909600-1

NO. 70568-7-1

SUPREME COURT
OF THE STATE OF WASHINGTON

NICHOLAS UHRICH, and THE MARITAL COMMUNITY THEREOF,

Appellant/Plaintiff,

v.

MT. SI CONSTRUCTION, INC.,

Respondent/Defendant.

RESPONDENT MT. SI CONSTRUCTION, INC.'S PETITION FOR REVIEW

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V. IDENTITY OF PETITION

Respondent/Defendant Mt. Si Construction, Inc., files this petition for review.

VI. CITATION TO THE COURT OF APPEALS' DECISION.

Mt. Si petitions the Supreme Court to review the Opinion of the Court of Appeals, Division I, filed August 25, 2014 and the Order Denying Motion for Reconsideration filed September 19, 2014, to reverse the Court of Appeals' decision, and reinstate the trial court's summary judgment in favor of Mt. Si.

VII. ISSUES PRESENTED FOR REVIEW.

1. Whether the Court of Appeals' decision conflicts with other Appellate Court decisions regarding whether Plaintiff Uhrich was exempt from a requirement to use fall protection gear because his scope of work did not expose him to the hazard of falling?

2. Whether the Court of Appeals' decision that Uhrich's assumption of the risk does not bar his recovery conflicts with other Appellate decisions and presents an issue of substantial public interest that should be determined by the Supreme Court?

VIII. STATEMENT OF THE CASE.

This is a personal injury action arising out of Plaintiff Uhrich's fall from the flat roof of a residential remodel construction site on November 3, 2009. Mt. Si was the general contractor for the remodel project. CP 64. As part of the remodeling work, it was necessary to locate the path of the electrical wires just underneath the surface of the flat roof so that when the new roof surface was applied over the old surface the roofers would not nail into the electrical wires. CP 64, 71. The wires in question supplied power between various light switches and lights on the main floor level. CP 64. Mt. Si hired Lander Electric to locate and mark the location of the wire paths on the roof. CP 65. Mr. Uhrich was an employee of Lander Electric. Mr. Uhrich determined the location of the wire paths in the roof by using a circuit tracer. CP 119.

Before Mr. Uhrich arrived at the job site, Dave Arnold, the president of Mt. Si, had marked the locations of the switches and lights with paint on the roof. CP 65. Most of those locations were towards the center of the roof. CP 65. All of the switch and light locations were well away from the edge of the roof, with the closest location being 7 ½ ' from the edge of the roof. CP 65. Mr. Uhrich's

scope of work was limited to identifying the location of the wire paths between those previously marked locations for the switches and lights, and then marking the paths with paint. CP 65-66. Mr. Uhrich's scope of work did not include getting anywhere near the edge of the roof or working in any area where there was a potential fall hazard. CP 66-67. On the contrary, Mr. Uhrich's scope of work did not take him any closer to the edge of the roof than 7 ½ feet. CP 66-67. Mr. Uhrich had his own fall protection gear in his work truck, and Mt. Si also had fall protection gear on site for use where it was required. CP 167, 180. However, since Mr. Uhrich's scope of work did not expose him to a hazard of falling, he did not choose to wear fall protection gear and was not required to wear it.

Rather than performing his scope of work, Mr. Uhrich abandoned his scope of work, and walked over to the west edge of the roof, an area that was well outside his assigned work scope. Mr. Uhrich leaned over the edge of the roof and fell off the roof in one continuous motion. CP 81.

On June 17, 2013, the Honorable William L. Downing granted Mt. Si's summary judgment motion and denied Mr. Uhrich's motion for partial summary judgment. CP 278-80. On August 25, 2014, the Court of Appeals, Division I, filed its decision reversing

the trial court's summary judgment in favor of Mt. Si, and remanding for trial. On September 2, 2014, the Court of Appeals entered an Order amending its opinion. The Court of Appeals denied Mt. Si's motion for reconsideration on September 19, 2014.

IX. ARGUMENT

A. Considerations governing acceptance of review.

Mt. Si petitions for review by the Supreme Court based upon RAP 13.4(b)(1), (2), and (4). The Supreme Court should accept review because the Court of Appeals' decision conflicts with decisions of the Supreme Court and Court of Appeals. In addition, the Supreme Court should accept review because the petition involves issues of substantial public interest that should be determined by the Supreme Court.

B. Standard of Review.

When a motion for summary judgment is supported by evidentiary matter, the adverse party may not rest on mere allegations in the pleadings but must set forth specific admissible facts showing there is a genuine issue for trial. *Young v. Key Pharmaceuticals, Inc.,* 112 Wn.2d 216, 225, 770 P.2d 182 (1989); *LePlante v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975). The non-moving party may not rely on speculation or argumentative

assertions that unresolved factual issues remain. *Marshall v. Bally's PacWest, Inc.*, 94 Wn.App. 372, 972 P.2d 475 (1999).

C. The Court of Appeals decision regarding fall protection conflicts with other Appellate Court decisions.

The Court of Appeals' opinion conflicts with other Appellate Court opinions regarding whether Mr. Uhrich was exempt from a requirement to use fall protection because his scope of work did not expose him to the hazard of falling. In particular, the Court of Appeals' opinion conflicts with other Appellate Court opinions requiring Mr. Uhrich to set forth admissible evidence that his scope of work made it reasonably predictable that he would fall from the roof.

WAC 296-155-24510 required employers to insure that fall protection equipment was provided, installed, and implemented "when employees are exposed to a hazard of falling from a location 10 feet or more in height". WAC 296-155-012 defines "hazard" to mean, "that condition, potential or inherent, which is likely to cause injury, death, or occupational disease." In order to demonstrate exposure to a hazard which will trigger application of the WAC regulations, Mr. Uhrich must demonstrate a reasonable predictability that in the course of his duties he will be, is, or has

been in the zone of danger. *Adkins v. Aluminum Company of America*, 110 Wn.2d 128, 147, 750 P.2d 1257 (1988).

In *Adkins, supra,* plaintiff was on a roof caulking the flashing on the inside of a pre-cast concrete parapet around the roof. He placed several tubes of caulk under the weather cap of an exhaust vent in order to warm the caulk. One tube fell into the vent. Plaintiff Adkins reached down into the duct to retrieve the tube of caulk and injured his hand when it was caught in a moving fan. The trial court ruled that certain WISHA regulations concerning machine guarding did not apply because the fan did not present a hazard to plaintiff in his normal work area. The Supreme Court affirmed the trial court's decision in that regard. The Court noted that in order to establish that he was exposed to a hazard, thereby triggering application of WISHA, plaintiff Adkins was required to demonstrate that it was reasonably predictable he would gain access to the fan in the course of his normal duties. The Court held plaintiff Adkins did not meet that burden:

> We are unconvinced that it was reasonably predictable that Mr. Adkins would need access to the fan in the course of his normal duties as a roofer. Indeed, the fan became a hazard only when he consciously and deliberately removed the cap and entered the vent, an area arguably beyond a roofer's normal work area.

Adkins, supra at 148.

Adkins is directly on point, requiring judgment in favor of Mt. Si. David Arnold testified he told Mr. Uhrich, "that his job was simply to 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." CP 65 (emphasis added). Mr. Arnold testified that the closest light or switch location to the west side of the roof where Mr. Uhrich ultimately fell was 7' 6". CP 65. That point was the blue light location shown in the photograph attached as Exhibit A to Mr. Arnold's Declaration. CP 69. As seen in the photograph, the pink switch location was even farther away from the edge of the roof. There was no evidence whatsoever in the record that the wire paths between any of the switch or light locations were any closer to the edge of the roof than 7' 6". On the contrary, Mr. Arnold's testimony demonstrated that none of the wire locations were any closer to the roof edge than 7' 6". Mr. Arnold testified that he finished marking the wire paths himself after Mr. Uhrich's accident. CP 66. Mr. Arnold, who had personal knowledge of where the wire paths were ultimately marked on the roof, further testified that Mr. Uhrich's scope of work did not include getting anywhere near the edge of the roof or working in any area

where there was a potential fall hazard. CP 66. He further testified there was no reason whatsoever for Mr. Uhrich to get any closer to the west edge of the roof than the 7' 6" mark where the light switch was located in Exhibits A-C. CP 66-67. All of that evidence was unrebutted. In fact, Mr. Uhrich's own testimony confirmed that his scope of work did not expose him to the hazard of falling. Mr. Uhrich testified:

> Q At any time while you were up on the roof doing the work, did you ever believe that you had to get so close to the edge of the roof to do your work that there might have been a potential of your falling off the roof?
> A Not that I can remember. . . .
>
> Q So you can't actually testify that you know you had to go over to the edge of the roof to trace a particular wire; is that correct?
> A No, I cannot say --
> Q Is that correct?
> A That's correct. . . .

Dep. J. Nicholas Uhrich, 76:23-77:2; 64:11-16; CP 141-42, 132.

As in *Adkins, supra,* falling from the roof became a hazard only when Mr. Uhrich consciously and deliberately left the safety of his work area and went over to the edge of the roof which was clearly outside the scope of his normal work area. Mr. Uhrich's accident did not occur because his scope of work exposed him to a

risk of falling. The accident did not occur because Mr. Uhrich was tracing a wire path and got distracted and did not realize where the edge of the roof was. Mr. Uhrich's accident occurred because he left his work area, walked over to the very edge of the roof where he was not supposed to be, leaned over, and tried to look into a window. CP 81. That was not in any imaginable way part of Mr. Uhrich's scope of work according to the undisputed facts in the record. As in *Adkins,* it was not reasonably predictable that Mr. Uhrich would fall from the roof when his normal duties in the scope of his work would require him to be, at a minimum, 7' 6" from the edge of the roof.[1]

Mr. Uhrich had the burden of coming forward with some admissible evidence that the location of the wire paths was so close to the edge of the roof that in tracing them it was likely and

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[1] The Court of Appeals' opinion at page 10 cited *Mid Mountain Contractors, Inc., v. Dep't of Labor & Indus.,* 136 Wn.App. 1, 7, 146 P.3d 1212 (2006) "(holding WISHA regulations were violated because the employee was working within close proximity to the hazard)." *Mid Mountain Contractors, supra*, is clearly distinguishable. In *Mid Mountain Contractors, supra*, the Court held:

> Unlike *Adkins*, here, Vern McCollaum, a Mid Mountain employee present the day of the citation, had access to the hazard, **and it was within his normal duties to have access to this area.**

Mid Mountain Contractors, supra 146 P.3d at 1214 (emphasis added). Unlike *Mid Mountain*, in the case at bar Mr. Uhrich had no business going over to the edge of the roof and it was not within his normal duties to be near the edge of the roof.

reasonably predictable he would fall from the roof and be injured. *Adkins, supra* at 148; WAC 296-155-012 ("Hazard"). Mr. Uhrich produced no such evidence. He produced no evidence whatsoever as to the location of the wire paths. Much less did Mr. Uhrich produce any evidence that the location of the wire paths was so close to the edge of the roof that in performing his scope of work and locating them with his circuit tracer he would be at risk of falling. Even if one assumes that the wires did not follow a straight path between the light and switch locations—and there was no evidence to that in the record—there was no evidence whatsoever that any of the wires were closer to the edge of the roof than 7' 6". To conclude, as the Court of Appeals' opinion does, that Mr. Uhrich might have had to go close to the edge of the roof in order to trace the wires is sheer speculation that is unsupported by any facts, and is contrary to the admissible facts in the case. The court's speculation is contrary to well established Supreme Court and Court of Appeals' decisions requiring the non-moving party on summary judgment to set forth specific admissible facts rebutting the moving party's contentions and disclosing the existence of issues of material fact. See, e.g., *Young v. Key Pharmaceuticals, Inc., supra; Marshall v. Bally's PacWest, Inc., supra.* Mr. Uhrich did

not meet his burden of setting forth specific facts to show his normal duties as part of his scope of work exposed him to the hazard of falling and, consequently, Mt. Si was entitled to judgment. *Adkins, supra* at 148.[2]

D. The Court of Appeals decision conflicts with Washington Appellate Court decisions and out of state decisions regarding assumption of risk.

In footnote 11 at page 14, the Court of Appeals rejected Mt. Si's argument that assumption of risk barred Plaintiff's claim. The Court apparently concluded that based upon a statement in *Stute v. PBMC, Inc.,* 114 Wn.2d 454, 464, 788 P.2d 545 (1990), regarding a general contractor having a non-delegable duty to comply with WISHA regulations, that as a matter of law the Doctrine of Primary Implied Assumption of Risk did not apply. The Court's conclusion misapplies both the concept of nondelegable duty and the Doctrine of Assumption of Risk. The existence of a nondelegable duty does not prevent assumption of risk from barring plaintiff's claims.

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[2] In concluding that there were material issues of fact as to whether the scope of work exposed Uhrich to the hazard of falling, the Court of Appeals noted that Mr. Arnold conceded in his deposition that he did not say anything to Uhrich about not being near the edge of the house. See Court of Appeals' Opinion at 10-11. The Court of Appeals' Opinion is misplaced. In *Adkins, supra*, no one said anything to Plaintiff about not sticking his hand down in the exhaust vent near the fan either. It does not follow that plaintiff Adkins' or Plaintiff Uhrich's deviation from their normal work area was thereby rendered reasonably predictable.

Assumption of risk is divided into four classifications: (1) express, (2) implied primary, (3) implied reasonable; and (4) implied unreasonable. *Scott v. Pacific West Mountain Resort,* 119 Wn.2d 484, 497, 834 P.2d 6 (1992). At issue in this matter is implied primary assumption of the risk which "arises where a plaintiff has impliedly consented (often in advance of any negligence by defendant) to relieve defendant of a duty to plaintiff regarding specific known and appreciated risks." *Id.* at 498 (citing *Kirk v. WSU,* 109 Wn.2d 448, 453, 746 P.2d 285 (1987)). Where plaintiff knowingly and voluntarily chose to encounter a risk, he has relieved defendant of any duty towards him with respect to that risk. *See, e.g., Jessee v. City Council Dayton,* _____ Wn.App. _____, 293 P.3d 1290 (2013); *Eire v. White*, 92 Wn.App. 297, 966 P.2d 342 (1998). "If the defendant does not have the duty, there can be no breach and hence no negligence." *Scott,* 119 Wn.2d at 497 (citing W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on Torts § 68, at 496-97 (5th ed. 1984)); *see also Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 875 P.2d 621 (1994) ("Assumption of the risk in this form is really a principle of no duty, or no negligence, and so denies the existence of the underlying action.").

The Doctrine of Assumption of Risk does not depend upon the particular duty that Plaintiff relieves or the risk that he assumes. Plaintiff is free to relieve Defendant of any duty he chooses to, as long as he knowingly and voluntarily does so. Consequently, the Court of Appeals decision relying upon *Stute's* nondelegable duty language is misplaced. *Stute* did not involve the issue of implied assumption of the risk. Rather, the court held:

> Thus, to further the purposes of WISHA to assure safe and healthful working conditions for every person working in Washington, RCW 49.18.010, we hold the general contractor should bear the primary responsibility for compliance with safety regulations because the general contractor's innate supervisory authority constitutes sufficient control over the work place.

Stute v. P.B.M.C., Inc., 114 Wn.2d 454, 464, 788 P.2d 545 (1990). While the *Stute* court defined the duty of the general contractor as nondelegable, it did not hold that a plaintiff may not relieve a defendant of a nondelegable duty pursuant to the Doctrine of Assumption of Risk. Indeed, assumption of risk was not even at issue in *Stute.*

Furthermore, the concept of a nondelegable duty has nothing to do with the principles of assumption of risk. The nondelegable duty simply means that a general contractor cannot

eliminate its duty towards plaintiff by entering into a contract with a third party other than plaintiff. The term nondelegable duty does not mean a general contractor cannot delegate compliance with construction safety regulations to a third party subcontractor by contract. In fact, the *Stute* court recognized that type of delegation as perfectly proper:

> It is the general contractor's responsibility to furnish safety equipment or to contractually require subcontractors to furnish adequate safety equipment relevant to their responsibilities.

Stute, supra at 464 (emphasis added). Washington courts since *Stute* have made this distinction clear, viz., a general contractor may delegate responsibility for compliance with WISHA's safety regulations to a subcontractor by contract, including provisions for defense and indemnity, based upon the contractual arrangement with the subcontractor. However, the general contractor cannot eliminate its own duty towards plaintiff by a contract it enters into with a subcontractor and not with plaintiff. In short, absent a contract or agreement with plaintiff directly, a general contractor cannot eliminate its duty towards plaintiff by simply entering into a contract with a third party. That is all that the nondelegable duty language means, and Washington courts since *Stute* have

recognized that. *See, e.g., Degroot v. Berkley Construction, Inc.*, 83 Wn. App. 125, 129, 920 P.2d 619 (1996) ("The subcontract safety provision at issue here contains boilerplate language that appears designed to meet the duty of care outlined in *Stute*."); *Millican v. N.A. Degerstrom, Inc.*, ___ Wn. App. ___, 313 P.3d 1215 (2013) (citing *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 128 Wn.2d 745, 912 P.2d 472 (1996) "Sharp-Line's agreement to assume sole responsibility and indemnify Degerstrom has no more and no less significance here. If it complies with statute, then as between Sharp-Line and Degerstrom the agreement is controlling. As between Mr. Lafayette [decedent] and Degerstrom, for any WISHA violation established by the evidence, it is irrelevant." *Millican, supra,* 313 P.3d at 1222. In other words, the general contractor cannot eliminate the rights of an employee of the subcontractor by entering into an agreement with the subcontractor rather than with the employee.

In the case at bar however, the Doctrine of Assumption of Risk provided that the agreement Mt. Si entered into was not with Mr. Uhrich's employer, but with Mr. Uhrich himself. Implied primary assumption of the risk means that Mr. Uhrich himself knowingly and voluntarily assumed the risk of falling from the roof, and by doing so

eliminated the duty of Mt. Si to insure that he used fall protection gear. Just as the agreement between the general contractor and subcontractor is controlling as between them, so too assumption of the risk between Mr. Uhrich and Mt. Si controlled their relationship and relieved Mt. Si of any duty towards Mr. Uhrich with respect to fall protection equipment.

There is no authority in Washington for the proposition that implied primary assumption of risk does not apply with respect to duties in the construction context. Neither is there any authority in Washington that supports the Court of Appeals decision in this case that implied primary assumption of risk does not apply in the context of a nondelegable duty. In this regard, the Court of Appeals decision has misapplied both the concept of nondelegable duty and the Doctrine of the Assumption of Risk. Consistent with the proper application of both the nondelegable duty concept and the Doctrine of the Assumption of Risk, courts in other jurisdictions have applied assumption of risk in the context of a nondelegable duty. *See, e.g., Larabee v. Triangle Steel, Inc.*, 451 N.Y.S.2d 258, 86 A.D.2d 289 (1982) (liability of general contractor is nondelegable but not absolute and subject to affirmative defenses of comparative negligence and assumption of risk); *Brady v. Ralph M. Parsons*

Co., 327 Md. 275, 292, 609 A.2d 297 (1992) (Assumption of risk defense available in action claiming breach of a contractor's nondelegable duty to enforce OSHA regulations).

Applying this law to the facts in the case at bar, it is clear Mr. Uhrich knowingly and voluntarily assumed the risk of falling from the roof and is barred from suing Mt. Si. It is undisputed Plaintiff knew exactly where the edge of the roof was, because he walked right up to it, got down into a three-point stance, and leaned over the edge of the roof. CP 81. It is undisputed Mr. Uhrich knowingly and voluntarily encountered the risk of falling from the roof. He testified:

> Q You understood before your accident that if you got too close to the edge of the roof there's a potential of falling, correct?
> A What? I'm sorry.
> (The pending question was read by the reporter.)
> A Yes.
> Q You did not need anybody to warn you about that, did you?
> A No.

Dep. Nicholas Uhrich, 90:3-12, CP 152. It is also undisputed Mr. Uhrich knew he had a reasonable opportunity to act differently that would have avoided the danger. Mr. Uhrich had fall protection

gear available in his own work van on-site. CP 180. He knew that fall protection gear was available and that it was one means of protecting himself against the risk of falling if he got too close to the roof. Mr. Uhrich testified:

> Q What do you believe that Lander had by way of fall protection gear before our accident?
> A I believe they had a harness, at least one. . . .
>
> Q So you understood before our accident that where there was a situation where there was a potential for falling at a height over ten feet, a harness and a line would be one means of protecting you against that risk, correct?
> A Yes. . . .

Dep. Nicholas Uhrich, 32:13-15; 37:14-18; CP 32, 37. Mr. Uhrich also could have safely avoided this risk by simply using the ladder, as he had previously, to go down to the main floor and check the light and switch locations rather than leaning over the edge of the roof to try to look in a window. Dep. Nicholas Uhrich, 56:6-8; CP 124. Mr. Uhrich also confirmed he understood it would not be safe to lean over the edge of the roof without being tied off. Mr. Uhrich testified:

Q Wouldn't you agree it would not be a safe work practice to try to lean over the edge of the roof to look down into the house to find a light or a switch location? Again, assuming you're not tied off.
A Was that a "would you agree" question?
Q Go ahead and read it back.
(The pending question was read by the reporter.)
A Yeah, I guess I would agree with that.
Q And it would not be consistent with ordinary care to lean over the edge of the roof without being tied off in an effort to try to locate a switch or a light location; isn't that true?
A I would say so, yes.

Dep. Nicholas Uhrich, 95:11-24; CP 156.

The risk was obvious and Mr. Uhrich knew that before his accident. Mr. Uhrich knew that if got too close to the edge of the roof there was a potential of his falling. He knew it was unsafe to lean over the edge of the roof without being tied off with fall protection gear. He knew fall restraint gear was available to him if he wanted it. Mr. Uhrich knew he could safely use the ladder, as he had previously, to get off the roof and check light and switch locations on the main floor if he needed to. Despite all that knowledge, he voluntarily assumed the risk of leaning over the

edge of the roof without fall protection gear on. Mr. Uhrich's assumption of the risk bars his claims. *Jesse v. City Council Dayton,* _____ Wn.App. _____, 293 P.3d 1290 (2013); *Erie v. White*, 92 Wn.App. 297, 966 P.2d 342 (1998).

X. CONCLUSION

Mt. Si respectfully requests the Court grant its petition for review, reverse the Court of Appeals' decision in this matter, and reinstate the trial court's summary judgment in favor of Mt. Si.

Respectfully submitted this 16th day of October, 2014.

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By: _____
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XI. APPENDIX

1. Opinion of the Court of Appeals, Division 1, filed August 25, 2014.

2. Court of Appeals Order Amending Opinion, filed September 2, 2014.

3. Court of Appeals Order Denying Mt. Si's Motion for Reconsideration, filed September 19, 2014.

4. WAC 296-155-012.

5. WAC 296-155-040.

6. WAC 296-155-24505.

7. WAC 296-155-24510.

8. WAC 296-155-24515.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MT. SI CONSTRUCTION, INC., and CONTRACTORS BONDING AND INSURANCE COMPANY, Respondents, v. NICHOLAS AND KELLY UHRICH, and the marital community thereof, Appellants.	)	No. 70568-7-I DIVISION ONE UNPUBLISHED OPINION FILED: August 25, 2014

SCHINDLER, J. — Nicholas Uhrich appeals summary judgment dismissal of his personal injury lawsuit against general contractor Mt. Si Construction Inc. Uhrich contends Mt. Si had a duty to ensure he was using fall protection equipment while working on the roof under former WAC 296-155-24510 (2000) and former WAC 296-155-24515 (2000). Mt. Si argues neither former WAC 296-155-24510 nor former WAC 296-155-24515 apply because the scope of work did not expose Uhrich to the hazard of falling. Mt. Si also contends that fall protection was not required by an exception under former WAC 296-155-24515(2)(a) because Uhrich was on the roof "only to inspect, investigate, or estimate roof level conditions." Because there are genuine issues of material fact as to whether the scope of work exposed Uhrich to the hazard of falling, we reverse and remand for trial.

FACTS

Mt. Si Construction Inc. was the general contractor for a remodeling project. David Arnold, the president of Mt. Si, testified that "[a]s part of the remodeling work, it was necessary to locate the electrical wires just underneath the surface of the roof so that when the new roof surface was applied the roofers would not nail into the electrical wires." Mt. Si hired subcontractor Lander Electrical Services (LES) "to come locate the wire paths and mark their locations on the roof."

LES electrician Nicholas Uhrich arrived at the house at around 9:00 a.m. on November 3, 2009. Arnold took Uhrich up the "set of stairs on the outside of the addition we'd done . . . , in through what was to be a set of French doors . . . into the master bedroom." Arnold testified that he and Uhrich then walked "down the hallway and the living room" so that he could show Uhrich "the light and the switch locations that we needed to mark out in the roof." Arnold said that Uhrich "took out his sending device and attached it to a light switch at one of the locations" before returning to the master bedroom. Arnold testified that he then "set up a ladder in a skylight that—we'd just built a skylight that's a 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 [opening] and got onto the roof." The roof is flat with a 2-1/2-foot-wide gutter along the perimeter. At its highest point, the roof is 17-1/2 feet from the ground.

Arnold testified that earlier that morning, he had "gone up with a bucket of paint, and . . . marked the lights and the switch locations on top of the roof with paint." Arnold said that he showed Uhrich the light and switch locations he had marked on the roof

before "somebody called," and he left. Uhrich was not wearing fall protection equipment and there was no warning line system around the perimeter of the roof. Shortly after Uhrich started working, he fell off the roof. Uhrich sustained serious injuries, including a traumatic brain injury.

Uhrich and his spouse Kelly Uhrich (Uhrich) filed a personal injury lawsuit against Mt. Si. Uhrich alleged Mt. Si breached its duty to provide a safe work environment by allowing him to work on the roof without providing fall protection as required under former WAC 296-155-24510 and failing to have "a written fall protection work plan" as required under former WAC 296-155-24515. Mt. Si filed an answer denying liability and asserting Uhrich's negligence barred or reduced "any recovery."

Mt. Si filed a motion for summary judgment dismissal. Mt. Si argued that because the scope of work did not expose Uhrich to the hazard of falling, neither former WAC 296-155-24510 nor former WAC 296-155-24515 applied. Mt. Si also argued that fall protection was not required under the exception in former WAC 296-155-24515(2)(a) for a worker who is on a low-pitched roof only to "inspect, investigate, or estimate roof level conditions." Mt. Si also claimed it was entitled to judgment as a matter of law because Uhrich assumed the risk of falling from the roof.

Mt. Si submitted excerpts of the deposition testimony of Arnold and Uhrich, the declaration of Arnold, and the declaration of a painter at the work site, Jason Pontious. Arnold states that in his opinion, the "scope of work did not include getting anywhere near the edge of the roof or working in any area where there was a potential fall

hazard," and "[t]he closest light or switch location to the west side of the roof where Mr. Uhrich ultimately fell was 17' 6"."

In his declaration, Jason Pontious states that while he was painting the trellis on the west side of the house, he saw Uhrich "pacing around an area near the center of the roof. Mr. Uhrich was complaining to himself and tapping on a machine that he was holding in his hand." Pontious testified that Uhrich "was trying to locate the wires in the roof." Pontious states that he told Uhrich "the lights and switches were in a general area over the center of the roof," and "gestured towards some painted marks . . . on the roof showing the location of the switches and lights." Pontious testified that instead of walking over toward the painted marks, "Uhrich walked in the opposite direction to the west edge of the roof," and "leaned over . . . while commenting that he was just going to peek over the edge of the roof and take a look." Pontious said he saw Uhrich "crouch down into a 3-point stance," and as he started to fall, Pontious tried to reach out "to try to grab 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 on the decorative trellis and fell right off the roof in one continuous motion."

In the excerpts from the deposition submitted by Mt. Si, Uhrich states that he has no memory of the fall and cannot remember why he walked over to the edge of the roof. Uhrich testified that he was familiar with fall protection gear and he understood "that if you get too close to the edge of the roof there's a potential of falling." Uhrich also described how he traces electrical wires and the equipment he uses.

Uhrich filed a cross motion for partial summary judgment on breach of duty. Uhrich argued Mt. Si "breached its statutory duties by not providing a safe work environment, not having a written fall protection plan on the job site, by not furnishing such plan to the plaintiff, and by failing to ensure that the plaintiff was wearing fall protection gear."[1]

In support of the motion for partial summary judgment, Uhrich submitted Mt. Si's supplemental answers to interrogatories and requests for production and excerpts from Arnold's deposition. In answer to the interrogatories, Mt. Si admits Uhrich was an employee of the independent contractor it hired "to locate and mark the wiring paths between two light and switch locations on the roof."

During his deposition, Arnold testified that "[t]he 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." Arnold also admitted he did not have a fall protection plan on site and did not discuss safety or the use of fall protection equipment with Uhrich. Arnold said he was not familiar with the "safe place standards" adopted by the Department of Labor and Industries[2] and did not know if he was "currently following the directives from that act." Arnold testified that on the day of the accident, there were roofers working on the other side of the house insulating the addition Mt. Si had just built, and the roofers were using fall protection equipment.

The court denied Uhrich's motion for partial summary judgment, granted Mt. Si's motion for summary judgment, and dismissed the lawsuit.

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[1] Emphasis omitted.

[2] WAC 296-155-040 describes the "safe place standards."

ANALYSIS

Uhrich argues the court erred in denying his motion for partial summary judgment and dismissing his personal injury lawsuit. Uhrich contends Mt. Si had a duty under former WAC 296-155-24510 and former WAC 296-155-24515 to ensure he was using fall protection equipment while working on the 17-1/2-foot-high roof. Mt. Si contends that because the scope of work did not expose Uhrich to the hazard of falling, neither former WAC 296-155-24510 nor former WAC 296-155-24515 applies. Mt. Si also claims a fall restraint or fall arrest system was not required, asserting the exception under former WAC 296-155-24515(2)(a) where a worker is on a low-pitched roof "only to inspect, investigate, or estimate roof level conditions" applies. In the alternative, Mt. Si contends that even if there were a duty under former WAC 296-155-24510 or former WAC 296-155-24515, it met that duty because fall protection gear was available for Uhrich to use.

This court reviews summary judgment de novo, engaging in the same inquiry as the trial court. Afoa v. Port of Seattle, 176 Wn.2d 460, 466, 296 P.3d 800 (2013). Summary judgment is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. City of Sequim v. Malkasian, 157 Wn.2d 251, 261, 138 P.3d 943 (2006). In determining whether a genuine issue of material fact exists, we consider the facts and all reasonable inferences in the light most favorable to the nonmoving party. Hearst Commc'ns, Inc. v. Seattle Times, 154 Wn.2d 493, 501, 115 P.3d 262 (2005). Where different competing

inferences may be drawn from the evidence, the issue must be resolved by the trier of fact. Johnson v. UBAR, LLC, 150 Wn. App. 533, 537, 210 P.3d 1021 (2009).

In a negligence action, a plaintiff must prove (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause. Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 48, 914 P.2d 728 (1996). The existence of a legal duty is generally a question of law. Snyder v. Med. Serv. Corp. of E. Wash., 145 Wn.2d 233, 243, 35 P.3d 1158 (2001). But where the existence of a legal duty depends on disputed material facts, summary judgment is inappropriate. Afoa, 176 Wn.2d at 466.

The Washington Industrial Safety and Health Act of 1973 (WISHA), chapter 49.17 RCW, governs safety standards for employers. The purpose of WISHA is to supplement the federal Occupational Safety and Health Act of 1970 (OSHA) and "assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington." RCW 49.17.010; Afoa, 176 Wn.2d at 470. "OSHA requires states to comply with its rules or else enact safe workplace standards at least as effective as OSHA in ensuring worker safety." Afoa, 176 Wn.2d at 470. Under WISHA, the Department of Labor and Industries must promulgate regulations that equal or exceed the OSHA standards. RCW 49.17.010, .040. As a remedial statute, WISHA and its regulations are liberally construed to carry out its stated purpose. Adkins v. Aluminum Co. of Am., 110 Wn.2d 128, 146, 750 P.2d 1257, 756 P.2d 142 (1988). "[R]egulations promulgated pursuant to WISHA . . . must also be construed in light of WISHA's stated purpose." Adkins, 110 Wn.2d at 146.[3]

[3] Footnote omitted.

RCW 49.17.060 and WAC 296-155-040 impose a nondelegable duty on employers to comply with WISHA. RCW 49.17.060 states, in pertinent part:

> 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 . . . ; and
> (2) Shall comply with the rules, regulations, and orders promulgated under this chapter.

The WAC regulation mirrors RCW 49.17.060. WAC 296-155-040 provides, in part:

> (1) Each employer shall furnish to each employee a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to employees.
> (2) Every employer shall require safety devices, furnish safeguards, and shall adopt and use practices, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe. Every employer shall do everything reasonably necessary to protect the life and safety of employees.

In Stute v. P.B.M.C., Inc., 114 Wn.2d 454, 788 P.2d 545 (1990), the Washington Supreme Court held that a general contractor has a nondelegable duty to ensure compliance with safety regulations for the protection of all employees at the work site, including the employees of a subcontractor. Stute, 114 Wn.2d at 464. The court concluded that the general contractor assumes primary responsibility because its "innate supervisory authority constitutes sufficient control over the workplace." Stute, 114 Wn.2d at 464. The court explained that the policy rationale for placing this responsibility upon a general contractor is because the "general contractor's supervisory authority places the general in the best position to ensure compliance with safety regulations." Stute, 114 Wn.2d at 463.

WISHA requires contractors ensure workers use specific fall protection equipment when the work presents a hazard of falling 10 feet or more. The WISHA fall protection requirements apply to workers "in construction, alteration, repair, maintenance (including painting and decorating), demolition workplaces, and material handling covered under chapter 296-155 WAC." Former WAC 296-155-24501 (2000).

Former WAC 296-155-24510 provides, in pertinent part:

> 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.[4]

Former WAC 296-155-24515 is a more specific standard that applies to work on low-pitched roofs "with a potential fall hazard greater than ten feet."[5] Former WAC 296-155-24515 requires contractors ensure employees use a fall restraint or fall arrest system, or erect a warning line system. Former WAC 296-155-24515 provides, in pertinent part:

> (1) General Provisions. During the performance of work on low pitched roofs with a potential fall hazard greater than ten 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 or fall arrest systems, as defined in WAC 296-155-24510; or
>
> (b) By the use of a warning line system erected and maintained as provided in subsection (3) of this section and supplemented for

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[4] Former WAC 296-155-24510(1)-(3) outlines the requirements for each of the three alternative forms of fall protection. Fall restraint systems include guardrails, safety belts or harnesses, warning lines, and safety monitors; fall arrest systems include full body harnesses, safety nets, and catch platforms; and positioning device systems include a body belt or harness system rigged so that an employee cannot free fall more than two feet and must be secured to appropriate anchorages. Former WAC 296-155-24510(1)-(3).

[5] "Low pitched roofs" are defined as roofs "having a slope equal to or less than four in twelve." WAC 296-155-24603.

> 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.

Uhrich argues Mt. Si had a duty to ensure use of fall protection equipment under former WAC 296-155-24510 and former WAC 296-155-24515 because he was exposed to the hazard of falling from a 17-1/2-foot-high roof. Mt. Si relies on Arnold's testimony to argue the undisputed facts establish Uhrich was not exposed to the hazard of falling because the scope of work did not require him to go near the edge of the roof.

WAC 296-155-012 defines "hazard" to mean a "condition, potential or inherent, which is likely to cause injury, death, or occupational disease." A worker is exposed to a hazard in violation of WISHA where the worker has "access to the violative conditions." Adkins, 110 Wn.2d at 147. There must be a "reasonable predictability that, in the course of [the workers'] duties, employees will be, are, or have been in the zone of danger." Adkins, 110 Wn.2d at 147; see also Mid Mountain Contractors, Inc. v. Dep't of Labor & Indus., 136 Wn. App. 1, 7, 146 P.3d 1212 (2006) (holding WISHA regulations were violated because the employee was working within close proximity to the hazard).

Viewing the evidence in the light most favorable to Uhrich, we conclude there are material issues of fact as to whether the scope of work exposed Uhrich to the hazard of falling and, therefore, whether former WAC 296-155-24510 or former WAC 296-155-24515 apply. Arnold testified that before Uhrich arrived, he "marked on the roof with paint the location of all the lights and switches from the main floor below," and "[m]ost of the switch and light locations were towards the center of the roof." But Arnold stated that on November 3, he told Uhrich to "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." Arnold concedes in his deposition that he did not say anything to Uhrich "about not being near the edge of the house." Further, nothing in the record shows that the wiring ran in a straight line between the light and switch locations Arnold had previously marked with paint on the roof. Uhrich testified that he had to go up and down from the roof in order to locate and trace each line. In his deposition, Uhrich explained that he had to attach one part of the circuit tracer to the circuit inside the house, then return to the roof and use the hand-held receiver to locate the electrical wire.[6] Pontious also testified Uhrich appeared to have difficulty locating the electrical wires, "pacing around an area near the center of the roof . . . complaining to himself and tapping on a machine that he was holding in his hand."

In the alternative, Mt. Si claims that the exception under former WAC 296-155-24515(2)(a) applies. Former WAC 296-155-24515 states, in pertinent part:

> (2) Exceptions.
> (a) 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.[7]

Preliminarily, Mt. Si argues that Uhrich may not for the first time on appeal rely on RCW 49.17.010 and the OSHA regulations to interpret the exception under former WAC 296-155-24515(2)(a). We disagree. "[A] statute not addressed below but pertinent to

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[6] The part of the circuit tracer attached to the circuit inside the house emits a radio frequency that the hand-held receiver picks up.

[7] Emphasis added.

the substantive issues which were raised below may be considered for the first time on appeal." Bennett v. Hardy, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990).

RCW 49.17.010 specifically incorporates OSHA, expressly stating that the regulations promulgated under WISHA "shall equal or exceed the standards prescribed by [OSHA]." Accordingly, in construing WISHA regulations, we can look to OSHA regulations and the federal decisions interpreting OSHA. Adkins, 110 Wn.2d at 147.

The OSHA regulation for fall protection in construction workplaces has a similar exception to former WAC 296-155-24515(2)(a), providing, in pertinent part:

> 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.

29 C.F.R. § 1926.500(a)(1).[8]

The OSHA exception applies only to workers engaged in "inspecting, investigating and assessing workplace conditions before the actual work begins or after work has been completed" because workers "are exposed to fall hazards for very short durations, if at all, since they most likely will be able to accomplish their work without going near the danger zone." Safety Standards for Fall Protection in the Construction Industry, 59 Fed. Reg. 40,672-01 (Aug. 9, 1994).[9] In addition, the OSHA regulations state, in pertinent part:

> [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

[8] Emphasis added.

[9] Emphasis added.

> machine, or a plumber whose attention is on overhead pipe and not on the floor edge.

59 Fed. Reg. 40,672-01. Accordingly, the exception does not apply "if inspections are made while construction operations are underway," in which case "all employees who are exposed to fall hazards while performing these operations must be protected." 59 Fed. Reg. 40,672-01.

Construction on the remodeling project was already underway when Uhrich was on the roof. There is no dispute that Uhrich was on the roof to locate and mark the locations for the electrical wiring underneath the surface of the roof. Uhrich was not on the roof "only to inspect, investigate, or estimate roof level conditions."[10]

Mt. Si also argues that even if it had a duty to provide fall protection equipment, the record shows it met that duty. Mt. Si relies on Uhrich's admission that he had fall protection gear in his van and Arnold's testimony that lanyards and safety harnesses were available for use at the project site. We reject Mt. Si's argument.

In Washington Cedar & Supply Co. v. Department of Labor & Industries, 137 Wn. App. 592, 154 P.3d 287 (2007), we held that former WAC 296-155-24510 "imposes three mandatory duties on employers." Wash. Cedar, 137 Wn. App. at 600. The employer must make certain that a fall system is provided, installed, and implemented. Wash. Cedar, 137 Wn. App. at 601. And former WAC 296-155-24515 explicitly requires

[10] (Emphasis added.) We note that even if the exception in former WAC 296-155-24515(2)(a) applies, there is no dispute that Mt. Si failed to provide a warning line system as required under former WAC 296-155-24515(1)(b).

the employer "ensure" the worker is using fall protection equipment or erect a warning line system.[11]

Because there are genuine issues of material fact as to whether the scope of work exposed Uhrich to the hazard of falling and whether Mt. Si breached the duty to ensure Uhrich used fall protection equipment, we reverse and remand for trial.

Schindler, J.

WE CONCUR:

Verellen, A.C.J.

Appelwick, J.

[11] We also reject Mt. Si's argument that Uhrich's assumption of the risk of falling off the roof bars his recovery. For assumption of the risk to be a complete bar to recovery, the plaintiff must consent "to relieve defendant of a duty to plaintiff regarding specific known and appreciated risks." Scott v. Pac. W. Mountain Resort, 119 Wn.2d 484, 497, 834 P.2d 6 (1992). Because a general contractor has a nondelegable duty to comply with WISHA regulations, assumption of risk is not a complete bar to recovery. Whether Uhrich was contributorily negligent is a question for the trier of fact. See Scott, 119 Wn.2d at 503.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MT. SI CONSTRUCTION, INC., and CONTRACTORS BONDING AND INSURANCE COMPANY, Respondents, v. NICHOLAS AND KELLY UHRICH, and the marital community thereof, Appellants.	)	No. 70568-7-I ORDER AMENDING OPINION

The panel has determined that the unpublished opinion filed August 25, 2014 should be amended to correct a typo. It is hereby

ORDERED that the opinion of this court in the above-entitled case filed August 25, 2014 be amended as follows:

1. The end of the sentence at the top of page 4 that states:

> and "[t]he closest light or switch location to the west side of the roof where Mr. Uhrich ultimately fell was 17' 6"."

shall be deleted and replaced with:

> and "[t]he closest light or switch location to the west side of the roof where Mr. Uhrich ultimately fell was 7' 6"."

The remainder of this opinion shall remain the same.

Dated this 2nd day of September, 2014.

Schindler, J

Verellen, A.C.J.

Appelwick, J

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MT. SI CONSTRUCTION, INC., and CONTRACTORS BONDING AND INSURANCE COMPANY, Respondents, v. NICHOLAS AND KELLY UHRICH, and the marital community thereof, Appellants.	)	No. 70568-7-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

The respondent Mt. Si Construction Inc. filed a motion for reconsideration. A majority of the panel determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Dated this 19th day of September 2014.

FOR THE COURT:

Judge

3.

WAC 296-155-012 Definitions applicable to all sections of this chapter.

Note: Unless the context indicates otherwise, words used in this chapter shall have the meaning given in this section. Certain parts of this chapter contain definitions as they apply to that particular part.

4.

"Approved" means approved by the director of the department of labor and industries or his/her authorized representative: Provided, however, That should a provision of this chapter state that approval by an agency or organization other than the department of labor and industries is required, such as Underwriters' Laboratories or the bureau of mines, the provisions of WAC 296-155-006 shall apply.

"Assistant director" means the individual in charge of the division of consultation and compliance, department of labor and industries, or an authorized representative.

"Authorized person" means a person approved or assigned by the employer to perform a specific type of duty or duties or be at a specific location or locations at the workplace.

"Competent person" means one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective action to eliminate them.

"Confined space" means a space that:

(1) Is large enough and so configured that an employee can bodily enter and perform assigned work; and

(2) Has limited or restricted means for entry or exit (for example, tanks, vessels, silos, storage bins, hoppers, vaults, and pits are spaces that may have limited means of entry); and

(3) Is not designed for continuous employee occupancy.

"Construction work" shall mean and include all or any part of excavation, construction, erection, alteration, repair, demolition, and dismantling, of buildings and other structures and all operations in connection therewith; the excavation, construction, alteration and repair of sewers, trenches, caissons, conduits, pipe lines, roads and all operations pertaining thereto; the moving of buildings and other structures, and to the construction, alteration, repair, or removal of wharfs, docks, bridges, culverts, trestles, piers, abutments or any other construction, alteration, repair or removal work related thereto.

"Defect" means any characteristic or condition which tends to weaken or reduce the strength of the tool, object, or structure of which it is a part.

"Department" means the department of labor and industries.

"Designated person" means "authorized person" as defined in this section.

"Director" means the director of the department of labor and industries, or his/her designated representative.

"Division" means the division of consultation and compliance of the department.

"Employer" means any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees or who contracts with one or more persons, the essence of which is the personal labor of such person or persons and includes the state, counties, cities, and all municipal corporations, public corporations, political subdivisions of the state, and charitable organizations: Provided, that any person, partnership, or business entity not having employees, and who is covered by the industrial insurance act shall be considered both an employer and an employee.

"Equipment" means all machinery, devices, tools, facilities, safeguards, and protective construction used in connection with construction operations.

"Ground fault circuit interrupter" means a fast acting circuit breaker that is sensitive to very low levels of current leakage to ground. The device is designed to limit the electric shock to a current and time duration below that which can cause serious injury.

"Hazard" means that condition, potential or inherent, which is likely to cause injury, death, or occupational disease.

"Hazardous substance" means a substance which, by reason of being explosive, flammable, poisonous, corrosive, oxidizing, irritating, or otherwise harmful, is likely to cause death or injury.

"Maintenance" means the work of keeping a building, machine, roadway, etc., in a state of good repair.

"Part" means a major division, of this chapter, relating to a specific topic or topics and containing various sections, subsections, etc.

"Permit-required confined space (permit space)" means a confined space that has one or more of the following characteristics:

(1) Contains or has a potential to contain a hazardous atmosphere;

(2) Contains a material that has the potential for engulfing an entrant;

(3) Has an internal configuration such that an entrant could be trapped or asphyxiated by inwardly converging walls or by a floor which slopes downward and tapers to a smaller cross-section; or

(4) Contains any other recognized serious safety or health hazard.

"Qualified" means one who, by possession of a recognized degree, certificate, or professional standing, or who by extensive knowledge, training, and experience, has successfully demonstrated their ability to solve or resolve problems relating to the subject matter, the work, or the project.

"Repair" means to restore a building, machine, roadway, etc., to an original state after damage or decay.

"Safety factor" means the ratio of the ultimate breaking strength of a member or piece of material or equipment to the actual working stress or safe load when in use.

"Safety and health standard" means a standard which requires the adoption or use of one or more practices, means, methods, operations, or processes reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

"Shall" means that the provision(s) of the standard are mandatory.

"Substantial" means constructed of such strength, of such material, and of such workmanship, that the object referred to will withstand all normal wear, shock and usage.

"Standard safeguard" means a device designed and constructed with the object of removing the hazard of accident incidental to the machine, appliance, tool, building, or equipment to which it is attached.

Standard safeguards shall be constructed of either metal or wood or other suitable material or a combination of these. The final determination of the sufficiency of any safeguard rests with the director of the department of labor and industries through the division of consultation and compliance.

"Suitable" means that which fits, or has the qualities or qualifications to meet a given purpose, occasion, condition, function, or circumstance.

"Working day" means a calendar day, except Saturdays, Sundays, and legal holidays as set forth in RCW 1.16.050, as now or hereafter amended, and for the purposes of the computation of time within which an act is to be done under the provisions of this chapter, shall be computed by excluding the first working day and including the last working day.

"Worker," "personnel," "man," "person," "employee," and other terms of like meaning, unless the context of the provision containing such term indicates otherwise, mean an employee of an employer who is employed in the business of their employer whether by way of manual labor or otherwise and every person in this state who is engaged in the employment of or who is working under an independent contract the essence of which is their personal labor for an employer whether by manual labor or otherwise.

"Work place" means any plant, yard, premises, room, or other place where an employee or employees are employed for the performance of labor or service over which the employer has the right of access or control, and includes, but is not limited to, all work places covered by industrial insurance under Title 51 RCW, as now or hereafter amended.

Abbreviations used in this chapter:

"ANSI" means American National Standards Institute.

"API" means American Petroleum Institute.

"ASA" means American Standards Association.

"ASAE" means American Society of Agricultural Engineers.

"ASHRE" means American Society of Heating and Refrigeration Engineers.

"ASME" means American Society of Mechanical Engineers.

"ASTM" means American Society of Testing and Materials.

"AWS" means American Welding Society.

"BTU" means British thermal unit.

"BTUH" means British thermal unit per hour.

"CFM" means cubic feet per minute.

"CFR" means Code of Federal Register.

"CGA" means Compressed Gas Association.

"CIE" means Commission Internationale de l' Eclairage.

"DOT" means department of transportation.

"FRP" means fiberglass reinforced plastic.

"GPM" means gallons per minute.

"ICC" means Interstate Commerce Commission.

"ID" means inside diameter.

"LPG" means liquefied petroleum gas.

"MCA" means Manufacturing Chemist Association.

"MSHA" means United States Department of Labor, Mine Safety and Health Administration.

"NBFU" means National Board of Fire Underwriters.

"NEMA" means National Electrical Manufacturing Association.

"NFPA" means National Fire Protection Association.

"NTP" means normal temperature and pressure.

"OD" means outside diameter.

"PSI" means pounds per square inch.

"PSIA" means pounds per square inch absolute.

"PSIG" means pounds per square inch gauge.

"RMA" means Rubber Manufacturers Association.

"SAE" means Society of Automotive Engineers.

"TFI" means The Fertilizer Institute.

"TSC" means Trailer Standard Code.

"UL" means Underwriters' Laboratories, Inc.

"USASI" means United States of America Standards Institute.

"USC" means United States Code.

"USCG" means United States Coast Guard.

"WAC" means Washington Administrative Code.

"WISHA" means Washington Industrial Safety and Health Act of 1973.

[Statutory Authority: Chapter 49.17 RCW. 95-04-007, § 296-155-012, filed 1/18/95, effective 3/1/95. Statutory Authority: RCW 49.17.040 and 49.17.050. 86-03-074 (Order 86-14), § 296-155-012, filed 1/21/86; Order 74-26, § 296-155-012, filed 5/7/74, effective 6/6/74.]

WAC 296-155-040 Safe place standards. (1) Each employer shall furnish to each employee a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to employees.

(2) Every employer shall require safety devices, furnish safeguards, and shall adopt and use practices, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe. Every employer shall do everything reasonably necessary to protect the life and safety of employees.

(3) No employer shall require any employee to go or be in any employment or place of employment which is hazardous to the employee.

(4) No employer shall fail or neglect:

(a) To provide and use safety devices and safeguards.

(b) To adopt and use methods and processes reasonably adequate to render the employment and place of employment safe.

(c) To do everything reasonably necessary to protect the life and safety of employees.

(5) No employer, owner, or lessee of any real property shall construct or cause to be constructed any place of employment that is hazardous to the employee.

(6) No person shall do any of the following:

(a) Remove, displace, damage, destroy or carry off any safety device, safeguard, notice, or warning, furnished for use in any employment or place of employment.

(b) Interfere in any way with the use thereof by any other person.

(c) Interfere with the use of any method or process adopted for the protection of any employee, including themselves, in such employment, or place of employment.

(d) Fail or neglect to do everything reasonably necessary to protect the life and safety of employees.

(7) The use of intoxicants or debilitating drugs while on duty is prohibited. Employees under the influence of intoxicants or drugs shall not be permitted in or around worksites.

5.

This subsection (7) shall not apply to employees taking prescription drugs or narcotics as directed and prescribed by a physician, provided such use does not endanger the employee or others.

[Statutory Authority: Chapter 49.17 RCW. 94-15-096 (Order 94-07), § 296-155-040, filed 7/20/94, effective 9/20/94; Order 74-26, § 296-155-040, filed 5/7/74, effective 6/6/74.]

(d) Describe the correct procedures for the handling, storage, and securing of tools and materials.

(e) Describe the method of providing overhead protection for workers who may be in, or pass through the area below the work site.

(f) Describe the method for prompt, safe removal of injured workers.

(g) Be available on the job site for inspection by the department.

(3) Prior to permitting employees into areas where fall hazards exist the employer shall:

(a) Ensure that employees are trained and instructed in the items described in subsection (2)(a) through (f) of this section.

(b) Inspect fall protection devices and systems to ensure compliance with WAC 296-155-24510.

(4) Training of employees:

(a) The employer shall ensure that employees are trained as required by this section. Training shall be documented and shall be available on the job site.

(b) "Retraining." When the employer has reason to believe that any affected employee who has already been trained does not have the understanding and skill required by subsection (1) of this section, the employer shall retrain each such employee. Circumstances where retraining is required include, but are not limited to, situations where:

• Changes in the workplace render previous training obsolete; or

• Changes in the types of fall protection systems or equipment to be used render previous training obsolete; or

• Inadequacies in an affected employee's knowledge or use of fall protection systems or equipment indicate that the employee has not retained the requisite understanding or skill.

Note: The following appendices to Part C-1 of this chapter serve as nonmandatory guidelines to assist employers in complying with the appropriate requirements of Part C-1 of this chapter.

[Statutory Authority: RCW 49.17.010, [49.17].040, and [49.17].050. 00-14-058, § 296-155-24505, filed 7/3/00, effective 10/1/00. Statutory Authority: RCW 49.17.040, [49.17.]050 and [49.17.]060. 96-24-051, § 296-155-24505, filed 11/27/96, effective 2/1/97. Statutory Authority: Chapter 49.17 RCW. 95-10-016, § 296-155-24505, filed 4/25/95, effective 10/1/95; 91-03-044 (Order 90-18), § 296-155-24505, filed 1/10/91, effective 2/12/91.]

WAC 296-155-24505 Fall protection work plan. (1) The employer shall develop and implement a written fall protection work plan including each area of the work place where the employees are assigned and where fall hazards of 10 feet or more exist.

(2) The fall protection work plan shall:

(a) Identify all fall hazards in the work area.

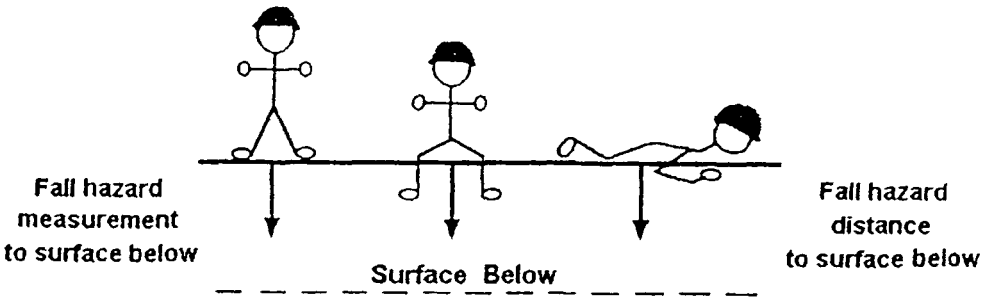
(b) Describe the method of fall arrest or fall restraint to be provided.

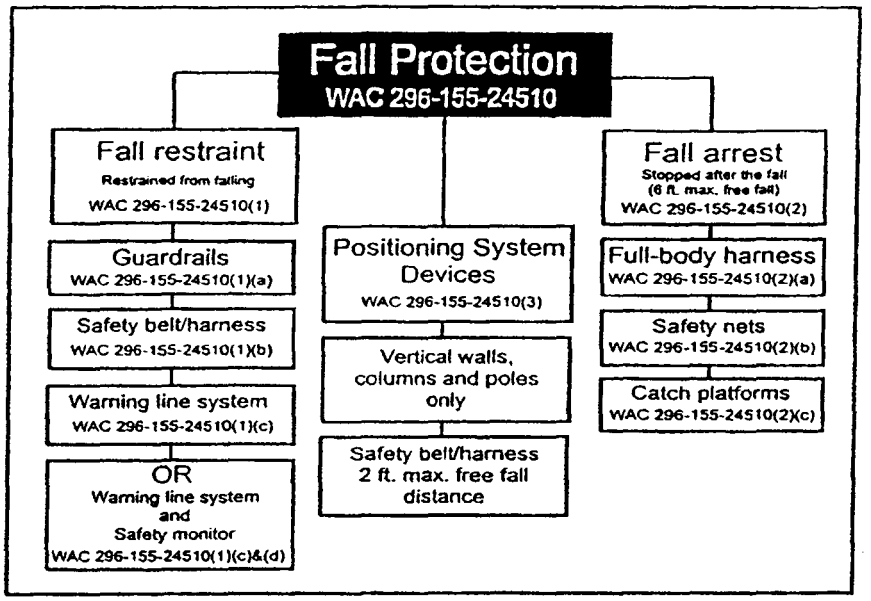
(c) Describe the correct procedures for the assembly, maintenance, inspection, and disassembly of the fall protection system to be used.

6.

WAC 296-155-24510 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.

7.





(1) Fall restraint protection shall consist of:

(a) Standard guardrails as described in chapter 296-155 WAC, Part K.

(b) Safety belts and/or harness attached to securely rigged restraint lines.

(i) Safety belts and/or harness shall conform to ANSI Standard:

Class I body belt

Class II chest harness

Class III full body harness

Class IV suspension/position belt

(ii) All safety belt and lanyard hardware assemblies shall be capable of withstanding a tensile loading of 4,000 pounds without cracking, breaking, or taking a permanent deformation.

(iii) Rope grab devices are prohibited for fall restraint applications unless they are part of a fall restraint system designed specifically for the purpose by the manufacturer, and used in strict accordance with the manufacturer's recommendations and instructions.

(iv) The employer shall ensure component compatibility.

(v) Components of fall restraint systems shall be inspected prior to each use for mildew, wear, damage, and other deterioration, and defective components shall be removed from service if their function or strength have been adversely affected.

(vi) Anchorage points used for fall restraint shall be capable of supporting 4 times the intended load.

(vii) Restraint protection shall be rigged to allow the movement of employees only as far as the sides and edges of the walking/working surface.

(c) A warning line system as prescribed in WAC 296-155-24515(3) and supplemented by the use of a safety monitor system as prescribed in WAC 296-155-24521 to protect workers engaged in duties between the forward edge of the warning line and the unprotected sides and edges, including the leading edge, of a low pitched roof or walking/working surface.

(d) Warning line and safety monitor systems as described in WAC 296-155-24515 (3) through (4)(f) and 296-155-24520 respectively are prohibited on surfaces exceeding a 4 in 12 pitch, and on any surface whose dimensions are less than forty-five inches in all directions.

(2) Fall arrest protection shall consist of:

(a) Full body harness system.

(i) An approved Class III full body harness shall be used.

(ii) Body harness systems or components subject to impact loading shall be immediately removed from service and shall not be used again for employee protection unless

inspected and determined by a competent person to be undamaged and suitable for reuse.

(iii) All safety lines and lanyards shall be protected against being cut or abraded.

(iv) The attachment point of the body harness shall be located in the center of the wearer's back near shoulder level, or above the wearer's head.

(v) Body harness systems shall be rigged to minimize free fall distance with a maximum free fall distance allowed of 6 feet, and such that the employee will not contact any lower level.

(vi) Hardware shall be drop forged, pressed or formed steel, or made of materials equivalent in strength.

(vii) Hardware shall have a corrosion resistant finish, and all surfaces and edges shall be smooth to prevent damage to the attached body harness or lanyard.

(viii) When vertical lifelines (droplines) are used, not more than one employee shall be attached to any one lifeline.

Note: The system strength needs in the following items are based on a total combined weight of employee and tools of no more than 310 pounds. If combined weight is more than 310 pounds, appropriate allowances must be made or the system will not be deemed to be in compliance.

(ix) Full body harness systems shall be secured to anchorages capable of supporting 5,000 pounds per employee except: When self retracting lifelines or other deceleration devices are used which limit free fall to two feet, anchorages shall be capable of withstanding 3,000 pounds.

(x) Vertical lifelines (droplines) shall have a minimum tensile strength of 5,000 pounds (22.2 kN), except that self retracting lifelines and lanyards which automatically limit free fall distance to two feet (.61 m) or less shall have a minimum tensile strength of 3,000 pounds (13.3 kN).

(xi) Horizontal lifelines shall be designed, installed, and used, under the supervision of a qualified person, as part of a complete personal fall arrest system, which maintains a safety factor of at least two.

(xii) Lanyards shall have a minimum tensile strength of 5,000 pounds (22.2 kN).

(xiii) All components of body harness systems whose strength is not otherwise specified in this subsection shall be capable of supporting a minimum fall impact load of 5,000 pounds (22.2 kN) applied at the lanyard point of connection.

(xiv) Dee-rings and snap-hooks shall be proof-tested to a minimum tensile load of 3,600 pounds (16 kN) without cracking, breaking, or taking permanent deformation.

(xv) Snap-hooks shall be a locking type snap-hook designed and used to prevent disengagement of the snap-hook by the contact of the snap-hook keeper by the connected member.

(xvi) Unless the snap-hook is designed for the following connections, snap-hooks shall not be engaged:

(A) Directly to webbing, rope or wire rope;

(B) To each other;

(C) To a dee-ring to which another snap-hook or other connector is attached;

(D) To a horizontal lifeline; or

(E) To any object which is incompatibly shaped or dimensioned in relation to the snap-hook such that unintentional disengagement could occur by the connected object being able to depress the snap-hook keeper and release itself.

(xvii) Full body harness systems shall be inspected prior to each use for mildew, wear, damage, and other deterioration, and defective components shall be removed from service if their function or strength have been adversely affected.

(b) Safety net systems. Safety net systems and their use shall comply with the following provisions:

(i) Safety nets shall be installed as close as practicable under the surface on which employees are working, but in no case more than thirty feet (9.1 m) below such level unless specifically approved in writing by the manufacturer. The potential fall area to the net shall be unobstructed.

(ii) Safety nets shall extend outward from the outermost projection of the work surface as follows:

Vertical distance from working level to horizontal plane of net	Minimum required horizontal distance of outer edge of net from the edge of the working surface
Up to 5 feet	8 feet
More than 5 feet up to 10 feet	10 feet
More than 10 feet	13 feet

(iii) Safety nets shall be installed with sufficient clearance under them to prevent contact with the surface or structures below when subjected to an impact force equal to the drop test specified in (b)(iv) of this subsection.

(iv) Safety nets and their installations shall be capable of absorbing an impact force equal to that produced by the drop test specified in (b)(iv)(A) and (B) of this subsection.

(A) Except as provided in (b)(iv)(B) of this subsection, safety nets and safety net installations shall be drop-tested at the job site after initial installation and before being used as a fall protection system, whenever relocated, after major repair, and at 6-month intervals if left in one place. The drop-test shall consist of a 400 pound (180 kg) bag of sand 30 ± 2 inches (76 ± 5 cm) in diameter dropped into the net from the highest walking/working surface at which employees are exposed to fall hazards, but not from less than forty-two inches (1.1 m) above that level.

(B) When the employer can demonstrate that it is unreasonable to perform the drop-test required by (b)(iv)(A) of this subsection, the employer (or a designated competent person) shall certify that the net and net installation is in compliance with the provisions of (b)(iii) and (b)(iv)(A) of this subsection by preparing a certification record prior to the net being used as a fall protection system. The certification record must include an identification of the net and net installation for which the certification record is being prepared; the date that it was determined that the identified net and net installation were in compliance with (b)(iii) of this subsection and the signature of the person making the determination and certification. The most recent certification record for each net and net installation shall be available at the job site for inspection.

(v) Defective nets shall not be used. Safety nets shall be inspected at least once a week for wear, damage, and other deterioration. Defective components shall be removed from service. Safety nets shall also be inspected after any occurrence which could affect the integrity of the safety net system.

(vi) Materials, scrap pieces, equipment, and tools which have fallen into the safety net shall be removed as soon as possible from the net and at least before the next work shift.

(vii) The maximum size of each safety net mesh opening shall not exceed 36 square inches (230 cm^2) nor be longer than 6 inches (15 cm) on any side, and the opening, measured center-to-center of mesh ropes or webbing, shall not be longer than 6 inches (15 cm). All mesh crossings shall be secured to prevent enlargement of the mesh opening.

(viii) Each safety net (or section of it) shall have a border rope for webbing with a minimum breaking strength of 5,000 pounds (22.2 kN).

(ix) Connections between safety net panels shall be as strong as integral net components and shall be spaced not more than 6 inches (15 cm) apart.

(c) Catch platforms.

(i) A catch platform shall be installed within 10 vertical feet of the work area.

(ii) The catch platforms width shall equal the distance of the fall but shall be a minimum of 45 inches wide and shall be equipped with standard guardrails on all open sides.

(3) Positioning device systems. Positioning device systems and their use shall conform to the following provisions:

(a) Positioning devices shall be rigged such that an employee cannot free fall more than 2 feet (.61 m).

(b) Positioning devices shall be secured to an anchorage capable of supporting at least twice the potential impact load of an employee's fall or 3,000 pounds (13.3 kN), whichever is greater.

(c) Connectors shall be drop forged, pressed or formed steel, or made of equivalent materials.

(d) Connectors shall have a corrosion-resistant finish, and all surfaces and edges shall be smooth to prevent damage to interfacing parts of this system.

(e) Connecting assemblies shall have a minimum tensile strength of 5,000 pounds (22.2 kN).

(f) Dee-rings and snap-hooks shall be proof-tested to a minimum tensile load of 3,600 pounds (16 kN) without cracking, breaking, or taking permanent deformation.

(g) Snap-hooks shall be a locking type snap-hook designed and used to prevent disengagement of the snap-hook by the contact of the snap-hook keeper by the connected member.

(h) Unless the snap-hook is designed for the following connections, snap-hooks shall not be engaged:

(i) Directly to webbing, rope or wire rope;

(ii) To each other;

(iii) To a dee-ring to which another snap-hook or other connector is attached;

(iv) To a horizontal lifeline; or

(v) To any object which is incompatibly shaped or dimensioned in relation to the snap-hook such that unintentional disengagement could occur by the connected object being able to depress the snap-hook keeper and release itself.

(i) Positioning device systems shall be inspected prior to each use for wear, damage, and other deterioration, and defective components shall be removed from service.

(j) Body belts, harnesses, and components shall be used only for employee protection (as part of a personal fall arrest system or positioning device system) and not to hoist materials.

(4) Droplines or lifelines used on rock scaling operations, or in areas where the lifeline may be subjected to cutting or abrasion, shall be a minimum of 7/8 inch wire core manila rope. For all other lifeline applications, a minimum of 3/4 inch manila or equivalent, with a minimum breaking strength of 5,000 pounds, shall be used.

(5) Safety harnesses, lanyards, lifelines or droplines, independently attached or attended, shall be used while performing the following types of work when other equivalent type protection is not provided:

(a) Work performed in permit required confined spaces and other confined spaces shall follow the procedures as described in chapter 296-62 WAC, Part M.

(b) Work on hazardous slopes, or dismantling safety nets, working on poles or from boatswains chairs at elevations greater than six feet (1.83 m), swinging scaffolds or other unguarded locations.

(c) Work on skips and platforms used in shafts by crews when the skip or cage does not occlude the opening to within one foot (30.5 cm) of the sides of the shaft, unless cages are provided.

(6) Canopies, when used as falling object protection, shall be strong enough to prevent collapse and to prevent penetration by any objects which may fall onto the canopy.

[Statutory Authority: RCW 49.17.010, [49.17].040, and [49.17].050. 00-14-058, § 296-155-24510, filed 7/3/00, effective 10/1/00. Statutory Authority: RCW 49.17.040, [49.17.]050 and [49.17.]060. 96-24-051, § 296-155-24510, filed 11/27/96, effective 2/1/97. Statutory Authority: Chapter 49.17 RCW. 95-10-016, § 296-155-24510, filed 4/25/95, effective 10/1/95; 95-04-007, § 296-155-24510, filed 1/18/95, effective 3/1/95; 93-19-142 (Order 93-04), § 296-155-24510, filed 9/22/93, effective 11/1/93; 91-24-017 (Order 91-07), § 296-155-24510, filed 11/22/91, effective 12/24/91; 91-03-044 (Order 90-18), § 296-155-24510, filed 1/10/91, effective 2/12/91.]

WAC 296-155-24515 Guarding of low pitched roof perimeters. (1) General provisions. During the performance of work on low pitched roofs with a potential fall hazard greater than ten 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 or fall arrest systems, as defined in WAC 296-155-24510; or

(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.

(c) Mechanical equipment shall be used or stored only in areas where employees are protected by a warning line system, or fall restraint, or fall arrest systems as described in WAC 296-155-24510. Mechanical equipment may not be used or stored where the only protection is provided by the use of a safety monitor.

(2) Exceptions.

(a) 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.

(b) Employees engaged in roofing on low-pitched roofs less than fifty feet wide, may elect to use a safety monitor system without warning lines.

8.

Note: See Appendix A to Part C-1—Determining roof widths nonmandatory guidelines for complying with WAC 296-155-24515 (2)(b).

(3) Warning lines systems.

(a) Warning lines shall be erected around all sides of the work area.

(i) When mechanical equipment is not being used, the warning line shall be erected not less than six feet (1.8 meters) from the edge of the roof.

(ii) When mechanical equipment is being used, the warning line shall be erected not less than six feet (1.8 meters) from the roof edge which is parallel to the direction of mechanical equipment operation, and not less than ten feet (3.1 meters) from the roof edge which is perpendicular to the direction of mechanical equipment operation.

(b) The warning line shall consist of a rope, wire, or chain and supporting stanchions erected as follows:

(i) The rope, wire, or chain shall be flagged at not more than six foot (1.8 meter) intervals with high visibility material.

(ii) The rope, wire, or chain shall be rigged and supported in such a way that its lowest point (including sag) is no less than 36 inches (91.4 cm) from the roof surface and its highest point is no more than 42 inches (106.7 cm) from the roof surface.

(iii) After being erected, with the rope, wire or chain attached, stanchions shall be capable of resisting, without tipping over, a force of at least 16 pounds (71 Newtons) applied horizontally against the stanchion, thirty inches (0.76 meters) above the roof surface, perpendicular to the warning line, and in the direction of the roof edge.

(iv) The rope, wire, or chain shall have a minimum tensile strength of 200 pounds (90 kilograms), and after being attached to the stanchions, shall be capable of supporting, without breaking, the loads applied to the stanchions.

(v) The line shall be attached at each stanchion in such a way that pulling on one section of the line between stanchions will not result in slack being taken up in adjacent sections before the stanchion tips over.

(c) Access paths shall be erected as follows:

(i) Points of access, materials handling areas, and storage areas shall be connected to the work area by a clear access path formed by two warning lines.

(ii) When the path to a point of access is not in use, a rope, wire, or chain, equal in strength and height to the warning line, shall be placed across the path at the point where the path intersects the warning line erected around the work area.

(4) Roof edge materials handling areas and materials storage. Employees working in a roof edge materials handling or materials storage area located on a low pitched roof with a ground to eave height greater than ten feet shall be protected from falling along all unprotected roof sides and edges of the area.

(a) When guardrails are used at hoisting areas, a minimum of four feet of guardrail shall be erected on each side of the access point through which materials are hoisted.

(b) A chain or gate shall be placed across the opening between the guardrail sections when hoisting operations are not taking place.

(c) When guardrails are used at bitumen pipe outlet, a minimum of four feet of guardrail shall be erected on each side of the pipe.

(d) When safety belt/harness systems are used, they shall not be attached to the hoist.

(e) When fall restraint systems are used, they shall be rigged to allow the movement of employees only as far as the roof edge.

(f) Materials shall not be stored within six feet of the roof edge unless guardrails are erected at the roof edge.

[Statutory Authority: RCW 49.17.010, [49.17].040, and [49.17].050. 00-14-058, § 296-155-24515, filed 7/3/00, effective 10/1/00. Statutory Authority: RCW 49.17.040, [49.17.]050 and [49.17.]060. 96-24-051, § 296-155-24515, filed 11/27/96, effective 2/1/97. Statutory Authority: Chapter 49.17 RCW. 95-10-016, § 296-155-24515, filed 4/25/95, effective 10/1/95; 91-24-017 (Order 91-07), § 296-155-24515, filed 11/22/91, effective 12/24/91; 91-03-044 (Order 90-18), § 296-155-24515, filed 1/10/91, effective 2/12/91.]