

67045-0

67045-0

NO. 67045-0-1

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

WASHINGTON STATE DEPARTMENT OF LABOR
& INDUSTRIES,

Appellant,

v.

SCHOLTEN ROOF ENTERPRISES, dba
HYTECH ROOFING, INC

Respondent,

2011 SEP 14 AM 10:50

~~FILED~~
~~SUPERIOR COURT~~
~~STATE OF WASHINGTON~~
FILED
COURT OF APPEALS DIV 1

Appeal from Superior Court of King County

BRIEF OF RESPONDENT

Aaron K. Owada, WSBA #13869
Attorney for Respondent

AMS LAW, P.C.
975 Carpenter Road NE #201
Lacey, WA 98516
Tel: (360) 459-0751
Fax: (360) 459-3923

ORIGINAL

TABLE OF CONTENTS

I.	STATEMENT OF THE ISSUES	7
II.	STATEMENT OF THE CASE	8
	A. PROCEDURAL BACKGROUND	8
	B. STATEMENT OF FACTS	9
	1. Events that took place on January 13, 2009	10
	2. Prior work history of the foreman, Josh Allsop	12
	3. Hytech's inspection of the job prior to January 13, 2009	14
	4. Citations recommended by the Department	18
III.	ARGUMENT	19
	A. Standard of Review	19
	B. Where a supervisor's knowledge of his own malfeasance is not imputable to the employer where the employer's safety policy, training, and discipline are insufficient to make the supervisor's conduct in violation of the policy foreseeable, the Department failed to establish the	

prima facie element of Employer
knowledge and Violation 1-1 and 1-2
must be vacated 20

1. Where the Employer exercised due diligence in hiring and retaining Mr. Allsop as a foreman, the Department has failed to establish employer knowledge to establish a violation. 28
2. Where a title of “lead worker” does not automatically impute knowledge to the Employer, the Department has failed to establish Employer knowledge and the citations must be vacated. 31

C. Assuming arguendo, where the Department relies on speculation to assert the Employer did not effectively supervise, train or take steps to discover and correct employee violations and where the substantive record demonstrates contrary, the Department has failed to establish the preclusion of the Employer’s affirmative defense of unpreventable employee misconduct and Violation 1-1 and 1-2 must be vacated as found by the Superior Court. 33

IV. CONCLUSION 47

TABLE OF AUTHORITIES

STATE CASES

<i>Department of Ecology v. Campbell & Gwinn, L.L.C.</i> , 146 Wn.2d 1, 43 P.3d 4 (2002).	19
<i>Department of Labor & Industries v. Gongyin</i> , 154 Wn.2d 38, 109 P.3d 816 (2005)	19
<i>JELD-WEN</i> of Everett, BIIA Dec., 88-W144 (1990)	40
<i>In re: Wilder Construction Co.</i> , 2007 WL 3054874 (Wash. Bd. Ind. Ins. App.).	40, 41
<i>Inland Foundry Co. v. State of WA Dept. of Labor & Industries</i> , 106 Wn. App. 333 (2001)	21
<i>Legacy Roofing, Inc. v. Dept. of Labor & Industries</i> , 129 Wn. App. 356, 119 P.3d 366 (2005)	36
<i>Ragnar Benson, Inc.</i> , 18 BNA OSHC 1937, 1940, 1999 CCH OSHD ¶ 31,932, p. 47,373 (No. 97-1676, 1999)	35
<i>Secretary v. Packerland Packing Company of Texas, Inc.</i> , OSHRC Dkt. No. 13315, Nov. 17, 1977	35
<i>Secretary v. Southern Tea Company</i> , OSHRC Dkt. No. 78-2321, Jan. 25, 1979	35
<i>State v. Ryan</i> , 103 Wn.2d 165, 691 P.2d 197 (1984).	20

<i>The Quadrant Corporation v. Growth Management Hearings Bd.</i> , 154 Wn.2d 224, 110 P.3d 1132 (2005).	20
<i>WA Cedar & Supply Co., Inc. v. State of WA Dept. of Labor & Industries</i> , 137 Wn. App. 592 (2007).	21, 39, 40

FEDERAL CASES

<i>Austin Bldg. Co. v. Occupational Safety & Health Review Comm'n</i> , 647 F.2d 1063 (10th Cir.1981)	40
<i>Brennan v. Butler Lime & Cement Co.</i> , 520 F.2d 1011 (7th Cir. 1975)	38
<i>Brennan v. OSHRC & Raymond Hendrix d/b/a Alsea Lumber Co.</i> , 511 F.2d 1139 (9th Cir.1975). (Div. 3, 2006)	23, 27, 32, 34, 3
<i>Brock v. L.E. Myers Co.</i> , 818 F.2d 1270 (6 th Cir.) cert. denied, 484 U.S. 989 (1987).	40
<i>Capital Electric Line Builders of Kansas, Inc. v. Marshall</i> , 678 F.2d 128 (10th Cir. 1982)	34
<i>Danco Constr. Co. v. OSHRC</i> , 586 F.2d 1243 (8th Cir.1978)	44
<i>Daniel Int'l Corp. v. OSHRC</i> , 683 F.2d 361 (11th Cir.1982)	44

<i>Danis-Shook Jt. Venture XXV v. Secretary of Labor</i> , 319 F.3d 805 (6th Cir.2003)	25
<i>Forging Indus. Ass'n v. Secretary of Labor</i> , 773 F.2d 1436 (4th Cir.1985)	43
<i>General Dynamics Corp. v. OSHRC</i> , 599 F.2d 453 (1st Cir.1979)	44
<i>H.B. Zachry Co. v. OSHRC</i> , 638 F.2d 812, (5th Cir. Unit A Mar.1981)	44
<i>Horne Plumbing and Heating Company v. OSAHRC</i> , 528 F.2d 564 (5 th Cir. 1976)	22, 24, 25, 26, 27, 36
<i>N.L.R.B. v. Metropolitan Life</i> , 380 U.S. 438, 85 S. Ct. 1061	42
<i>Mountain States Telephone and Telegraph Co. v. OSHRC</i> , 623 F.2d 155, 158 (10th Cir.1980).	23, 26, 43
<i>Mineral Indus. & Heavy Constr. Group v. Occupational Safety & Health Review Comm'n</i> , 639 F.2d 1289 (5th Cir.1981)	40
<i>National Realty & Construction Co. v. OSHRC</i> , 160 U.S. App. D.C. 133, 489 F.2d 1257 (1973)	37, 38
<i>New York State Electric & Gas Corp. v. Secy. of Labor</i> , 17 BNA-OSHC 1650, (U.S. Ct. of Appeals, 2 nd Cir. 1995).	41, 42, 43

<i>Ocean Electric Corporation v. Secretary of Labor,</i> 594 F.2d 396 (4 th Cir. 1979)	43
<i>Pennsylvania. Power & Light Co. v. Occupational Safety & Health Review Commission,</i> 737 F.2d 350 (3rd Cir. 1982)	22, 25, 27, 43
<i>Trinity Industries, Inc. v. Occupational Safety and Health Review Commission,</i> 206 F.3d 539 (5th Cir. 2000)	41
<i>W.G. Yates & Sons Construction Co., v. Occupational Safety & Health Review Commission,</i> 459 F.3d 604 (5th Cir. 2006)	24, 25, 26

STATE STATUTES

RCW 49.17.120(5)	39
RCW 49.17.120(5)(a)	33
RCW 49.17.120(5)(iv)	39
RCW 49.17.150(1).	19
RCW 49.17.180(6)	20

WASHINGTON ADMINISTRATIVE CODE

WAC 296-155-505(4)(a)	18
WAC 296-155-24510	19

OTHER LEGAL AUTHORITY

29 USC 651	21
29 USC 654	22

I. STATEMENT OF ISSUES

1. Where a supervisor's knowledge of his own malfeasance is not imputable to the employer where the employer's safety policy, training, and discipline are insufficient to make the supervisor's conduct in violation of the policy foreseeable, did the Department fail to establish the prima facie element of Employer knowledge resulting in the need to vacate Violation 1-1 and 1-2?
2. Assuming arguendo, where the Department relies on speculation to assert the Employer did not effectively supervise, train or take steps to discover and correct employee violations and where the substantive record demonstrates contrary, has the Department failed to establish the preclusion of the Employer's affirmative defense of unpreventable employee misconduct resulting in a need to affirm the Superior Court's Order to vacate Violation 1-1 and 1-2?

II. STATEMENT OF CASE

A. PROCEDURAL BACKGROUND

On April 3, 2009, the Department of Labor and Industries (hereinafter “DLI”) issued Citation and Notice No. 312812852, against the Employer. (CABR p. 56-57). A timely appeal was made with the DLI which resulted in the DLI transfer of the Employer’s appeal to the Board for hearing. On May 10, 2010, IAJ Harada issued a Proposed Decision and Order stating “Citation and Notice No. 312812852, issued by the Department of Labor and Industries on April 3, 2009, is incorrect; and is vacated.” (CABR p. 51, lines 21-23). The DLI thereafter filed Department of Labor and Industries’ Petition for Review on May 27, 2010. (CABR p. 27-40.). On June 9, 2010, the Employer filed a Response to Department’s Petition for Review. Ultimately a Decision and Order was issued from the Board on July 26, 2010 affirming Citation and Notice No. 312812852. (CABR p. 2-7). The matter was thereafter heard

on April 12, 2011, in Whatcom County Superior Court wherein the Court reversed the Board's Decision and Order dated July 26, 2010 and vacated Citation and Notice No. 312812852 reversed.

B. STATEMENT OF FACTS

Hytech Roofing, Inc.¹ worked as a roofing subcontractor at the Bakerview Square worksite (hereinafter "worksite") located at 410 W. Bakerview Road in Bellingham, Washington. Although its work began in December 2008, because of poor weather conditions much of their work was placed on hold because of snow. The Department's citation was based on an incident that took place on January 13, 2009 when Jeremy Moorlag, a Hytech employee fell through a skylight that had been opened that morning by Barron Heating, another subcontractor on site.

¹ Scholten Roof Enterprises, Inc. is the legal name of the Respondent. Hytech Roofing Inc. is its trade name and will used throughout Respondent's Brief.

1. Events that took place on January 13, 2009.

On the day of inspection, the Employer had begun work at approximately 8:00 a.m. During the installation process, Barron Heating employees arrived and worked in the same work area where Hytech employees were installing the membrane installation. As a result, it was Barron employees that removed the plywood covering to install “curbs” around the roof opening.

At approximately 11 a.m. Mr. Jeremy Moorlag (hereinafter “Moorlag”) and Mr. Joseph Allsop (hereinafter “Allsop”), a Hytech foreman; returned from a work break and found the Barron Heating employees were no longer on the roof. Mr. Moorlag and Mr. Allsop rolled out membranes in the area where they had just installed the insulation. Their work came up to one of the HVAC openings which had a curb built around it. While Mr. Moorlag was installing material he hit the curb which caused a sound and resulted in Mr. Allsop looking up and seeing Mr. Moorlag falling through the HVAC opening

which did not have a plywood covering. The undisputed facts demonstrate that while Mr. Allsop was a foreman, he was also a *working foreman*. That is, like the other workers on the job site from Hytech, Mr. Allsop physically engaged in construction activities.

Mr. Moorlag's fall occurred within a quick period of time, right after lunch. No one from management could have anticipated or prevented this unfortunate occurrence. In fact, the following relevant testimony by Mr. Koskela establishes the Department has no witness that can corroborate the alleged time period of exposure that would indicate Employer knowledge of the violations alleged (Koskela, Tr. 1/5/10, p. 68, lines 1-15):

- Q. And then between January 5 and January 13, you weren't present at the job site on any of those days, were you?
- A. No.
- Q. So you have no personal knowledge as to Hytech employees working between that period of time?
- A. I have no knowledge of them working between that time.
- Q. And you have no knowledge of the Faber employees working during that period of time either?

- A. I don't know.
- Q. So during that same period of time you have no personal knowledge as to what, if any, HVAC openings were actually covered or uncovered, isn't that true?
- A. Between 1/5 and 1/13?
- Q. Correct.
- A. I don't know.

2. Prior work history of the foreman, Josh Allsop.

Prior to the January 13, 2009 incident Mr. Allsop was a trusted employee and Hytech Roofing had no reason to doubt his judgment for safety (Gross, Tr. 1/6/10, p. 19-20, lines 22-26 & 1-9):

- Q. Now Counsel asked you if you had relied on Mr. Josh Allsop, a foreman at the Bakerview Square project, to ensure safety for the other employees. I believe you said yes; is that correct?
- A. Yes.
- Q. At that point in time and prior to the Bakerview Square project did you believe that Mr. Allsop was capable and qualified to be the foreman who would be responsible for safety in your absence?
- A. Yes.
- Q. What did you base that on?
- A. Prior work history.
- Q. Tell me about that. How was Mr. Allsop prior to the Bakerview Square project, how was he as an employee?
- A. He was an excellent foreman. He was given

multiple commendations for his work. He was doing a good job.

Mr. Gross expected his foremen, including Mr. Allsop to ensure that the crew worked safely. This was a specific part of their job. (Gross, Tr. 1/6/10, p. 5, lines 6 - 17)

As evidenced by Exhibits 15 and 16, Mr. Allsop was well aware of Hytech's fall protection rules and there was nothing the Employer could have reasonably done to anticipate the removal of the plywood by Barron Heating employees or that Mr. Allsop, a well trained employee, would disregard safety training.

Mr. Allsop agreed that his company never pressured him to violate the fall protection rules in order to get the job done. In fact, he said the opposite was true. He made a bad decision and took a short cut that he knew that he was not supposed to take. He agreed that management never told him to take any shortcuts, and that no pressure was ever put on him to disregard safety to get the job done. (Allsop, Tr. 1/5/10, p 149 - 150,

lines 7-26 & 1-13).

4. Hytech's inspection of the job prior to January 13, 2009.

The Board record reflects that the Employer took steps to discover and correct violations of its safety rules. In the Decision and Order, the Board incorrectly stated that the, "worksite visits to determine safety compliance were sporadic at best." (CABR p. 5, lines 21-23). Such a statement ignores the fact that unannounced visits are meant to be a surprise to ensure that employees are on their "A game" at all times. The current Decision and Order also ignored Judge Harada's finding that, "While Mr. Gross had not visited when his workers were there working, he had been to the site on three separate occasions (planning, material off-loading, and one other occasion) when the workers were present. Plus, it appears that between the time when the work began and the time of the incident, there were few days when he could have visited the site." (CABR p. 49-50, lines 32 & 1-4). Nevertheless, Mr.

Gross visited the Bakerview project on three occasions prior to January 13, 2009. (Gross, Tr. 1/6/10, p. 13, line 8.) While at the job, he also discussed safety issues with the Superintendent, and assessed safety issues to ensure that Mr. Allsop was provided sufficient resources to address safety. *Id.* At page 14, lines 7 – 22.

The Board record reflects that Hytech was in fact effective in enforcement of its safety program as written in practice and not just in theory. The current Decision and Order states, “there was little evidence of discipline for safety violations prior to the January 13, 2009 incident.” The testimony before the Board showed disciplinary action against two employees, Trevor Brown and Travis Postma. (Gross at page 8, lines 18 – 21, and page 11, line 7.) The Superior Court concluded that the Board erred in reversing the Proposed Decision and Order when the Board assumed there were disciplinary issues that took place prior to this period that required disciplinary proceedings. The Employer respectfully

asserts that the Superior Court was correct when it reaffirmed Judge Harada's finding that, "Scholten [Employer] did what their policy calls for so the policy was effective." (CABR p. 50, lines 8-9).

Mr. Allsop's own testimony acknowledges that employees knew and recognized the safety standards required. In relevant testimony. Mr. Allsop acknowledged specifically that he received training related to working with HVAC openings (Allsop, Tr. 1/5/10, p. 140, p. 8-19):

Q. But after December 17, 2008, had you received any training prior to that point in time about how to deal with HVAC openings?

A. Yes.

Q. And you understood those to be floor openings that needed to be adequately protected to ensure the safety of yourself and your crew, is that correct?

A. Yes.

Q. Did you understand the training that was provided to you?

A. Yes, I did.

Q. And did you have any questions as to what was expected of you in terms of how to protect yourself or your employees?

A. No.

The fall protection violation was addressed by Mr. Allsop

who readily admitted to choosing a short cut that could not have been prevented by the Employer regardless of the amount of due diligence afforded (Allsop, Tr. 1/5/10, p. 149-150, lines 17-26 & 1-10):

Q. Would you agree that you took a short cut?

A. Yes.

Q. And that you just did this for your own personal belief as compared to, well, let me ask you this way: did anyone from management, any of the owners tell you to do any kind of short cut?

A. Never.

Q. Why do you say never?

A. It is like you said before, with roofing our biggest concerns is fall protection. And that's Hytech biggest concern. That our employer is making sure that we don't have accidents like this and making sure that we have what we need to be safe. And we had all of the safety flagging and we could have done the flagging, but we didn't. It was.

Q. Bad decision on your part?

A. Yes.

Furthermore, it is not disputed that the Employer initiated disciplinary procedures including a five day suspension and a year of probation on Mr. Allsop. (Allsop, Tr. 1/5/10, p 140-141, lines 20-26 & 1-7).

Mr. Michael Draper was called as the Employer's expert

based upon his extensive experience in working on safety issues in the construction industry. In relevant testimony, Mr. Draper stated the following when asked whether the Employer took reasonable steps to ensure Mr. Allsop did as he was supposed (Draper, Tr. 2/12/10, p 24, lines 16-23):

A. Yes. I think that we're doing everything possible and going beyond it. When we look at the Foreman Evaluation Guide, the safety training foremen had been given, the refresher training on fall protection, they had reasonable expectation to assume that foremen like Josh are taking care of matters in the field and are their lead people and are addressing the hazard on the job as they occur, which is expected of them.

5. Citations recommended by the Department.

As a result of the Compliance Officer's inspection, the Department recommended two serious citations against the Employer:

1-1 WAC 296-155-505(4)(a) alleging the Employer did not ensure that floor openings on the upper roof area were covered resulting in an employee falling through one of the openings.

1-2 WAC 296-155-24510 alleging the Employer did not ensure employees installing roofing materials were wearing fall protection.

The IAJ found that it was the aberrant act of Mr. Allsop that, unfortunately, led to the fall from the roof by Mr. Moorlag on January 13, 2009. (CABR p. 49, lines 19-24).

III. ARGUMENT

A. Standard of Review

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

However, statutory interpretation for questions of law are reviewed by the appellate courts de novo. *Department of Labor & Industries v. Gongyin*, 154 Wn.2d 38, 44, 109 P.3d 816 (2005). An appellate court's prime construction objective is to "carry out the legislature's intent." *Department of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

To discern legislative intent, courts will look to the statute as a whole. *The Quadrant Corporation v. Growth Management Hearings Board*, 154 Wn.2d 224, 239, 110 P.3d 1132 (2005). Further, courts must harmonize statutes and rules to give effect to both. *State v. Ryan*, 103 Wn.2d 165, 178, 691 P.2d 197 (1984).

B. Where a supervisor's knowledge of his own malfeasance is not imputable to the employer where the employer's safety policy, training, and discipline are insufficient to make the supervisor's conduct in violation of the policy foreseeable, the Department failed to establish the prima facie element of Employer knowledge and Violation 1-1 and 1-2 must be vacated.

As set forth under RCW 49.17.180(6) and federal case law interpreting OSHA statutory requirements, the Department of Labor & Industries must establish that either the employer had actual knowledge of the alleged fall protection violation, or that it failed to meet its duty of care in exercising due diligence in order to establish constructive knowledge of the violation. In relevant part, RCW 49.17.180(6) declares:

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

In interpreting WISHA regulations in the absence of state decisions, Washington courts look to the federal Occupational and Health Administration (OSHA) regulations and consistent federal decisions. *WA Cedar & Supply Co., Inc. v. State of WA Dept. of Labor & Industries*, 137 Wn. App. 592, 604 (2007). *Inland Foundry Co. v. State of WA Dept. of Labor & Industries*, 106 Wn. App. 333, 427 (2001).

The purpose and policy of the Occupational Safety and Health Act is “to assure so far as possible every working man and woman in the nation safe and healthful working conditions...” 29 U.S.C. s 651. To achieve that goal, the Act imposes on employers a general duty to provide ‘a place of

employment . . . free from recognized hazards that are . . . likely to cause death or serious physical harm . . .,’ and establishes a dual responsibility of employers and employees to ‘comply with occupational safety and health standards.’ 29 U.S.C. s 654. *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564, 568 3 O.S.H. Cas. (BNA) 2060, 1975-1976 O.S.H.D. (CCH) P 20,504 (5th Cir. 1976).

When drafting the Occupational Safety and Health Act “Congress quite clearly did not intend ... to impose strict liability: The duty was to be an achievable one.... Congress intended to require *elimination only of preventable hazards.*” (Emphasis added). *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564, 568-69 (5th Cir.1976) (c iting *Nat’l Realty & Construction Co. v. OSHRC*, 489 F.2d 1257 (D.C.Cir.1973)). Specifically, the “Act itself provides the basis for [this] reasoning [as] the statement of congressional purpose contained in the Act evidences an intent to ensure worker safety *only so far as possible.* (Emphasis added). *Penn. Power & Light Co. v.*

OSHRC, 737 F.2d 350, 354 (3d Cir.1984) (citing *Brennan v. Occupational Safety and Health Review Com'n (Hanovia Lamp)*, 502 F.2d 946, 951-52 (3d Cir.1974)).

In referring to the employer and employee relationship, the Court in the case of *Mountain States Telephone and Telegraph Co. v. OSHRC* found “a corporate employer entrusts to a supervisory employee its duty to assure employee compliance with safety standards, it is reasonable to charge the employer with the supervisor's knowledge actual or constructive of non-complying conduct of a subordinate.” *Mountain States Telephone and Telegraph Co. v. OSHRC*, 623 F.2d 155, 158 (10th Cir.1980). However, the court emphasized that “when the noncomplying behavior is the supervisor's own a ***different*** situation is presented.” (Emphasis added). *Id.*

The fifth circuit has held “a supervisor's knowledge of his own rogue conduct cannot be imputed to the employer; and consequently ***the element of employer knowledge must be established, not vicariously through the violator's knowledge,***

but by either the employer's actual knowledge, or by its constructive knowledge based on the fact that the employer could, under the circumstances of the case, foresee the unsafe conduct of the supervisor.” (Emphasis added). *W.G. Yates & Sons Const. Co. Inc. v. OSHHRC*, 459 F.3d 604, 609 21 O.S.H. Cas. (BNA) 1609, 2005 O.S.H.D. (CCH) P 32,830 (5th Cir. 2006).

In the case of *W.G Yates & Sons*. a supervising employee was found working along a dangerous ledge without fall protection. *Id.* at 605. In finding the ALJ erred in imputing to company foreman's knowledge that, acting contrary to company's policy, his conduct violated the law the Court relied on the case of *Horne Plumbing & Heating Co. v. OSHRC* and stated “in this case it is not disputed that Olvera was a supervisory employee, that his own conduct is the OSHA violation, and that he knew his conduct was violative of the law and of company policy. Yet, imputing to the employer the knowledge of a supervisor of his own violative conduct without

any further inquiry would amount to the imposition of a strict liability standard, which the Act neither authorizes nor intends. *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564, 568 (5th Cir.1976).

As discussed and relevant to the present case the Court in *W.G. Yates & Sons* sought to answer in what circumstances may it be appropriate to impute the knowledge of a supervisor to the employer. Unfortunately, there is not a clear consensus among the Circuit Courts, as disagreement in determining ***whether the government can establish an employer's knowledge of a violation of law based on a disobedient supervisor's misconduct.*** See, e.g., *Danis-Shook Jt. Venture XXV v. Secretary of Labor*, 319 F.3d 805, 811-12 (6th Cir.2003) (holding that the supervisor's knowledge of his own misconduct can be imputed to establish employer knowledge because such supervisor misconduct “raises an inference of lax enforcement and/or communication of the employer's safety policy”); *Penn. Power & Light Co.*, 737 F.2d at 358-59 (Third Circuit holding

that the Secretary cannot meet its burden to establish knowledge “where the inference of employer knowledge is raised only by proof of a supervisor's misconduct”); *Mountain States Telephone & Telegraph Co.*, 623 F.2d at 156 (Tenth Circuit holding that supervisor's knowledge and violation of the safety standard is insufficient evidence to establish employer knowledge, finding that a contrary rule would inappropriately “shift the burden of proof to the employer” on a required element of the violation). *W.G. Yates & Sons Const. Co. Inc. v. OSHHRC*, 459 F.3d 604, 608 21 O.S.H. Cas. (BNA) 1609, 2005 O.S.H.D. (CCH) P 32,830 (5th Cir. 2006).

Ultimately, the Court in *W.G. Yates & Sons* relied on *Horne*, to find “a supervisor's knowledge of his own malfeasance is not imputable to the employer where the employer's safety policy, training, and discipline are sufficient to make the supervisor's conduct in violation of the policy **unforeseeable**. (Emphasis added). *Id.* at 609. In the facts of *W.G. Yates & Sons*, Yates can be charged with knowledge only

if Olvera's knowledge of his own misconduct is imputable to Yates. The knowledge is imputed only if Olvera's conduct was foreseeable. Consequently, the Secretary, not Yates, bears the burden to establish that the supervisor's violative conduct was foreseeable. *Id.*

“It is clear that the failure to comply with a specific regulation, even coupled with substantial danger is, standing alone, insufficient to establish a violation of the Act.” See, e.g., *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564, 568-69 (5th Cir.1976) (citing *Nat'l Realty & Construction Co. v. OSHRC*, 489 F.2d 1257 (D.C.Cir.1973)); *Penn. Power & Light Co. v. OSHRC*, 737 F.2d 350, 354-55 (3rd Cir.1984) (citing *Brennan v. Occupational Safety and Health Review Com'n (Hanovia Lamp)*, 502 F.2d 946, 951-52 (3d Cir.1974)).

Proving employer knowledge is a strict obligation of the Department as part of its *prima facie* case. This obligation cannot be ignored or shifted away from the Department. In this case, the question of foreseeability focuses on whether the

Employer knew, or should have known, that Mr. Allsop would engage in his aberrant behavior.

- 1. Where the Employer exercised due diligence in hiring and retaining Mr. Allsop as a foreman, the Department has failed to establish employer knowledge to establish a violation.**

The record reflects that the Department failed to prove the Employer had actual knowledge of the violations at issue or failed to have an effective plan that reasonably could have foreseen that Mr. Allsop would allow the fall protection violations to occur.

On the day of inspection, the Employer had begun work at approximately 8:00 a.m. During the installation process, Barron Heating employees arrive and work in the same work area where Hytech employees were installing the membrane installation. As a result, it was Barron employees that removed the plywood covering to install “curbs” around the roof opening.

At approximately 11 a.m., Mr. Jeremy Moorlag and Mr. Joseph Allsop returned from a work break and found the Barron Heating employees were no longer on the roof. Mr. Moorlag and Mr. Allsop rolled out membranes in the area where they had just installed the insulation. Their work came up to one of the HVAC openings which had a curb built around it. While Mr. Moorlag was installing material he hit the curb, which caused a sound and resulted in Mr. Allsop looking up and seeing Mr. Moorlag falling through the HVAC opening which did not have a plywood covering.

The bump and fall occurred within a quick period of time that no one could have anticipated or prevented. In fact, the following relevant testimony by Mr. Koskela establishes the Department has no witness that can corroborate the alleged time period of exposure that would indicate Employer knowledge of the violations alleged (Koskela, Tr. 1/5/10, p. 68, lines 1-15):

Q. And then between January 5 and January 13, you weren't present at the job site on any of those days, were you?

- A. No.
- Q. So you have no personal knowledge as to Hytech employees working between that period of time?
- A. I have no knowledge of them working between that time.
- Q. And you have no knowledge of the Faber employees working during that period of time either?
- A. I don't know.
- Q. So during that same period of time you have no personal knowledge as to what, if any, HVAC openings were actually covered or uncovered, isn't that true?
- A. Between 1/5 and 1/13?
- Q. Correct.
- A. I don't know.

Prior to the January 13, 2009 incident Mr. Allsop was a trusted employee and Hytech roofing had no reason to doubt his judgment for safety (Gross, Tr. 1/6/10, p. 19-20, lines 22-26 & 1-9):

- Q. Now Counsel asked you if you had relied on Mr. Josh Allsop, a foreman at the Bakerview Square project, to ensure safety for the other employees. I believe you said yes; is that correct?
- A. Yes.
- Q. At that point in time and prior to the Bakerview Square project did you believe that Mr. Allsop was capable and qualified to

be the foreman who would be responsible for safety in your absence?

A. Yes.

Q. What did you base that on?

A. Prior work history.

Q. Tell me about that. How as Mr. Allsop prior to the Bakerview Square project, how was he as an employee?

A. He was an excellent foreman. He was given multiple commendations for his work. He was doing a good job.

The Employer could not reasonably have done anything to anticipate the removal of the plywood by Barron Heating employees or that Mr. Allsop, a well trained employee, would disregard safety training. As a result, the Employer initiated disciplinary procedures including a five day suspension and a year of probation on Mr. Allsop. (Allsop, Tr. 1/5/10, p 140-141, lines 20-26 &1-7).

It is not the intent of WISHA to punish Employers via strict liability and an Employer cannot be held responsible for the idiosyncratic conduct of employees.

2. Where a title of “lead worker” does not automatically impute knowledge to the Employer, the Department has failed to

establish Employer knowledge and the citations must be vacated.

Under federal OSHA cases, where the safety violation was committed by a lead or supervisory worker, the knowledge element is not automatically imputed to the Employer. Instead, the party seeking to impute knowledge must show that the supervisor's conduct was reasonably foreseeable and thus preventable by the employer. *Brennan v. Occupational Safety and Health Review Commission*, 511 F.2d 1139 (9th Cir. 1975).

In the present case, Mr. Allsop held an entry level position as a working foreman where he had no authority to speak on legal matters, no authority to sign contracts on behalf of the Employer and no authority to purchase real estate or major capital expenditures. (Allsop, Tr. 1/5/10, p. 125-126, lines 26 & 1-15). For all intents and purposes Mr. Allsop engaged in "rogue conduct" which is evident throughout the record and such conduct cannot be imputed to the Employer.

Mr. Koskela acknowledged that the Department must establish all four elements to establish a violation. (Koskela, Tr. 1/5/10, p. 71, lines 2-18). Where the Department has failed to establish the element of employer knowledge the violations at issue must be vacated.

C. Assuming arguendo, where the Department relies on speculation to assert the Employer did not effectively supervise, train or take steps to discover and correct employee violations and where the substantive record demonstrates contrary, the Department has failed to establish the preclusion of the Employer's affirmative defense of unpreventable employee misconduct and Violation 1-1 and 1-2 must be vacated as found by the Superior Court.

Where the employee at issue was fully aware of the Employer's practices and procedures yet affirmatively chose to ignore them with subjective and unauthorized discretion, the Department cannot establish knowledge and the affirmative defense of employee misconduct is applicable.

In relevant part RCW 49.17.120(5)(a) states the following:

No citation may be issued under the section if there is unpreventable employee misconduct that led to the violation, but the employer must show the existence of:

- (i) A thorough safety program, including work rules, training, and equipment designed to prevent the violation;
- (ii) Adequate communication of these rules to employees;
- (iii) Steps to discover and correct violations of its safety rules; and
- (iv) Effective enforcement of its safety program as written in practice and not just in theory.

The Ninth Circuit's holding in *Brennan* has been adopted by the 3rd, 4th, 5th and 10th Circuit Courts of Appeal. In *Capital Electric Line Builders of Kansas, Inc. v. Marshall*, 678 F.2d 128 (10th Cir. 1982) the court held:

There is little an employer can do to insure that the employee makes the proper judgment beyond providing adequate training and equipment, and explaining how to perform the job and what general hazards to avoid. *Id.* at 131.

Employers are not charged with monitoring each individual employee at all hours of the day to ensure compliance with the State's Safety and Health Act. Instead,

where employers act with due diligence the employer cannot be liable for the personal subjective decisions of their employees.

In the case of *Secretary v. Southern Tea Company*, it is established that the statutes related to the enforcement of employee safety and health was not designed to protect against intentional or deliberate acts of employees. *Secretary v. Southern Tea Company*, OSHRC Dkt. No. 78-2321, Jan. 25, 1979.

The only means that may have possibly curbed this unpreventable employee misconduct would to have had constant supervision of its numerous employees. However, that is not feasible, nor is it the law:

- An employer is not required to provide constant surveillance by supervisors. *Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1940, 1999 CCH OSHD ¶ 31,932, p. 47,373 (No. 97-1676, 1999).
- *Secretary v. Packerland Packing Company of Texas, Inc.*, OSHRC Dkt. No. 13315, Nov. 17, 1977 (“The Act does not impose strict liability; an employer is only responsible for hazards it can prevent.”)

In the case of *Legacy Roofing, Inc. v. Dept. of Labor & Industries*, the Court held an employer failed to establish the unpreventable employee misconduct affirmative defense for employee failure to wear fall protection. *Legacy Roofing, Inc. v. Dept. of Labor & Industries*, 129 Wn. App. 356, 119 P.3d 366 (2005). However, in *Legacy*, the employer at issue had yet to satisfy its own inspection goals as outlined nor was it consistently penalizing employees who violated its safety policy. *Id.* at 372. In order for the employer to prove that the enforcement of its safety program is effective, it must prove that the employee's misconduct was not foreseeable. *Id.* at 367.

In the case of *Horne Plumbing & Heating Co. v. OSHRC*, the Court held that an employer who had done everything possible to insure compliance with the Act short of personally supervising operation himself could not be held liable for violations of Act committed by his experienced foremen who were aware of safety measures to be taken. *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564, 3 O.S.H. Cas. (BNA)

2060, 1975-1976 O.S.H.D. (CCH) P 20,504 (5th Cir. 1976). In *Horne*, the employer was found to be diligent in providing for the safety of his employees, and there was no dispute that his foreman understood his policy and instructions. *Id.* at 567. It also appeared the employer had no reason to believe policy and instructions would be disregarded by his foreman. *Id.* In coming to its decision, the Court adopted the reasoning of the Ninth Circuit as “it was error to find Horne liable on an imputation theory for the unforeseeable, implausible, and therefore unpreventable acts of his employees. A contrary holding would not further the policies of the Act, and it would result in the imposition of a standard virtually indistinguishable from one of strict or absolute liability, which Congress, through section 17(k), specifically eschewed.” *Id.* at 571.

In the leading case of *National Realty & Construction Co. v. OSHRC*, the Court held a “willfully reckless employee may on occasion circumvent the best conceived and most vigorously enforced safety regime. . . . Congress intended to

require elimination only of preventable hazards.” *National Realty & Construction Co. v. OSHRC*, 160 U.S. App. D.C. 133, 489 F.2d 1257 (1973).

The Seventh Circuit agreed with the D.C. Circuit's construction, and held that an employer was not guilty of a serious violation of the general duty clause when an inexperienced employee was killed while unloading a truck, after the employer had explicitly warned him to stay away from the trucks. *Brennan v. OSHRC*, 501 F.2d 1196 (7th Cir. 1974). The issue, the court determined, was foreseeability and concluded that a reasonably diligent employer could not have foreseen the danger. The Seventh Circuit elaborated on the foreseeability requirement of section 17(k): ‘In sum, whether a serious violation of the standard was foreseeable with the exercise of reasonable diligence depends in great part on whether (the) employees . . . had received adequate safety instructions.’ *Brennan v. Butler Lime & Cement Co.*, 520 F.2d 1011, 1018 (7th Cir. 1975) (specific duty case).

The Department of Labor and Industries cited Washington Cedar and Supply for failing to ensure that its employees were wearing fall restraints when they delivered materials onto the roof of a construction site in the case of *WA Cedar & Supply Co., Inc. v. Dept. of Labor & Industries*, 119 Wn. App. 906, 83 P.3d 1012, 20 O.S.H. Cas. (BNA) 1489 (2003). In asserting the defense of unpreventable employee misconduct, the employer in *WA Cedar* took issue with RCW 49.17.120(5) as allowing the unpreventable employee misconduct defense only where the violation is characterized as an “isolated occurrence.” But the Board's interpretation of RCW 49.17.120(5) was not this narrow. *Id.* at 912. In an effort to clarify, the Court stated: The “isolated occurrence” language stems from agency and judicial interpretation of the “effective enforcement” prong of the unpreventable employee misconduct defense. RCW 49.17.120(5)(iv). The Board and federal courts have concluded that in order for the enforcement of a safety program to be “effective,” the misconduct could not have been

foreseeable. *Jeld-Wen*, No. 88 W144; *Brock*, 818 F.2d at 1277 (stating that the violation must have been “idiosyncratic and unforeseeable”); *Austin Bldg. Co. v. Occupational Safety & Health Review Comm'n*, 647 F.2d 1063, 1068 (10th Cir.1981); *Mineral Indus. & Heavy Constr. Group v. Occupational Safety & Health Review Comm'n*, 639 F.2d 1289, 1293 (5th Cir.1981). In *WA Cedar*, the Court found “repeat citations for the same safety violation should put an employer on notice that it is not effectively enforcing its safety program. Thus, absent changes in the safety program or increased enforcement measures, the employer should anticipate continued violations.” *Id.*

The case of *In re: Wilder Construction Co.* is referenced by the Appellant to address employer noncompliance with training standards. *In re: Wilder Construction Co.*, 2007 WL 3054874 (Wash. Bd. Ind. Ins. App.). Interestingly, *Wilder* cites the case of *Trinity Industries, Inc.*, Where the Commission found “the Secretary had **failed** to establish a training violation because the employer was able to establish that it trained

employees about the combustibility and fire hazard of a coating compound (Tectyl) and the employer had specifically trained employees to not enter tanks until a hot work permit was issued; use a fire watch when welding; wear all-cotton clothing; ventilate tanks; and remove preservative coatings from the point of welding. The Secretary was not able to persuasively demonstrate *how* the established training was deficient. (Emphasis added). *Trinity Industries, Inc.*, OSHRC Docket No. 95-1597; 20 OSHC (BNA) 1051 (April 26, 2003). In *Wilder*, it was found there was “no evidence from Wilder about what training, if any, they provided.” *In re: Wilder Construction Co.*, 2007 WL 3054874 (Wash. Bd. Ind. Ins. App.).

In the case of *New York State Electric & Gas Corporation v. Secretary of Labor and OSHRC*, the employer appealed two citations issued for its alleged failure to comply with safety standards where the Commission “declined to follow cases from the Third and Tenth Circuits placing the burden of proof for employee misconduct on the Secretary.

Again, it stated that whether or not Webb was a supervisor was not relevant: in either case, the employer had failed to make sufficient efforts to detect violations of the safety rules. Were Webb not a supervisor, but simply Price's co-worker, then supervision was inadequate because it was limited to brief, twice-daily visits to work sites; if Webb was a supervisor, then NYSEG failed to show it did enough to prevent safety violations, including adequate training of its supervisors.” *New York State Electric & Gas Corporation v. Secretary of Labor and OSHRC*, 88 F.3d 98, 35 Fed.R.Serv.3d 454, 17 O.S.H. Cas. (BNA) 1650, 1995-1997 O.S.H.D. (CCH) P 31,099 (2d Cir.). In *New York*, the Court found the Commission did not seriously analyze both parties advanced reasons for reaching opposite conclusions regarding the adequacy of NYSEG's safety program. But to accept the Secretary's position would be to “accept appellate counsel's post hoc rationalizations for agency action.” *Id.* See also *Metropolitan Life*, 380 U.S. at 444, 85 S. Ct. at 1064-65.

There is a lack of consensus among the Circuit Courts regarding the defense of unpreventable employee misconduct as discussed in the case of *New York. Id.* The fourth circuit has held “the Secretary has the burden to show an employee's act was not idiosyncratic and unforeseeable, rejecting the Commission's position that unpreventability is an affirmative defense to be established by the employer.” See *Ocean Electric Corp. v. Secretary of Labor*, 594 F.2d 396, 401-02 (4th Cir.1979); *Forging Indus. Ass'n v. Secretary of Labor*, 773 F.2d 1436, 1450 (4th Cir.1985) (referring to “unforeseeable employee misconduct” as a “defense” available to the employer under the Act). Two Circuits have held that the Secretary must disprove “unpreventable conduct” in the special situation where the alleged violative conduct is that of a supervisor. *Pennsylvania Power & Light Co. v. OSHRC*, 737 F.2d 350, 358 (3d Cir.1984); *Mountain States Tel. and Tel. Co. v. OSHRC*, 623 F.2d 155, 158 (10th Cir.1980).

The majority of the Circuits have held that unpreventable employee misconduct is an affirmative defense that an employer must plead and prove. The First Circuit so held in a case involving the general duty clause, *General Dynamics Corp. v. OSHRC*, 599 F.2d 453, 459 (1st Cir.1979), as have the Fifth, Sixth, Eighth, and Eleventh Circuits in special duty cases, *H.B. Zachry Co. v. OSHRC*, 638 F.2d 812, 818 (5th Cir. Unit A Mar.1981); *L.E. Myers*, 818 F.2d at 1277; *Danco Constr. Co. v. OSHRC*, 586 F.2d 1243, 1246-47 (8th Cir.1978); *Daniel Int'l Corp. v. OSHRC*, 683 F.2d 361, 364 (11th Cir.1982).

Contrary to the Secretary's suggestion, the view of the majority of the Circuits-that unpreventable misconduct is an affirmative defense-does not compel a holding that the employer bears the burden on the adequacy of its safety policy in this case. The Secretary must first make out a prima facie case before the affirmative defense comes into play. See *L.E. Myers*, 818 F.2d at 1277.

In the present case, not only were the fall protection rules communicated, Mr. Allsop's own testimony demonstrates that employees knew and recognized the safety standards required. In relevant testimony Mr. Allsop acknowledged specifically that he received training related to working with HVAC openings (Allsop, Tr. 1/5/10, p. 140, p. 8-19):

Q. But after December 17, 2008, had you received any training prior to that point in time about how to deal with HVAC openings?

A. Yes.

Q. And you understood those to be floor openings that needed to be adequately protected to ensure the safety of yourself and your crew, is that correct?

A. Yes.

Q. Did you understand the training that was provided to you?

A. Yes, I did.

Q. And did you have any questions as to what was expected of you in terms of how to protect yourself or your employees?

A. No.

The fall protection hazard was disregarded by Mr. Allsop who readily admitted to choosing a short cut that could not have been prevented by the Employer regardless of the amount of

due diligence afforded (Allsop, Tr. 1/5/10, p. 149-150, lines 17-26 & 1-10):

Q. Would you agree that you took a short cut?

A. Yes.

Q. And that you just did this for your own personal belief as compared to, well, let me ask you this way: did you anyone from management, any of the owners tell you to do any kind of short cut?

A. Never.

Q. Why do you say never?

A. It is like you said before, with roofing our biggest concerns is fall protection. And that's Hytech biggest concern. That our employer is making sure that we don't have accidents like this and making sure that we have what we need to be safe. And we had all of the safety flagging and we could have done the flagging, but we didn't. It was.

Q. Bad decision on your part?

A. Yes.

Mr. Michael Draper was called as the Employer's expert based upon his extensive experience in working on safety issues in the construction industry. In relevant testimony Mr. Draper stated the following when asked whether the Employer took reasonable steps to ensure Mr. Allsop did was he was supposed to. (Draper, Tr. 2/12/10, p 24, lines 16-23):

- A. Yes. I think that were doing everything possible and going beyond it. When we look at the Foreman Evaluation Guide, the safety training foremen had been given, the refresher training on fall protection, they had reasonable expectation to assume that foremen like Josh are taking care of matters in the field and are their lead people and are addressing the hazard on the job as they occur, which is expected of them.

Assuming arguendo, where the Department can establish the prima facie elements to establish the violations, the citations at issue should be vacated based upon employee misconduct. The incident at issue was an unfortunate but occurred in a brief duration that could not have been anticipated or expected.

IV. CONCLUSION

For the above stated reasons, the Court should affirm the rulings of both the IAJ and the Superior Court, which vacated the citations against Hytech.

DATED this 12th day of September, 2011.



Aaron K. Owada, WSBA No. 13869
Attorney for Respondent

CERTIFICATE OF SERVICE

I, Lisa Ockerman, hereby certify under penalty of perjury under the laws of the State of Washington that on September 12, 2011, I filed with the Court of Appeals Division One, via US Mail, the original and one copy of the following document:

1. **BRIEF OF RESPONDENT**

and that I further served a copy via U.S. mail upon:

Beth A. Hoffman, AAG
Office of the Attorney General
Labor & Industries Division
PO Box 40121
Olympia, WA 98504-0121

SIGNED in Lacey, Washington on September 12,
2011.



Lisa Ockerman

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 SEP 14 AM 10:50