NO. 100715-9

SUPREME COURT OF THE STATE OF WASHINGTON

CENTRAL STEEL,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

ANSWER TO PETITION FOR REVIEW DEPARTMENT OF LABOR AND INDUSTRIES

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I. INTRODUCTION

Ordinary workplace safety law rules apply worker safety requirements to all jobsites. Applying routine principles of law as set forth by this Court and several Court of Appeals decisions, the Court of Appeals ruled that an employer must ensure a worker continues to follow fall protection safety rules meant to prevent injury and death even when another worker is involved in a serious accident. Although the circumstances here are tragic, the Court of Appeals correctly conducted a substantial evidence review of a single safety violation, which presents no significant legal issues meriting review.

Under the Washington Industrial Safety and Health Act (WISHA), a rule that protects workers from falling from heights provides that employers must "ensure that the appropriate fall protection system is provided, installed, and implemented" whenever a worker is exposed to fall hazards. Former WAC 296-155-24609(1) (2016). This requirement includes ensuring their workers are connected to an anchor to

prevent a fall whenever a worker is exposed to a fall hazard—being "tied off."

Following the nine-story fall of one of Central Steel's workers at the jobsite, a Central Steel on-site supervisor reacted by unclipping his fall protection and moving across the unprotected worksite so he could descend to the deceased worker. Unclipping from fall protection violated former WAC 296-155-24609(1), which required he stay tied off because he was still exposed to a nine-story fall. Central Steel makes two primary arguments in support of review: it says its worker wasn't exposed to a hazard when he untied on the nine-story structure designated as a 100 percent tie-off zone, and it says the Court of Appeals was wrong to impute knowledge through its on-site supervisor since he participated in the violation. Neither is true nor is a basis for granting review. The Court of Appeals applied settled WISHA principles and routine substantial evidence doctrine to resolve these issues.

II. ISSUES PRESENTED FOR REVIEW

1. Does substantial evidence support the Board's finding that Central Steel exposed its employee to a fall hazard when the worker was not tied off and the decking was unsupported?

2. Does substantial evidence show that Central Steel knew or could have known about the violations when its supervisor knew of the hazard?

III. STATEMENT OF THE CASE

A. Central Steel's Employees Were Working at Heights and Needed to Wear Fall Protection at All Times

Central Steel was a contractor on a multistory college residence hall in Seattle. AR 499-500, 621. It was hired "[t]o place the rebar in the building and the post-tension cable." AR 497.[1] The building had reached the ninth level and was split into two zones by a cattle guard—a barrier—separating the north and south sections of the floor. AR 392-94, 397-98. The north section was designated a leading-edge zone. *See* AR 267-68, 392-94. A "leading edge" is "[t]he advancing edge of a floor, roof, or formwork which changes location as additional

[1] The administrative record is cited as "AR."

floor, roof, or formwork sections are placed, formed, or constructed." Former WAC 296-155-24603 (2016) (now WAC 296-880-095). Former WAC 296-155-24609(1) requires an employer to "ensure that the appropriate fall protection system is provided, installed, and implemented according to the requirements in this part when employees are exposed to fall hazards of 4 feet or more to the ground or lower level when on a walking/working surface."

Employers typically use fall arrest or fall restraint systems when the work does not allow them to use another system or when it has not yet installed one—like here. Attachment to such a system is called being "tied-off." When used correctly, these fall protection systems protect workers from falls. *See* AR 286, 326-27.

The north leading-edge zone employees were required "to be 100 percent tied off at all times." AR 392-94. The whole north area required fall protection because the area was a "leading edge deck" because the crew was in the process of

"putting down plywood or other types of material" covering "an open steel skeleton." AR 268; former WAC 296-155-24603, -24609(1). The leading edge was next to falls of 90 feet, and the workers had not finished installing the plywood decking—there were portions of the deck that were unsupported. AR 267-68; *see* AR 275-76, 334-35. One worker fell through such an unsupported portion of the deck. AR 365, 571.

In contrast, the southern portion did not require fall protection because the decking was complete and it had guardrails. AR 394-97. Whenever workers needed to cross the cattle guard to access the north leading-edge zone, they would first attach a safety device and line called a yo-yo to their harness before crossing. AR 468-69. A yo-yo is a retractable device with a line that keeps a worker from falling. AR 345. They would use the yo-yos to access the work area and, when there, connect a personal lanyard from themselves to the rebar on the core before detaching from the yo-yo. AR 469. When

they needed to leave, they would reattach to the yo-yo, detach their own personal lanyards and walk to the safe area. AR 469.

B. Site Supervisor Nick Hofmann Did Not Reattach to an Anchor Point so He Was Unprotected After Unclipping

In the north leading-edge zone at the time of the accident, Central Steel's workers were working on a structure known as the "north core." AR 253. This was a vertical shaft leading to the ground level where an elevator would eventually be placed. AR 253, 499. One side of the north core was open. AR 373.

Hofmann and Ray Estores were assigned "[t]o tie back the rebar elements" inside the north core. *See* AR 322, 465-66. Because Central Steel's general foreperson was not on-site, he designated Hofmann as the site supervisor. AR 640.

Tying back the rebar required standing on the form attached to the north core's interior. AR 465-66. Because the north core was in the north leading-edge zone, workers needed to be tied off 100 percent of the time. AR 394. A fall from the north zone would result in a 90-foot fall to the ground level.

See AR 334-35. Hofmann and Estores attached yo-yos to their harnesses to provide fall protection while they moved out to north zone. AR 467-71. When they reached the work area, they attached their personal lanyards to anchor points. AR 469.

After they finished tying back the rebar, they started climbing down to the ninth floor deck surface from the structure. AR 476. As he descended, Estores jumped on the unsupported plywood decking, it cracked open, and he fell through the north core shaft 90 feet to ground level. *See* AR 365, 436-43, 571; *see also* AR 52. It is believed Estores fell because he attached his lanyard to an incompatible anchor point—meaning "the hook [could] slip off the end" of the anchor point. AR 52-53 (FF 5), 527, 554.

At this point, Hofmann had already climbed down and was standing on the north side of the core. AR 480. Hofmann testified he then "stopped tying off" by unhooking his "lanyard off the rebar" after Estores fell. AR 480-81. He did not pause to clip on to the yo-yo to cross back over the cattle guard to the

safe south zone. *See* AR 478-81. Instead he "started booking it downstairs" to get to Estores. AR 481-82. According to the testimony of Alfred How, Hofmann was 10 feet or less from the leading edge of the building when he unhooked. AR 402-04. He crossed the entire leading-edge zone on the unsupported decking without fall protection. AR 481-82.

C. The Department Cited Central Steel with a Serious Violation of WISHA, and the Fact-Finder Board Affirmed

After conducting an investigation, the Department issued a citation, alleging a violation of former WAC 296-155-24609(1). AR 330-31, 335. It alleged that Hofmann was not properly attached to an anchor point while in a 100 percent tie-off zone. *See* AR 193.[2]

After Central Steel's appeal to the Board of Industrial Insurance Appeals, an industrial appeals judge affirmed the

[2] The Department also cited Central Steel because Estores did not have his fall protection harness attached to a proper anchor point. *See* AR 193. This portion of the citation was ultimately reversed, but the remaining portion about Hofmann sustained the citation.

Department's citation based on Hofmann's conduct because he "was not properly tied off in a 100 percent tie [off] zone." AR 43, 52, 54 (FF 8). The industrial appeals judge reasoned that Hofmann was "not connected to a yo-yo as he ran from the north core to the cattle guard, a substantial distance during which he was required to be tied off." AR 51. "Because [Hofmann] first stopped tying off while at the corner of the north core, he was within 20 feet of the leading edge and was in the zone of danger." AR 54 (FF 8). "Because [Hofmann] was acting in a supervisory role, his own actions can be imputed to the employer, thus establishing Central Steel's knowledge of the violative condition." AR 52, 53 (FF 7).

After Central Steel's petition for review, the Board affirmed the citation, adopting the industrial appeals judge's decision with minor typographical corrections. AR 7-14, 17-34. Central Steel appealed to superior court. CP 1-27. The superior court found substantial evidence supported the Board order and affirmed. CP 110-15.

D. The Court of Appeals Affirmed the Board's Decision Because Substantial Evidence Supported Its Findings of Exposure and Knowledge

The Court of Appeals rejected Central Steel's claims that substantial evidence did not show Hofmann's exposure to the hazard because (1) he was reacting to an emergency situation and that (2) he was 20 feet from the leading edge and running away from it when he detached. *Cent. Steel, Inc. v. Dep't of Lab. & Indus.*, 20 Wn. App. 2d 11, 21, 498 P.3d 990 (2021). Applying the well-established zone of danger test for exposure, the court recognized that the Department only needed to show that the employee was exposed to or had access to the violative condition. *Id*. at 22-23. The court concluded that substantial evidence supported the Board's finding that Hofmann was exposed to fall hazard of 90 feet based on Hofmann's testimony that he stopped tying off, another worker's testimony that Hofmann was roughly 10 feet from the leading edge, and that a "fair-minded person could find that Hofmann, without being attached to a fall protection system, traversed a structure that

had already proved to be not fully supported" based on Estores's fall through the plywood planking. *Id*. at 23-24.

And the court rejected Central Steel's claim that it was improper for the Board to impute "Hofmann's knowledge of his own violation" "to Central Steel." *Id*. at 33. Relying on a prior Court of Appeals decision, which adopted federal case law, the court applied the rule that "when a supervisor has actual or constructive knowledge of a safety violation, such knowledge can be imputed to the employer." *Id*. at 25 (quoting *Potelco, Inc. v. Dep't of Lab. & Indus.*, 194 Wn. App. 428, 440, 377 P.3d 251 (2016)). The court considered some federal cases cited by Central Steel, which have held that "a supervisor's knowledge of his or her own violation may be imputed to the employer *only if* the government also establishes that the violation was foreseeable to the employer," but rejected that approach because it is inconsistent with how Washington applies WISHA. *Id*. at 28.

IV. ARGUMENT

Central Steel cites no reason under RAP 13.4 for review, and indeed none exists. The Court of Appeals applied well-established law under WISHA, which establishes five elements to a WISHA violation:

> (1) the cited standard applies;
> (2) the requirements of the standard were not met;
> (3) employees were exposed to, or had access to, the violative condition;
> (4) the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition; and
> (5) there is a substantial probability that death or serious physical harm could result from the violative condition.

Wash. Cedar & Supply Co. v. Dep't of Lab. & Indus., 119 Wn. App. 906, 914, 83 P.3d 1012 (2003) (internal quotations omitted). Although Central Steel quibbles with the Court of Appeals' application of principles of law, ultimately its protestations boil down to claims that substantial evidence doesn't support the third and fourth elements. *See* Pet. 1, 7-11. Central Steel's arguments fail.

A. The Court of Appeals Acted Consistently With Well-Established Law About Exposure and Substantial Evidence Principles

Central Steel argues that substantial evidence doesn't support the Board's finding of exposure when it found the foreperson was in the zone of danger. Pet. 7-9; AR 54 (FF 8). Exposure can be shown by actual exposure to the hazard or by what is termed access exposure—exposure when a worker has access to the zone of danger. *Mid Mountain Contractors, Inc. v. Dep't of Lab. & Indus.*, 136 Wn. App. 1, 5-7, 146 P.3d 1212 (2006). Applying well-established principles of law around the element of exposure, the Court of Appeals recognized that "the zone of danger is that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent." *Cent. Steel*, 20 Wn. App. 2d at 22 (quoting *Shimmick Constr. Co. v. Dep't of Lab. & Indus.*, 12 Wn. App. 2d 770, 785, 460 P.3d 192 (2020)). The court found substantial evidence supported the Board's zone of danger finding because Hofmann traversed decking that was not fully

supported and he was 10 feet from the edge. *Id.* at 23-24. Central Steel's claims to the contrary lack merit for five reasons.

First, Central makes no mention of the applicable zone of danger test. But the Court of Appeals decision was consistent with this Court's decision in *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 131-32, 148, 750 P.2d 1257 (1988), in which this Court adopted the zone of danger standard. Under this test, the Department may show the worker was in the zone of danger covered by the regulation to prove an employer exposed a worker to a hazard in violation of WISHA. *Shimmick Constr. Co.*, 12 Wn. App. 2d at 785- 86. Or the Department may show that the worker had access to the zone of danger by being near it. *Mid Mountain*, 136 Wn. App. at 5-7. Central Steel shows no reason for review when the Court of Appeals followed this Court's decision.

Central Steel departs from this Court's test when it ignores the zone of danger test, and it now argues that "[b]eing

10 feet away from the fall edge is not exposed to a fall hazard." Pet. 8. It claims for the first time that the Court of Appeals should have applied a federal Occupational Safety & Health Administration (OSHA) non-construction definition of fall hazard that applies to longshore workers. *See* Pet. 8-9 (citing 29 C.F.R. § 1918.2). There are no ships or docks with containers in this case. No reason for review is presented by an invitation to follow some rule improperly imported from an unrelated OSHA standard.

Second, no reason for review is presented by a petition that uses a version of the facts, including its statement of the facts, presented in the light most favorable to the appealing party. The Court of Appeals acted consistently with this Court's direction to decline to follow this type of misdirection and instead to follow substantial evidence principles. *See Matter of Estate of Lint*, 135 Wn.2d 518, 531-32, 957 P.2d 755 (1998) (admonishing party to not present facts in a manner that ignores the substantial evidence standard); RAP 9.1; RAP 10.3(a)(5).

Third, Central Steel misrepresents the law and facts by suggesting that the Court did not "take into account that the northern section was protected against falls by handrails that were set up" and by claiming Hofmann was only in violation of a self-imposed rule. Pet. 8-10.

Central Steel's framing about the handrails is disingenuous because it suggests that the handrails offered protection to Hofmann. Pet. 8. But it later admits the handrails weren't complete in the north side. Pet. 9. More to the point, the handrails weren't set up yet where Estores fell—near where Hofmann also initially unclipped. *See* AR 365, 436-43, 571; *see also* AR 52. And handrails would not protect against decking that is unsupported. An inaccurate representation of the facts presents no reason for review. Central Steel was required to ensure that its workers used one of the fall protections provided by former WAC 296-155-24609. Following former WAC 296-155-24609(1) is not a self-imposed rule; it is required. RCW 49.17.060(2). No other protection was in place at the time

Hofmann untied. Only once the supporting decking was complete and had handrails in place could Central Steel's workers stop being tied off. The fact-finder Board could find that being 10 feet from the leading edge without proper fall protection is within the zone of danger because the risk of falling is presented by being close to the edge and by moving about an unsupported deck. *See* AR 267-68, 392-94. Requiring employers to follow fall protection does not deter employers from protecting its workers with stricter safety protections. Pet. 10. It sets a floor, not a ceiling.

Finally, again inviting this Court to reweigh the evidence, Central Steel attempts to refute the finding of exposure by saying that Hofmann was running away from the leading edge. But Hofmann was reacting in a hurry and could have easily approached the edge, and he was traveling on unsupported decking. *See* AR 481-82. Central Steel ignores the substantial evidence standard of review when it claims "there was no evidence that the deck the employees were traversing was in

any way defective such that employees could fall through" and argues there is no evidence the area would require fall protection. Pet. 8-10. But there was evidence that he unclipped within 10 feet of the edge and the piers were not completely supported in the decking. AR 267-68, 402-04.[3] After all, the decking cracked when an employee jumped on it and he fell 90 feet to his death. AR 410-13, 443. This shows exposure to a potential fall that requires fall protection.

The Court of Appeals acted consistently with the substantial evidence standard of review when it ruled that substantial evidence supported the Board's finding of exposure. FF 8; *Cent. Steel*, 20 Wn. App. 2d at 23-24.

[3] As one of workers for the prime contractor testified: the reason that the whole area was a leading-edge zone is that "[t]here might be areas where, in this building for instance, underneath, the piers had not been completely supported." AR 275- 76. Estores likely fell through the unsupported portion of the deck. *See* AR 365, 571. That's why the entire area was a fall hazard and required 100 percent tie-off.

B. The Court of Appeals Acted Consistently with Washington Case Law About Imputed Knowledge When a Supervisor Participated in the Violation

Central Steel's minor quarrels about the Court of Appeals' application of imputed knowledge show no reason for review for five reasons.

First, there is no dispute that the Department had the burden of proof at the Board. Yet Central Steel inconsistently complains that the Department must show foreseeability otherwise there would be strict liability. Pet. 12, 15. But to prove knowledge, the Department need not show that Central Steel could predict a specific incident—here the foreseeability of Estores's fall and Hofmann's response to it. *See* Pet. 11-12. Rather, the Department need only show knowledge of a worksite hazard. Central Steel argues that it is not just the hazard that needs to be shown but foreseeability of a "specific[]" hazard and that it is "not enough to find that a condition contravening that standard existed in the employer's workplace." Pet. 14. But that foreseeability argument is exactly

the argument that the court rejected in *Bayley Construction v. Department of Labor & Industries*, 10 Wn. App. 2d 768, 450 P.3d 647 (2019). In *Bayley*, the employer argued the Department needed to prove the employer could have predicted that a worker would jump directly onto a floor covering. *See Bayley*, 10 Wn. App. 2d at 785. But the court found that substantial evidence supported that the work site *hazard*, rather than an *incident*, was foreseeable based on the type of work the workers were performing and the layout of the construction site. *Id*. at 788- 89. As *Bayley* highlights, the knowledge analysis focuses on knowledge of the hazardous condition and not on the knowledge of a particular incident with a specific worker.

And indeed Central Steel concedes "[t]he Court of Appeals correctly held that: '[t]o establish the knowledge requirement of a WISHA violation, the Department does not bear the burden to prove that the violation was foreseeable.'" Pet. 11 (quoting *Cent. Steel*, 20 Wn. App. 2d at 19). And it also

agrees that the applicable standard "'here is whether [the employer] knew or should have known of the violative condition—not whether the behavior that led to the violation was foreseeable." Pet. 11 (citing 20 Wn. App. 2d at 19 (quoting *Potelco*, 194 Wn. App. at 440)). Nonetheless, it flips positions and claims foreseeability is required because under some federal cases the Secretary of Labor must show that the supervisor's conduct was reasonably foreseeable. Pet. 15-17 (citing *Brennan v. Occupational Safety and Health Comm'n*, 511 F.2d 1139 (9th Cir. 1975); *Horne Plumbing and Heating Co. v. Occupational Safety and Health Comm'n*, 528 F.2d 564 (5th Cir. 1976); *Ocean Elec. Corp. v. Sec'y of Lab.*, 594 F.2d 396 (4th Cir. 1979); *W.G. Yates & Sons Constr. Co. v. Occupational Safety and Health Comm'n*, 459 F.3d 604 (5th Cir. 2006)).

But Washington courts have not followed a foreseeability rule—instead treating it as part of unpreventable employee misconduct defense—and have adopted the federal case law

that "when a supervisor has actual or constructive knowledge of a safety violation, such knowledge can be imputed to the employer." AR 53 (FF 7); *Cent. Steel*, 20 Wn. App. 2d at 25 (quoting *Potelco, Inc.*, 194 Wn. App. at 440); *Nat'l Realty and Constr. Co. v. Occupational Safety and Health Comm'n*, 489 F.2d 1257, 1267 n. 38 (D.C. Cir. 1973) (negligent behavior by a supervisor or foreman which results in dangerous risks to employees raises an inference of lax enforcement and communication of the employer's safety policy); *Donovan v. Capital City Excavating Co.*, 712 F.2d 1008, 1010 (6th Cir. 1983) (actions of supervisors are imputed to the company); *Daniel Int'l Corp. v. Occupational Safety and Health Comm'n*, 683 F.2d 361, 363 (11th Cir. 1982) (unforeseeable employee misconduct constitutes an affirmative defense); *Forging Indus. Ass'n v. Sec'y of Lab.*, 773 F.2d 1436, 1450 (4th Cir. 1985) (same); *Brock v. L.E. Myers Co., High Voltage Div.*, 818 F.2d 1270, 1277 (6th Cir. 1987) (same); *Danco Constr. Co. v. Occupational Safety and Health Comm'n*, 586 F.2d 1243, 1246

(8th Cir.1978) (same); *H.B. Zachry Co. v. Occupational Safety and Health Comm'n*, 638 F.2d 812, 818- 19 (5th Cir. 1981) (same); *Gen. Dynamics Corp. v. Occupational Safety and Health Comm'n*, 599 F.2d 453, 458 (1st Cir. 1979) (employer may defend by showing it took all necessary precautions to prevent occurrence of violation). The grab bag of antiquated federal OSHA cases Central Steel cites to support the claim that employers can't be held responsible for their supervisors' violations without knowledge of a specific condition shows nothing. Pet. 13-17. The Court of Appeals recognized that Washington chose to follow the analysis from *Brock*, 818 F.2d at 1277, and others, when Washington adopted an affirmative defense by statute, a statute which places the burden of showing unforeseeability on the employer. *Cent. Steel*, 20 Wn. App. 2d at 29-30.

The Court of Appeals properly rejected the federal cases cited by Central Steel as they are inconsistent with how Washington applies WISHA. *Cent. Steel*, 20 Wn. App. 2d at

29-30. This Court has always directed that Washington courts not follow federal law that is inconsistent with Washington law. *See Aviation W. Corp. v. Dep't of Lab. & Indus.*, 138 Wn.2d 413, 423-24, 980 P.2d 701 (1999) (declining to adopt OSHA's two-part test for justifying a workplace safety standard for environmental tobacco smoke under WISHA because OSHA's approach was inconsistent with WISHA's more protective statutory scheme). The Court of Appeals recognized that "the Department *does not* bear the burden to prove that an employee's misconduct was foreseeable" and that Washington has decided not to follow this split in federal case law as shown by Washington cases rejecting it and by Washington's adoption of the affirmative defense for unforeseeable employee misconduct. *Cent. Steel*, 20 Wn. App. 2d at 29-30. Other Court of Appeals cases have also found imputed knowledge when a supervisor is present when they participate in the violative conduct. *See Potelco, Inc., v. Dep't of Lab. & Indus.*, 7 Wn. App. 2d 236, 245, 433 P.3d 513 (2019); *Central Steel v. Dep't*

of Lab. & Indus., No. 77432-8-I (consol. with 77530-8-I), 2019 WL 669942, *5 (Wash. Ct. App. Feb. 19, 2019) (unpublished decision).

Second, the Legislature has outlined the circumstances when unpreventable, idiosyncratic, and *unforeseeable* misconduct (i.e., failing to remain tied off) excuses compliance with a safety rule. In *BD Roofing, Inc. v. Department of Labor & Industries*, 139 Wn. App. 98, 113, 161 P.3d 387 (2007), and *Wash. Cedar*, 119 Wn. App. at 913, the court held that an employer must show that an incident was not foreseeable to prove unpreventable employee misconduct. Under RCW 49.17.120(5)(a), if unpreventable, unforeseeable conduct occurs but the employer has followed a comprehensive safety program, the unpreventable employee misconduct defense excuses a WISHA violation. If the Department establishes a prima facie case that a violation has occurred, as it did here, WISHA relieves the employer of responsibility for the violation if it meets the elements of the test, which center around creation,

communication, and execution of an effective safety program. RCW 49.17.120(5)(a); *Potelco, Inc. v. Dep't of Lab. & Indus.*, 7 Wn. App. 2d 236, 248-49, 433 P.3d 513 (2018); *BD Roofing*, 139 Wn. App. at 111. As the Court of Appeals recognized, once "the Department established a prima facie case of a WISHA violation, the burden shifted to Central Steel to establish that Hofmann's conduct amounted to unpreventable employee misconduct." *Cent. Steel*, 20 Wn. App. 2d at 20-21. Central Steel concedes it has waived the affirmative defense, but nonetheless appears to claim that it could not foresee Hofmann's actions. Pet. 11-12, 15-16, 18. But because Central Steel didn't raise the affirmative defense at the Board, the question of foreseeability of the supervisor's actions is irrelevant. *Cent. Steel*, 20 Wn. App. 2d at 21.

Third, Central Steel seeks to excuse its failure to raise the affirmative defense because it didn't think the Department proved exposure. Pet. 12. Employers are subject to a citation for a serious violation "unless the employer did not, and could not

with the exercise of reasonable diligence, know of the presence of the violation." RCW 49.17.180(7). Protestations about exposure do not go to proving knowledge under this statute.

Fourth, Central Steel's claim it did not need to raise the affirmative defensive of unpreventable employee misconduct because it claims it did not control Hofmann in what it terms "the emergency nature of why Mr. Hofmann decided to disconnect" misses the point entirely. Pet. 12. This conflates the control necessary to show that a company is an employer with the tests for knowledge and unpreventable employee misconduct. This Court recently held that for the Department to prove that a company is an employer there needs to be "some relevant control over the workers and related work conditions . . . ." *Dep't of Lab & Indus. v. Tradesmen Int'l, LLC*, 198 Wn.2d 524, 543, 497 P.3d 353 (2021). Washington law has never required that the Department show control over a specific instance of misconduct to prove misconduct. Rather once the Department establishes that a company is an employer—and

there is no dispute of that here—WISHA applies when an employer knows—here through imputed knowledge—about an unsafe condition. *See id.* at 543; *see also Potelco, Inc.*, 7 Wn. App. 2d at 245.

Finally, the Court of Appeals' reasonable interpretation about imputed knowledge of a supervisor involved in the misconduct furthers WISHA's legislative goals. The reason for this imputation rule is that a supervisor is in the best position to know about hazard and take action to remedy it. As the Court of Appeals recognized: "sound policy supports a rule authorizing the imputation of a supervisor's knowledge of his or her own misconduct to an employer" in part because "[a]lthough there is a split among federal circuit courts as to whether an employer's knowledge of a violation may be established by demonstrating that a supervisor knew of his or her own violation, the stated WISHA purpose is best advanced by adopting the analyses of those courts holding that the government regulator may establish employer knowledge by way of such a showing."

Cent. Steel, 20 Wn. App. 2d at 33. The Legislature has spoken by declaring that it is an affirmative defense to show unpreventable employee misconduct (of which a showing of unforeseeability is required), rather than following federal law to the contrary. No review is necessary to second-guess the Legislature's decision.

V. CONCLUSION

For the above reasons, this Court should deny review.

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RESPECTFULLY SUBMITTED this 6th day of May, 2022.

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