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Court of Appeals No. 70568-7-I

IN THE WASHINGTON COURT OF APPEALS
DIVISION ONE

MR. NICHOLAS UHRICH, and THE MARTIAL COMMUNITY THEREOF,

Appellant/Plaintiff,

v.

MT. SI CONSTRUCTION, INC.

Respondent/Defendant,

AMENDED BRIEF OF APPELLANT

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I. INTRODUCTION

This cases involves the dismissal of Mr. Nicholas Uhrich's ("Mr. Uhrich") case against Mt. Si Construction, Inc. ("Mt. Si"), for injuries he sustained as a result of falling from a roof of a home on which he was working. It is undisputed, that Mr. Uhrich fell a distance of seventeen-feet six inches (17'6"). As he was at such a height, the protective provisions of WAC 296-155-24515, a regulation under the Washington Industrial Safety and Health Act, RCW 49.17 ("WISHA"), were triggered. WAC 296-24.012(20)(mm).

It is also undisputed that Mt. Si did not provide a safety plan, did not provide a fall protection plan, did not instruct Mr. Uhrich to use fall protection equipment and it failed to provide a warning line system all required by WAC 296-155-24515. Despite these failings, the trial court dismissed Mr. Uhrich's claims against Mt. Si accepting its argument that it had no obligation to warn Mr. Uhrich or protect him from falling from the roof.

This was error. In this appeal, Mr. Uhrich asks this court to reverse the trial court's summary judgment order dismissing his case and seeks to have it reinstated. He does not seek review of the trial court's denial of his own motion for summary judgment.

II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The trial court erred by granting Mt. Si's motion for summary judgment and dismissing Mr. Uhrich's case. CP 282-284.

Assignment of Error No. 2: The trial court erred in finding or concluding as follows:

1. Mt. Si had no reason to believe that Mr. Uhrich would be exposed to any hazard of falling from the flat roof.

CP 282-284.

Assignment of Error No. 3: The trial court erred in finding or concluding as follows:

2. Thus, there was no "corresponding obligation to insist upon ... [Mr. Uhrich] using a safety harness or other fall protection device. See, WAC 296-155-24510.

CP 282-284.

Assignment of Error No. 4: The trial court erred in finding or concluding as follows:

3. As the flat roof qualifies as a "low pitched roof" as to which fall restraint or fall arrest systems are not required for a worker like plaintiff who is only on the roof to inspect or investigate roof level conditions. See, WAC 296-155-24515.

CP 282-284.

Assignment of Error No. 5: The trial court erred in finding or concluding as follows:

4. It could be argued that a "warning line system" near the edge would still be required but any such failure could not have been the proximate cause of this injury since the plaintiff was acting quite deliberately when, for whatever reason, he went to and leaned over the edge of the roof. The edge of the roof presented a known and obvious risk to which he did not need to be warned.

CP 282-284.

III. ISSUES RAISED

Issue No. 1: Whether a contractor and/or a general contractor have a non-delegable duty to provide a safe work place?

Issue No. 2: Whether the provisions of WAC 296-155-24515 are mandatory?

Issue No. 3: Was Mt. Si obligated to provide fall protection to Mr. Uhrich for his work under WAC 296-155-24515?

Issue No. 4: Whether Mt. Si was excepted from providing fall protection to Mr. Uhrich for his work under WAC 296-155-24515(2)(a) which excepts fall protection for inspections, investigations or estimating prior to the beginning of construction work?

Issue No. 5: Whether Mt. Si failed to provide a warning line system as required by WAC 296-155-24515?

Issue No. 6: Whether the question of proximate causation in this case should be sent to the jury?

IV. STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

On November 3, 2009, Mr. Uhrich was injured while working in his capacity as a journeyman electrician for his employer, Lander Electrical Services ("LES"). CP 25. LES was a subcontractor to Mt. Si in relation to a project on a residence located in Lake Forest Park, Washington ("Project"). CP 25. Mt. Si was the general contractor on the Project. CP 64. Just prior to his injury, Mr. Uhrich was instructed to work on the roof of the home marking the as-built electrical wiring and switch locations on the roof with spray paint. CP 198. The purpose of this work was to locate and mark electrical wiring and switches located under the roof so as to prevent screws, nails, and other items from damaging them while additional work was performed. Mr. Uhrich was injured on his first day on the job within minutes of arriving. CP 198-199.

When Mr. Uhrich arrived at the job site, Mr. Dave Arnold of Mt. Si took Mr. Uhrich through the job site and instructed him to locate the as-built electrical system as follows:

> .... And then he and I went back to the master bedroom, and I set up a ladder in a skylight that-we'd just built a skylight that the pitched skylight, there was no glass on it yet and it was right in the middle of a master bedroom addition to be done, and we went up through that and got onto the roof. In before he got there that morning, I'd gone up with a bucket

> of paint, and I marked the lights in the switch locations on top of the roof with paint **so he wouldn't have to search for them once he got there**. I had the switches marked with an asked straight up above them on the roof deck, and I had the lights marked with the circle, in paint.

(Emphasis added.) CP 198. In his declaration in support of Mt. Si's motion for summary judgment Mr. Arnold again confirmed his instructions to Mr. Uhrich:

> Before Mr. Uhrich arrived, I had marked on the roof with paint the location of all the lights and switches from the main floor below. I had determined those locations by taking measurements from the main floor below and then using those measurements and the house plans **to locate the various switch and light locations on top of the roof**. Most of the switch and light locations were towards the center of the roof. All of the switch and light locations were well away from the edge of the roof. The closest light or switch location to the west side of the roof where Mr. Uhrich ultimately fell was 7'6". **I told Mr. Uhrich that his job was to simply trace the wire paths between the switch and light locations that were marked on the roof, and then to mark those paths with the paint I had supplied. Mr. Uhrich confirmed his understanding and began his work with a circuit tracer[1] that he had brought with him**.

(Emphasis added.) CP 65 & CP 196. Mr. Arnold did not give Mr. Uhrich any warning about being near the edge of the roof nor was he instructed to stay away from it. CP 198-199. No safety plan (including a fall protection plan) was on site that day, Mr. Uhrich was not provided a copy of fall protection plan and it was not

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[1] A circuit tracer is similar to a stud finder but is designed to find circuits and other hidden electrical installations.

discussed with him. CP 201. Further, Mr. Uhrich was not instructed to use fall protection equipment. CP 65; 198. Further, no one else was using fall protection that day per Mr. Arnold. CP 204.

Mr. Jason Pontious described what happened when Mr. Uhrich fell off the roof.

> Rather than walking over towards the painted marks on the roof, Mr. Uhrich walked over to the west edge of the roof in the opposite direction from where I had pointed. The roof at a gutter near the edge of the roof that measured approximately 2 ½ feet wide. The gutter had water in it at the time. Mr. Uhrich stood was both feet on the east edge of the gutter leaned over to the edge of the roof while commenting that he was just going to peak over the edge of the roof and take a look. As I saw Mr. Uhrich start to crouch down into the three-point stance I yelled, "Hey!" and reached out toward Mr. Uhrich to try to grab him. I was able to grab part of Mr. Uhrich's shirt and pants, but he fell over the edge of the roof and I was not able to hold him. This all happened very quickly. Mr. Uhrich went up to the gutter, leaned over the edge of the roof, started to place his hand and on the decorative trellis and fell write off the roof and one continuous motion

CP 81.

As a result of the fall, Mr. Uhrich suffered a brain injury resulting in cognitive function loss, skull and facial fractures, brain damage, post-concussive syndrome, vision loss, double vision, optical myopathy, severe memory loss, soft tissue damage, broken teeth, or both fractures, and lacerations. CP 184. He has

undergone and continues to undergo numerous surgeries to reconstruct his face. CP 184. Additionally, he has had cognitive therapy, physical therapy, neurological therapy, back therapy, psychological treatment and counseling, and post-concussive therapy and treatment. CP 184.

B. PROCEDURAL FACTS

Mr. Uhrich filed his complaint on January 31, 2012, which was amended twice. CP 1-4; 17-20; 24-27. Mt. Si answered and a discovery process followed. CP 37-40. In May 2013, the parties made cross motions for summary judgment. On June 17, 2013, the trial court denied the Mr. Uhrich's motion for summary judgment and granted Mt. Si's motion thereby dismissing Mr. Uhrich's case. CP 282-284. In its ruling the court made the following findings:

1. Mt. Si had no reason to believe that Mr. Uhrich would be exposed to any hazard of falling from the flat roof.

2. Thus, there was no "corresponding obligation to insist upon ... [Mr. Uhrich] using a safety harness or other fall protection device. See, WAC 296-155-24510.

3. As the flat roof qualifies as a "low pitched roof" as to which fall restraint or fall arrest systems are not required for a worker like plaintiff who is only on the roof to inspect or investigate roof level conditions. See, WAC 296-155-24515.

4. It could be argued that a "warning line system" near the edge would still be required but any such failure could not have been the proximate cause of this injury since the

> plaintiff was acting quite deliberately when, for whatever reason, he went to and leaned over the edge of the roof. The edge of the roof presented a known and obvious risk to which he did not need to be warned.

CP 282-284. The trial court erred in reaching all of these findings/conclusions and by granting summary judgment in Mt. Si's favor. This appeal follows. CP 282-284.

V. ARGUMENT

A. STANDARD OF REVIEW & RULES OF CONSTRUCTION

The following standards and rules apply to this appeal.

1. Mt. Si Did Not Meet Its Burden on Summary Judgment

This Court's review of an order granting summary judgment is de novo meaning that the appellate court is in the same position as the trial court. *E.g. Hisle v. Todd Pac. Shipyards Corp.,* 151 Wn.2d 853, 860, 93 P.3d 108 (2004).

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to summary judgment as a matter of law. CR 56; *Carr v. Blue Cross*, 93 Wn. App. 941, 971 P.2d 102 (1999), *citing Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). All facts submitted and all reasonable inferences from them are viewed in a light most favorable to the non-moving party. *Michak v. Transnation Title Ins.*

Co., 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003). The moving party has the burden of showing the absence of an issue of material fact and they are entitled to judgment as a matter of law. *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). "But, [i]f the moving party does not sustain that burden, summary judgment should not be entered, irrespective of whether the nonmoving party has submitted affidavits or other materials." *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977). As is shown below, Mt. Si did not meet its burden.

2. Applicable Rules of Construction

When interpreting a WISHA regulation, the court interprets it in light of the WISHA statutes and regulations as a whole. *Netversant v. Dep't of Labor & Indus.,* 133 Wn. App. 813, 825, 138 P.3d 3161 (2006). WAC's are interpreted as if they were statutes. *Roller v. Dep't of Labor & Indus.,* 128 Wn. App. 922, 926 – 27, 117 P.3d 385 (2005) (*quoting Cobra Roofing Servs., Inc. v. Dep't of Labor & Indus.*, 122 Wn. App. 402, 409, 97 P.2d 17 (2004), *aff'd*, 157 Wn.2d 90 (2006)). As such, this court's review of the trial court's interpretation of the applicable WAC's is *de novo*. *Roller*, 128 Wn. App. at 926 – 27. Further, WISHA statutes and regulations are interpreted liberally to achieve their purpose of

providing safe working conditions for every worker in Washington. *Inland Foundry Co. v. Dep't of Labor & Indus.,* 106 Wn. App. 333, 336, 24 P.2d 424 (2001) (citi RCW 49.17.010).

When unambiguous, the courts will not look beyond the plain meaning of the words in the regulation. *Mader v. Health Care Auth.,* 149 Wn.2d 458, 473, 70 P.3d 931 (2003). In determining the plain meaning of the regulation, the courts may also look to the entire statutory scheme. *Id.* Further, all interpretations must give meaning to every word in the statute or regulation. *Berrocal v. Fernandez,* 155 Wn.2d 585, 121 P.3d 82 (2005). The goal is to achieve a harmonious total statutory scheme and avoid conflicts between different provisions. *Lee Cook Trucking & Logginb v. Dep't of Labor & Indus.,* 109 Wn. App. 471, 481, 36 P.3d 558 (2001).

B. MT. SI BREACHED ITS NON-DELEGABLE DUTY TO PROVIDE A SAFE WORKPLACE

In claiming negligence against a party, a plaintiff must show that a duty of care was owed by the defendant, the defendant breached that duty, the plaintiff was injured thereby and the breach by the defendant was the proximate cause of the injury. *E.g.*

Seiber v. Poulsbo Marine Cntr., Inc. 136 Wn. App. 731, 150 P.3d 633, 636 (2007). Whether a duty exists is a question of law. *Id.*

1. Mt. Si is a Contractor as a Matter of Law

As a predicate matter, Mt. Si falls within the statutory definition of contractor, and the more narrow statutory definition of general contractor. The definition of contractor is broad:

> "Contractor" includes any person, firm, corporation, or other entity who or which, in the pursuit of an independent business undertakes to, or offers to undertake, or submits a bid to, construct, alter, repair, add to, subtract from, improve, develop, move, wreck, or demolish any building, highway, road, railroad, excavation or other structure, project, development, or improvement attached to real estate or to do any part thereof including the installation of carpeting or other floor covering, the erection of scaffolding or other structures or works in connection therewith, the installation or repair of roofing or siding, performing tree removal services, or cabinet or similar installation; or, who, to do similar work upon his or her own property, employs members of more than one trade upon a single job or project or under a single building permit except as otherwise provided in this chapter. "Contractor" also includes a consultant acting as a general contractor. "Contractor" also includes any person, firm, corporation, or other entity covered by this subsection, whether or not registered as required under this chapter or who are otherwise required to be registered or licensed by law, who offer to sell their property without occupying or using the structures, projects, developments, or improvements for more than one year from the date the structure, project, development, or improvement was substantially completed or abandoned.

RCW 18.27.010(1). As Mt. Si undertook the construction of the Project in its entirety it is a contractor. CP 64. *Hinton v. Johnson*, 87

Wn. App. 670, 942 P.2d 1061 (1997) (real estate developer was "contractor" within meaning of contractor's registration act, where he employed members of more than one trade to work on one particular development).

Further, Mt. Si was a general contractor according to its own admission. CP 64. Mr. Arnold stated in his declaration: "On November 3, 2009, Mt. Si was the general contractor for a remodel project at a house in Lake Forest Park." CP 64. This admission clearly places Mt. Si within the definition of a general contractor.

> "General contractor" means a contractor whose business operations require the use of more than one building trade or craft upon a single job or project or under a single building permit. A general contractor also includes one who superintends, or consults on, in whole or in part, work falling within the definition of a contractor.

RCW 18.27.010(5).

2. Mt. Si Had a Non-Delegable Duty to Provide a Safe Work Place

General contractors have a non-delegable duty to ensure compliance with all WISHA regulations for the protection of all employees on the jobsite, whether its own employees or those of an independent subcontractor. *Kinney v. Space Needle Corporation*, 121 Wn. App. 242, 248, 85 P.2d 918 (2004); citing RCW 49.17.060; *Kamla v. Space Needle Corp.,* 147 Wn.2d 114,

122, 52 P.3d 472 (2002) (citing *Stute v. P.B.M.C., Inc.,* 114 Wn.2d 454, 464, 788 P.2d 545 (1990)).

In *Stute*, the general contractor P.B.M.C., Inc. contracted with Lincoln Highland Village Associates to construct a condominium complex. P.B.M.C. subcontracted with S & S Gutters to install gutters and downspouts. On March 13, 1984, Mr. Stute, an employee of S & S Gutters, was installing gutters and slipped off the roof, falling three stories. There was no scaffolding or other safety equipment to break the fall. Mr. Stute was injured by the fall. P.B.M.C. knew that employees of the subcontractor were working on the roof without safety devices. *Stute v. P.B.M.C., Inc.,* 114 Wn.2d at 456.

Stute sued P.B.M.C. alleging it owed him a duty to provide necessary safety devices at the job site. P.B.M.C. moved for summary judgment, which was granted. The trial court ruled that the general contractor did not owe Stute, an employee of a subcontractor, a duty to provide safety equipment because the general contractor had not voluntarily assumed the duty in its contract with the owner or subcontractor. The trial court also ruled P.B.M.C. had not retained authority to control the safety practices of the subcontractor. *Stute v. P.B.M.C., Inc.,* 114 Wn.2d at 456.

The Supreme Court disagreed and reversed, holding that the statutory directive to employers to comply with safety regulations applies to employees of a subcontractor as well as to the general contractor's direct employees. *Stute v. P.B.M.C., Inc.,* 114 Wn.2d at 457.

The Supreme Court held that RCW 49.17.060[2] creates a two-fold duty. Subsection (1) imposes a general duty on employers to protect only the employer's own employees from recognized hazards not covered by specific safety regulations. Subsection (2) imposes a specific duty to comply with WISHA regulations. *Stute v. P.B.M.C., Inc.,* 114 Wn.2d at 457. Thus, the employer's liability depends upon which section is being invoked. The employer's duty only extends to employees of independent contractors when a party asserts that the employer did not follow particular WISHA regulations. In such a case, all employees working on the premises

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[2] RCW 49.17.060 provides that each employer:(1) Shall furnish to each of his or her employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his or her employees: PROVIDED, That no citation or order assessing a penalty shall be issued to any employer solely under the authority of this subsection except where no applicable rule or regulation has been adopted by the department covering the unsafe or unhealthful condition of employment at the workplace; and (2) Shall comply with the rules, regulations, and orders promulgated under this chapter.

are members of the protected class. *Id.* "Thus, the specific duty clause of RCW 49.17.060(2), requiring employers to comply with applicable WISHA regulations, applies to employees of subcontractors." *Id.*

In this case, it is undisputed that Mr. Uhrich was an employee of Mt. Si's sub-contractor, LES. Mr. Uhrich alleges that Mt. Si did not ensure compliance with certain WISHA regulations. Therefore, he is a member of the protected class described by RCW 49.17.060(2). As demonstrated herein, Mt. Si did not ensure compliance with WISHA, which noncompliance ultimately led to Mr. Uhrich's injuries.

3. WAC 296–155 Has Broad Application

WAC 296-24-005 provides.

> The rules in this chapter are designed to protect the safety and health of employees by creating a healthy work environment by establishing requirements to control safety hazards in the workplace. Chapter 296-800 WAC, the safety and health core rules, contain safety and health rules that apply to most workplaces. Other special industry rules complement the rules found in this chapter and in the safety and health core rules.

WAC 296-155, entitled "Safety Standards for Construction Work" complement the rules set forth in WAC 296-24. The purpose and scope of both WAC 296-24 and WAC 296–155 is broad and protective. WAC 296–155-005(1) provides:

> The standards included in this chapter **apply** throughout the State of Washington, **to any and all workplaces** subject to the Washington Indus. Safety and Health Act (chapter 49.17 RCW), where construction, alteration, demolition, related inspection, and/or maintenance and repair work, including painting and decorating, is performed. **These standards are minimum safety requirements with which all industries must comply when engaged in the above listed types of work**.

(Emphasis added.)

Additionally, under WAC 296–155-040(1) an "employer has an obligation to furnish to each employee's place of employment free from recognized hazards that are causing or likely to cause serious injury or death to employees." Further, WAC 296–155-040(6)(d) requires that "no person shall" ... "Fail or neglect to do everything reasonably necessary to protect the life and safety of employees."

Under WAC 296-155-100, entitled "Management's Responsibility," 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.

(b) And accident prevention program as required by these standards.

(c) Training programs to improve the skill and competency of all employees in the field of occupational safety and health.

WAC 296-155-100(1). Under WAC 296-155-110, an employer is obligated to provide an accident prevention program and specifically provides at subsection three:

> The following are the minimal program elements for all employers: A safety orientation program describing the employer's safety program and including:
>
> (a) How, where, and when to report injuries, including instruction as to the location of first-aid facilities.
>
> (b) How to report unsafe conditions and practices.
>
> (c) The use and care of required personal protective equipment.
>
> (d) The proper actions to take in event of emergencies including the routes of exiting from areas during emergencies.
>
> (e) Identification of the hazardous gases, chemicals, or materials involved along with the instructions on the safe use and emergency action following accidental exposure.

WAC 296-155-110(3). There is no evidence in this record that Mt. Si complied with these basic requirements. In fact, it admits that it did not. As is shown in the record, Mr. Arnold did not give Mr. Uhrich any warning about being near the edge of the roof nor was he instructed to stay away from it. CP 198-199. No safety plan (including a fall protection plan) was on site that day, Mr. Uhrich was not provided a copy of fall protection plan and it was not discussed with him. CP 201. Further, Mr. Uhrich was not

instructed to use fall protection that day. CP 65 & 198. Mt. Si simply failed to meet its basic obligations.

C. A FALL PROTECTION SYSTEM WAS REQUIRED AS A MATTER OF LAW

The trial court concluded:

1. Mt. Si had no reason to believe that Mr. Uhrich would be exposed to any hazard of falling from the flat roof.

2. Thus, there was no "corresponding obligation to insist upon ... [Mr. Uhrich] using a safety harness or other fall protection device. See, WAC 296-155-24510.

CP 283. As is shown below, these findings/conclusions constitute reversible error.

The applicable fall restraining provision enacted into law on the date of Mr. Uhrich's injuries was WAC 296–155–24510.[3] The provision provided:

> When employees are exposed to a hazard of falling from a location 10 feet or more in height, **the employer shall ensure** that fall restraint, follow rest systems, or position positioning device systems are provided, installed, and implemented according to the following requirements.

(Emphasis added.).[4] Further, a violation of the fall safety regulation is a breach of a specific duty rather than a general one. *Cf. Wash.*

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[3] This WAC was superseded by new regulations with effective dates of April 1, 2013.

[4] The remaining portion of the regulation sets forth the specifications that a fall restraint, false arrest or position device system must meet. These physical requirements are not at issue in this appeal.

Cedar & Supply Co. v. Dep't of Labor & Indus., 119 Wn. App. 906, 914, 813 P.3d 1012, *review denied*, 152 Wn.2d 1003 (2004).

1. Mr. Uhrich was Exposed to a Hazard of Falling from a Location of 10 feet or More

The trial court concluded that "Mt. Si had no reason to believe that Mr. Uhrich would be exposed to any hazard of falling from the flat roof." CP 282-284. This was incorrect as a matter of law.

The term "hazard" is defined by WAC 296–155-012 as "... that condition, potential or inherent, which is likely to cause injury, death, or occupational disease." Mt. Si admitted in deposition testimony that the height of the roof exceeded 10 feet. Mr. Arnold testified:

> Q: How high was that roof?
>
> A: Depending on where you were standing but at the driveway edge it's probably 20 – well, there's a catwalk below there so – yea, if you fell from the roof at the driveway edge you'd come out on the catwalk so that's probably ten, twelve-foot drop and then down to the driveway it would be another eight feet. And on the other end of the house it was less than ten.
>
> Q: What about the highest part?
>
> A: That driveway would be the highest part, yeah. **The biggest fall potential is right where Mr. Uhrich fell off the roof and that was---I believe I measured it at 17'6" to the ground from there.**

CP 198-199. Thus, not only did Mr. Arnold admit a fall potential from the roof he testified that it was greater than 10 feet. A hazard in excess of ten feet within the meaning of WAC 296–155–24510 existed.

2. Mt. Si Admits It Did Not Ensure that Fall Protection was Provided, Installed or Implemented

Once an employee is exposed to a potential fall hazard in excess of 10 feet, as here, the plain language of WAC 296–155–24510 imposes three mandatory duties on employers. First, the employer "shall ensure" the fall safety systems "are provided." Second, the employer" shall ensure" that fall safety systems "are... installed." Third, the employer "shall ensure" that fall safety systems "are... Implemented." The term "shall" means "... the provision(s) of the standard are mandatory." WAC 296–155-012; *see also* WAC 296-24-012.

Relative to the term "ensure," as it is a non-technical and undefined term, the court looks to the dictionary for guidance. *State v. Pacheco*, 125 Wn.2d 150, 154, 882 P.2d 183 (1994). "[E]nsure" means to "make sure, certain, or safe." Webster's Third New International Dictionary 756 (2002). Thus, the regulation's plain language requires employers to make certain that a fall protection

system is provided, installed, and implemented. In other words, the employer must ensure that it provides safety equipment and that its employees use that equipment.

Here, Mt. Si specifically admits it did not provide fall protection to Mr. Uhrich. Mr. Arnold did not give Mr. Uhrich any warning about being near the edge of the roof. CP 199. No safety plan was on site that day; Mr. Uhrich was not provided a copy of fall protection plan and it was not discussed with him. CP 201. Further, no one else was using fall protection that day per Mr. Arnold. CP 204. Further, Mr. Uhrich was not instructed to use fall protection that day. CP 198. Given these failures, Mt. Si failed to meet any of the duties imposed by WAC 296–155–24510.

3. WAC 296-155-24515(2)(A) Does Not Apply: Mr. Uhrich was not Engaged in the Investigation, Inspection or Estimating of Roof Level Conditions

The trial court also concluded that:

> 3. As the flat roof qualifies as a "low pitched roof" as to which fall restraint or fall arrest systems are not required for a worker like plaintiff who is only on the roof to inspect or investigate roof level conditions. See, WAC 296-155-24515.

CP 284. This conclusion was based on Mt. Si's claim that it was not required to provide fall protection to Mr. Uhrich as a result of an

exception contained in WAC 296-155-24515(2)(a). This is incorrect.

WAC 296-155-24515 provides in part:

> (1) General Provisions. During the performance of work **on low pitched roofs with a potential fall hazard greater than 10 feet**, the employer **shall ensure** that employees engaged in such work be protected from falling from all unprotected sides and edges of the roof as follows:
>
> (a) By the use of a fall restraint system or fall arrest systems, as defined in WAC 296-155-24510;

(Emphasis added.) WAC 296-155-24515(2)(a) provides:

> The provisions of subsection (1)(a) of this section do not apply at points of access such as stairways, ladders and ramps, or when employees **are on the roof only to inspect, investigate, or estimate roof level conditions**. Roof edge materials handling areas and materials storage areas shall be guarded as provided in subsection (4) of this section.

(Emphasis added.) The court held that this exception applied to Mr. Uhrich's case and dismissed it on summary judgment. The court erred as a matter of law.

Again, Mt. Si has already admitted that Mr. Uhrich was exposed to a potential fall hazard in excess of ten feet from the flat roof. Mr. Arnold testified:

> Q: What about the highest part?
>
> A: That driveway would be the highest part, yeah. **The biggest fall potential is right where Mr. Uhrich fell**

> **off the roof and that was---I believe I measured it at 17'6" to the ground from there.**

CP 198-199; WAC 296–155-012 ("hazard" means "... that condition, **potential** or inherent, **which is likely to cause injury**, death, or occupational disease.") (Emphasis added.).

The phrase "employees are on the roof" is limited by the adjective "only" and the list of verbs "to inspect, investigate or estimate" which verbs are further limited by the phrase "roof level conditions." Thus, this exception applies in a very limited circumstance relating only to the inspection of roof level conditions, investigation of roof level conditions or estimation of roof level conditions.

The terms, inspect, investigate or estimate are not defined by the WAC. Thus, the dictionary definitions are used. *State v. Pacheco*, 125 Wn.2d 150, 154, 882 P.2d 183 (1994).

The term "inspect," a transitive verb, is defined as "to view closely in critical appraisal." Merriam-Webster's Online http://www.merriam-webster.com/dictionary/inspect. The term "investigate," a transitive verb, is defined as "to observe or study by close examination and systematic inquiry" or as an intransitive verb "to make a systematic examination ... : to conduct an official

inquiry." Merriam-Webster's Online, http://www.merriam-webster.com/dictionary/investigate. The term "estimate," yet a third transitive verb, is defined as "to judge tentatively or approximately the value, worth or significance of." Merriam-Webster Online, http://www.merriam-webster.com/dictionary/estimate.

The term "roof level conditions" is also not defined. Resort to dictionary definition again. The term "roof" is defined as "the cover of a building" or "the material used for a roof." Merriam-Webster's Online, http://www.merriam-webster.com/dictionary/roof. The term "level" is defined as a "horizontal condition." Merriam-Webster's Online, http://www.merriam-webster.com/dictionary/level. The term "condition" is defined as "the state in which something exists: the physical state of something." Merriam-Webster's Online, http://www.merriam-webster.com/dictionary/condition.

Here, Mr. Uhrich did not perform any of the three excepted activities. He was instructed by Mr. Arnold to locate the as-built electrical systems based on the work that Mr. Arnold had already begun. Again, Mr. Arnold testified:

> In before he got there that morning, I'd gone up with a bucket of paint, and **I marked the lights in the switch locations on top of the roof with paint so he wouldn't have to search for them once he got there**. I had the switch is marked with an asked straight up above them on

> the roof deck, and I had the lights marked with the circle, in paint.

(Emphasis added.) CP 198. Further, and again, in his declaration in support of Mt. Si's motion for summary judgment, Mr. Arnold again confirmed his instructions to Mr. Uhrich:

> Before Mr. Uhrich arrived, I had marked on the roof with paint the location of all the lights and switches from the main floor below. I had determined those locations by taking measurements from the main floor below and then using those measurements and the house plans to locate the various switch and light locations on top of the roof. Most of the switch and light locations were towards the center of the roof. All of the switch and light locations were well away from the edge of the roof. The closest light or switch location to the west side of the roof where Mr. Uhrich ultimately fell was 7'6". **I told Mr. Uhrich that his job was to simply trace the wire paths between the switch and light locations that were marked on the roof, and then to mark those paths with the paint I had supplied**. Mr. Uhrich confirmed his understanding and began his work with a circuit tracer that he had brought with him.

CP 65 & CP 196. What Mr. Uhrich was doing was locating[5] (i.e. continuing the work that Mr. Arnold had already begun) the internal as-built electrical systems; he was not investigating, inspecting or estimating the roof level conditions. The exception does not apply as a matter of law.

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[5] Neither inspect, investigate or estimate are listed as synonyms for the term locate. Merriam Webster's Online, www.m-w.com

4. Mt. Si's Argument Is Contradicted By RCW 49.17.010 and the Occupational Safety & Health Act of 1970

Mt. Si's claims that fall protection does not apply to Mr. Uhrich under WAC 296-155-24515(A)(2) contradicts the provisions of RCW 49.17.010 which provides in relevant part:

> The legislature finds that personal injuries and illnesses arising out of conditions of employment impose a substantial burden upon employers and employees in terms of lost production, wage loss, medical expenses, and payment of benefits under the industrial insurance act. Therefore, in the public interest for the welfare of the people of the state of Washington and in order to assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington, the legislature in the exercise of its police power, and in keeping with the mandates of Article II, section 35 of the state Constitution, **declares its purpose by the provisions of this chapter to create, maintain, continue, and enhance the industrial safety and health program of the state, which program shall equal or exceed the standards prescribed by the Occupational Safety and Health Act of 1970 (Public Law 91-596, 84 Stat. 1590)**.

(Emphasis added.). The Occupational Safety and Health Act of 1970 is codified at 29 U.S.C. §651 *et seq.* ("OSHA"). Under OSHA, the Secretary of the Department of Labor has the ability to promulgate standards. 29 U.S.C. §655. One standard adopted by the Secretary of Labor is found at 29 C.F.R. 1926, Subpart M, entitled "Safety and Health Regulations for Construction: Fall Protection." 29 C.F.R. 1926.500(a)(1) specifically provides:

> This subpart sets forth requirements and criteria for fall protection in construction workplaces covered under 29 CFR 1926. Exception: **The provisions of this subpart do not apply when employees are making an inspection, investigation, or assessment of workplace conditions prior to the actual start of construction work or after all construction has been completed**.

(Emphasis added.) (Emphasis in the original.) Appendix A, p. 1-2.

Letter #20091112-9340[6] from the Occupational Safety and Health Administration further explains the meaning of the exception:

> The preamble to the final rule, at 59 FR 40675, states:
>
> > [T]he Agency's experience is that such individuals who are not continually or routinely exposed to fall hazards tend to be **very focused on their footing, ever** alert **and aware of the hazards associated with falling**.... [E]mployees who inspect, investigate or assess workplace conditions will be more aware of their proximity to an unprotected edge than, for example, a roofer who is moving backwards while operating a felt laying machine, or a plumber whose attention is on overhead pipe and not on the floor edge.... **[I]f inspections are made while construction operations are underway, all employees who are exposed to fall hazards while performing these inspections must be protected as required by subpart M**. (Emphasis added).

(Appendix A). In addition it states:

> [T]he exception would apply where an employee goes onto a roof in need of repair to inspect the roof and to estimate what work is needed.... The intent of the provision is also to

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[6] Entitled "Interpretation of OSHA Fall Protection Exemption (29 CFR 1926.500(a)(1)) during inspection, investigation and assessment activities."

> recognize that after all work has been completed, and workers have left the area, there may be a need for building inspectors, owners, etc. to inspect the work.

Appendix A. Also, the March 12, 2004 letter of interpretation explains:

> [A]nother basis for the exception was the concept that in inspections before and after the work is done, there is no on-going construction work to divert the inspector's attention from the fall hazard. Once there is construction activity, the risk goes up by virtue of that diversion of attention.

Appendix A.

Mt. Si's suggested interpretation of WAC 296-155-24515(A)(2) contravenes RCW 49.17.010 which requires compliance with OSHA as a minimum standard. 29 C.F.R. 1926.500(a)(1) is the Federal counterpart to WAC 296-155-24515(A)(2) and thus, must be construed together. RCW 49.17.010. WISHA "shall equal or exceed" OSHA. RCW 49.17.010. Mt. Si's interpretation of WAC 296-155-24515(A)(2) does not "equal or exceed" OSHA, but, rather, falls well beneath if not directly contravening it.

D. MT. SI FAILED TO PROVIDE A WARNING LINE SYSTEM.

In addition to providing a fall restraint system, Mt. Si was required to provide a warning line system. WAC 296-155-24515 provides in relevant part:

(1) General Provisions. During the performance of work **on low pitched roofs with a potential fall hazard greater than 10 feet**, the employer **shall ensure** that employees engaged in such work be protected from falling from all unprotected sides and edges of the roof as follows: ...

(b) By the use of a warning line system erected and maintained as provided in subsection (3) of this section and supplemented for employees working between the warning line and the roof edge by the use of a safety monitor system as described in WAC 296-155-24521.

WAC 296-155-24519(3)(a) provides: "Warning line systems shall be erected around all sides of the work area." This provision is mandatory. WAC 296–155-012. There is no evidence in the record that any warning line system was installed. Further, there is no exception for a warning line system in WAC 296-155-24515(2). Mt. Si failed in its duties to Mr. Uhrich as a matter of law.

E. THE PURPOSE OF RCW 49.17 AND RCW 296-155 IS TO PROTECT AGAINST KNOWN AND OBVIOUS DANGERS

Under, WAC 296-155-105, employees have an overlapping duty to ensure their own safety and more specifically at subsection (3) it states: "Employees shall apply the principles of accident prevention in their daily work and shall use proper safety devices and protective equipment as required by their employment or employer." Here, as noted above, Mt. Si did not require fall

protection on the day of Mr. Uhrich's injuries and thus, Mr. Uhrich did not violate WAC 296-155-105(2).

Nevertheless, the trial court concluded that Mt. Si's failures on the day of Mr. Uhrich's injuries were not the proximate cause of his injuries. The trial court concluded:

> 4. It could be argued that a "warning line system" near the edge would still be required but any such failure could not have been the proximate cause of this injury since the plaintiff was acting quite deliberately when, for whatever reason, he went to and leaned over the edge of the roof. The edge of the roof presented a known and obvious risk to which he did not need to be warned.

CP 284. This too was error.

1. Proximate Causation is a Question for the Jury as a Matter of Law

Proximate cause consists of two elements—cause in fact and legal causation. *City of Seattle v. Blume*,134 Wn.2d 243, 251, 947 P.2d 223 (1997). Legal causation involves the question of whether liability should attach as a matter of law. *Blume*, 134 Wn.2d at 252. Cause in fact is established if the plaintiff's injury would not have occurred but for the defendant's action. *Hertog v. City of Seattle*, 138 Wn.2d 265, 282-283, 275, 979 P.2d 400 (1999). The question of cause in fact is normally left to the jury, but

if reasonable minds could not differ, this factual question may be determined as a matter of law. *Hertog*, 138 Wn.2d at 275.

The comparative negligence statute, RCW 5.40.060, states in pertinent part:

> . . . it is a complete defense to an action for damages for personal injury or wrongful death that the person injured or killed was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death and that such condition was a proximate cause of the injury or death **and the trier of fact finds** such person to have been more than fifty percent at fault.

(Emphasis added).

First, it has been universally held by Washington courts that comparative fault as asserted under RCW 5.40.060 is a question for the jury. *See Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 951 P.2d 749 (1998); *Greenleaf v. Puget Sound Bridge and Dredging Company*, 58 Wn.2d 647, 364 P.2d 796 (1961); *Kasparian v. Old Nat. Bank*, 6 Wn. App. 514, 494 P.2d 505 (1972); *Young v. Caravan Corp.*, 99 Wn.2d 655, 661, 663 P.2d 834 (1983) (amended on different grounds in 672 P.2d 1267 (1983).

Further, in *O'Dell v. Chicago, M., St. P. & P. R. Co.*, 6 Wn. App 817, 821, 496 P.2d 519 (1972), the court stated:

> As to plaintiff's contributory negligence, it is well established that this is generally a question for the jury, unless the acts of the plaintiff were **so**

> **palpably negligent** as to preclude the possibility of a difference of opinion.

(Emphasis added).

Mr. Uhrich's actions were not so palpably negligent as to preclude the possibility of a difference of opinion and thus a basis to dismiss his case on summary judgment. The uncontroverted facts show that Mt. Si failed to provide fall protection to employees who were admittedly exposed to a potential fall hazard in excess of 10 feet. The only action that Mr. Uhrich took is that he was standing (or approaching the edge of the roof in a three point stance) at the edge of the roof. Standing on a roof, wherever one may be, is not a negligent act. On the record before the court there is absolutely no evidence of any comparative fault of Mr. Uhrich; there are only the speculations of Mr. Arnold who admits he doesn't know what happened. He stated:

> Q: You didn't witness the fall, correct?
>
> A: I did not.
>
> Q: Do you know what Mr. Uhrich was doing at the time of the fall?
>
> A: I don't know. I know-I have a suspicion of what he was doing but I don't know. I don't know why-he had no business being over there. I don't understand why he did what he did.

CP 199. In his declaration, Mr. Pontious does not explain whys or wherefors but only describes the physicality of Mr. Uhrich falling off the roof. These speculations are not sufficient to support a motion for summary judgment.

2. Mt. Si had a Duty to Protect Mr. Uhrich Against the Known and Obvious Dangers

Here the trial court adopted Mt. Si's argument that it had no duty to warn Mr. Uhrich about obvious or known risks. CP 284. The basis for Mt. Si's argument are the cases of *Mele v. Turner*, 136 Wn.2d 73, 720 P.2d 787 (1986) and *Seiber v. Poulsbo Marine Cntr., Inc.,* 136 Wn. App. 731, 150 P.3d 633 (2007). As is shown below, neither of these cases involve the mandatory protection provisions of RCW 49.17 and WAC 296-155.

In *Mele v. Turner*, the Washington Supreme Court was asked to decide whether there was a duty to warn against the "dangerous condition" of a lawnmower. There, the plaintiff, an 18 year old college student, injured his hand when he placed it inside the mower's discharge chute while attempting to remove grass clippings therefrom.

One issue that the Supreme Court decided was whether the Restatement (Second) of Torts §388[7] (entitled "Chattel Known to be Dangerous for Intended Use") barred the plaintiff's claim. The Supreme Court concluded that the danger posed by the lawn mower was known and obvious and thus there was no duty to warn.

In *Seiber v. Poulsbo Marine,* the plaintiff brought suit against Poulsbo Marine for injuries suffered while walking along a boardwalk when she fell down some steps which fall resulted in serious leg and ankle injuries. Division Two, in *dicta*, stated that there was no reason to warn against the potential danger posed by Poulsbo Marine's merchandise located on the boardwalk (the court noted that the plaintiff did not contend that the merchandise located on the boardwalk caused her fall) citing *Mele v. Turner.* 150 P.3d at 637.

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[7] The section provides: One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel withteh consent of the other or to be endangered by its probably use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (a) knows or has reason to know that the chattel is likely to be dangerous for the use for which it is supplied, and (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and (3) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous. *Mele v. Turner*, 106 Wn.2d at 78.

Mele v. Turner is based on *Haysom v. Coleman Lantern*, 89 Wn.2d 474, 573 P.2d 785 (1978). There the Supreme Court was asked to decide the sufficiency of the warnings to a customer who was injured while filling a fuel tank manufactured by Coleman. The Supreme Court, while adopting the rule that there is no duty to warn against the obvious and known danger of a chattel/product, also stated:

> Where, as here, the dangers associated with the use of a product cannot be said to be clearly latent, but the question of whether instructions or warnings are adequate to ensure safe use of the product, as well as that of whether the dangers involved are so obvious or well known as to eliminate the necessity for detailed warnings, are for the trier of fact.
>
> > Virtually any tool on the market today, including the ordinary screwdriver or hammer, may be dangerous to the ultimate user if used in an inappropriate manner or for an unintended use. It is for the jury to determine whether the danger so presented is unreasonable in the absence of some warning or instruction by the manufacturer concerning safety precautions which should be taken to prevent injury.

(Citations omitted.) 89 Wn.2d at 480.

All of these cases relate to the use of an article of personal property/chattel. The rule clearly comes from product liability cases and is not applicable to employment settings or construction projects. Mt. Si has not cited a single case, nor can Mr. Uhrich find

one, which states that the rule of *Haysom* and *Mele*, supersede the safety provisions contained in RCW 49.17 and WAC 296-155.

Of course, the rule stated in *Haysom* and *Mele,* does not apply to construction sites such as the Project. Construction projects are inherently dangerous, a fact long recognized by the State of Washington. Again, RCW 49.17.010, enacted by the Laws of 1973, Chapter 80, Section 1, provides:

> The legislature finds that personal injuries and illnesses arising out of conditions of employment impose a substantial burden upon employers and employees in terms of lost production, wage loss, medical expenses, and payment of benefits under the industrial insurance act. Therefore, in the public interest for the welfare of the people of the state of Washington and in order to assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington, the legislature in the exercise of its police power, and in keeping with the mandates of Article II, section 35 of the state Constitution, declares its purpose by the provisions of this chapter to create, maintain, continue, and enhance the industrial safety and health program of the state, which program shall equal or exceed the standards prescribed by the Occupational Safety and Health Act of 1970 (Public Law 91-596, 84 Stat. 1590).

RCW 49.17.030 provides: "This chapter shall apply with respect to employment performed in any work place within the state." RCW 49.17.040 provides: "The director shall make, adopt, modify, and repeal rules and regulations governing safety and health standards for conditions of employment as authorized by this chapter after

public hearing in conformance with the administrative procedure act and the provisions of this chapter." And again, RCW 49.17.060 provides: "Each employer: ... (2) Shall comply with the rules, regulations, and orders promulgated under this chapter."

Further, the Washington Department of Labor & Industries has numerous warnings and copious information on its website warning against such dangers and actions to take to prevent them. *E.g.* Construction Site Hazards to Watch Out For! http://www.lni.wa.gov/Safety/Basics/SmallBusiness/Construction/documents/WhatToWatchoutFor.pdf. Further, construction accident practice is a cottage industry within the practice of law. *E.g. "Washington Construction Accident Lawyer" http://www.legalinfo.com/content/construction-accident/washington-construction-accident-lawyer.html.* The Federal Government through the Department of Labor has recognized the threat caused by falling at a construction site. *See https://www.osha.gov/.*

The notion that construction sites are littered with dangers is obvious. That is why Legislature enacted RCW 49.17 and the Department of Labor & Industries promulgated safety regulations under WAC 296 so as to protect against them. The notion that a contractor need not warn and take action to protect against them is

directly contrary to the statutory and regulatory scheme established by RCW 49.17 and WAC 296-155. The trial court erred as a matter of law by dismissing Mr. Uhrich's case.

VI. CONCLUSION

For the above stated reasons, the trial court should be reversed, Mr. Uhrich's case should be reinstated, and this matter remanded for further proceedings.

Dated this 24th day of January, 2014.

THE LAW OFFICE OF CATHERINE C. CLARK PLLC

By: 

Catherine C. Clark, WSBA 21231
Attorneys for Appellants Mr. Nicholas Uhrich, and the Martial Community thereof

Certificate of Service

I hereby certify that I caused the foregoing document to be served upon the below named individual in the identified manner on this 24th day of January, 2014:

Via Hand Delivery/ABC Legal Services

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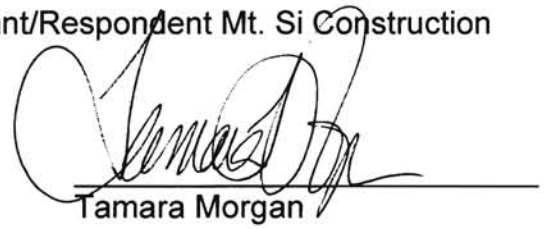

Tamara Morgan

Appendix A

• **Standard Number:** 1926.500; 1926.500(a)(1)

OSHA requirements are set by statute, standards and regulations. Our interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. This letter constitutes OSHA's interpretation of the requirements discussed. Note that our enforcement guidance may be affected by changes to OSHA rules. Also, from time to time we update our guidance in response to new information. To keep apprised of such developments, you can consult OSHA's website at http://www.osha.gov.

Letter # 20091112-9340

Re: Interpretation of OSHA Fall Protection Exemption (29 CFR § 1926.500(a)(1)) during inspection, investigation, and assessment activities.

Scenario: *Section 1926.500(a)(1) allows inspectors to be exempted from the fall protection requirements of Subpart M when performing an inspection before or after the performance of work. In this scenario, engineers are contracted to inspect a roof prior to the beginning of construction. To perform a three hour inspection of the roofing membrane, the engineers must kneel within inches of the edge of the roof to access inspection areas. In addition, they must lean over or towards the edge to use hand tools like drills, screw drivers, and small saws to remove flashing and parapet caps. The inspectors use no fall protection and the fall distance to a lower level is 40 feet.*

Question (1): How does OSHA define "short duration" within the context of § 1926.500(a)(1) and when would or could the length of an inspection or investigation negate the intent of the fall protection exemption?

Answer (1): Section 1926.500(a)(1) states:

> This subpart sets forth requirements and criteria for fall protection in construction workplaces covered under 29 CFR Part 1926. Exception: **The provisions of this subpart do not apply when employees are making an inspection, investigation, or assessment of workplace conditions** prior to the actual start of construction work or after all construction work has been completed. (Emphasis added).

As a practical matter, OSHA has consistently rejected specifying an acceptable time span for a worker to be exposed to a fall hazard. This position was previously explained in an interpretation letter dated March 12, 2004 that was issued to Mr. Randy Stahl. However, the explanation of §1926.500(a)(1) of the final rule, at 59 FR 40675, describes how time can be used as one of several factors in determining if fall protection must be used during an inspection that is performed before or after work. The explanation of the rule states:

> OSHA has set this exception because employees engaged in inspecting, investigating and assessing workplace conditions before the actual work begins or after work has been completed are exposed to fall hazards for very short durations, if at all, since **they most likely would be able to accomplish their work without going near the danger zone**....[R]equiring the installation of fall protection systems under such circumstances would expose the employee who installs those systems to falling hazards for a longer time than the person performing an inspection or similar work. (Emphasis added).

Please note that, in addition to the exposure time of an employee during the installation of fall protection systems, the necessity for the inspector to go near the danger zone would be another factor in determining whether fall protection must be used. In most cases, limiting the duration of an inspection when an inspector never goes anywhere close to the unprotected side or edge would be arbitrary. In contrast, in the scenario you describe, leaning over an unprotected side or edge that is 40 feet above a lower level to remove roofing materials with tools is a significant risk of injury or death regardless of how quickly the inspection can be completed. For reasons like these, OSHA has determined that requiring fall protection based solely on how long it would take an inspector to do the inspection would be impractical.

Question (2): Does the fall protection exemption apply when inspecting, investigating, or assessing procedures put workers directly in the danger zone for extended periods of time?

Answer (2): As stated above, the fall protection exemption anticipates that inspectors likely would be able to accomplish their work without going near the danger zone. In the situation you describe, inspectors were exposed to fall hazards for up to three hours when kneeling within inches of a danger zone with a 40 foot drop. Therefore, the nature of the work was not consistent with the intent of the exemption. Scenarios that keep employees in close proximity to a fall hazard would not fall under the exemption allowed by §1926.500(a)(1).

Question (3): Is inspecting, investigating, or assessing primarily a visual task? Would the task become maintenance or construction activity when tools are involved which could divert the attention away from fall hazard awareness?

Answer (3): The preamble to the final rule, at 59 FR 40675, states:

> [T]he Agency's experience is that such individuals who are not continually or routinely exposed to fall hazards tend to be **very focused on their footing, ever alert and aware of the hazards associated with falling**.... [E]mployees who inspect, investigate or assess workplace conditions will be more aware of their proximity to an unprotected edge than, for example, a roofer who is moving backwards while operating a felt laying machine, or a plumber whose attention is on overhead pipe and not on the floor edge.... **[I]f inspections are made while construction operations are underway, all employees who are exposed to fall hazards while performing these inspections must be protected as required by subpart M.** (Emphasis added).

In addition it states:

> [T]he exception would apply where an employee goes onto a roof in need of repair to inspect the roof and to estimate what work is needed.... The intent of the provision is also to recognize that after all work has been completed, and workers have left the area, there may be a need for building inspectors, owners, etc. to inspect the work.

Also, the March 12, 2004 letter of interpretation explains:

> [A]nother basis for the exception was the concept that in inspections before and after the work is done, there is no on-going construction work to divert the inspector's attention from the fall hazard. Once there is construction activity, the risk goes up by virtue of that diversion of attention.

In an ideal situation, inspections would only be visual, but §1926.500(a)(1) does not prohibit inspectors from using tools to perform tasks like opening covers and making measurements needed to complete inspections. However, in the scenario you describe, the inspectors must maintain their balance, use hand tools to manipulate and inspect roofing materials, and perform these tasks while at or leaning over the unprotected edge of a roof. The combination of these activities could distract the inspector and increase the risk of falling 40 feet to a lower level. As explained above, work activities during which tools are used in a potentially distracting manner in close proximity to fall hazards would not fall under the exemption allowed by §1926.500(a)(1).

If you need additional information, please contact us by fax at: U.S. Department of Labor, OSHA, Directorate of Construction, Office of Construction Standards and Guidance, fax # 202-693-1689. You can also contact us by mail at the above office, Room N3468, 200 Constitution Avenue, N.W., Washington, D.C. 20210, although there will be a delay in our receiving correspondence by mail.

Sincerely,

Richard E. Fairfax, Acting Director
Directorate of Construction

Standard Interpretations - Table of Contents