensure that it was adequate for the work to be performed; conducting walkarounds that averaged once per hour; requiring subcontractors to correct any unsafe act; establishing a disciplinary program, and taking appropriate steps to ensure safety on the job.

The Superior Court erred by finding that the Board did not have substantial evidence in the record to support its findings. As the Board's Findings of Fact were appropriately applied to the law, the Superior Court erred by concluding in its Finding of Fact 2.4 that HSWC retained ultimate responsibility under *Afoa* such that HSWC violated WAC 296-155-100(1)(a).

## **V. CONCLUSION**

Based on the above, HSWC respectfully requests this Court to reverse the Superior Court's Findings of Fact and Conclusions of Law and to reinstate in its entirety the Board's Decision that vacated the Citation against HSWC.

There is sufficient evidence in the record to support Board Findings of Fact Numbers 2 – 4. Because the Board found that the Corona Steel employees were not working on a walking working surface as the area between the guardrail and the edge was not more than 45 inches in all directions, the Superior Court erred by concluding that the four foot fall protection rule applied. When the workers left the protection of the

guardrail, they were no longer on an open sided floor. As such, the Board correctly concluded that the 10 foot fall protection was applicable.

The Superior Court further erred by concluding that HSWC violated its management responsibilities when there were substantial facts in the record to support the Board's findings that HSWC required all employees to attend a safety orientation, and further conducted hourly walk around inspections to ensure that the safety rules were being followed.

This Court should reinstate the Board's Decision and Order.

Respectfully submitted this 21<sup>st</sup> day of December, 2015.

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**CERTIFICATE OF SERVICE**

I certify that on December 21, 2015, I caused the original and copy of the Employer's/Appellant's Opening Brief to be filed via Hand Delivery/ABC Legal Messenger, with the Court of Appeals, Division I and that I further served a true and correct copy of same, on:

**(X) Facsimile and U.S. Mail, Postage Prepaid:**

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DATED this 21<sup>st</sup> day of December 2015, in Lacey, Washington.

*s/ Kasey Snead*

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