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SUPREME COURT OF THE STATE OF WASHINGTON

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BRANDON APELA AFOA,

Respondent,

v.

PORT OF SEATTLE,

Petitioner.

**FILED**  
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STATE OF WASHINGTON

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AMICUS CURIAE BRIEF BY WASHINGTON STATE  
DEPARTMENT OF LABOR & INDUSTRIES

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ORIGINAL

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	IDENTITY AND INTEREST OF AMICUS .....	2
III.	ISSUES OF INTEREST TO AMICUS.....	2
IV.	FACTS RELEVANT TO AMICUS.....	2
V.	ARGUMENT .....	4
	A. Washington Follows OSHA’s Multi-Employer Worksite Doctrine and Places a Primary WISHA Duty on an Employer Having Control over a Multi-Employer Worksite.....	4
	B. Specific WISHA Duty Turns on an Employer’s Supervisory Control over the Worksite and Ability to Ensure Work Safety, Measured by the Reality, Not Technicalities, of Relationships .....	13
	C. If the Port is Liable under WISHA, the Liability Arises from Its Control as an Employer over the Multi-Employer Worksite, Not from Its Exercise of Regulatory Authority as a Sovereign .....	16
VI.	CONCLUSION .....	18

## TABLE OF AUTHORITIES

### Cases

<i>Afoa v. Port of Seattle</i> , 160 Wn. App. 234, 247 P.3d 482 (2011).....	3, 4, 13
<i>Awana v. Port of Seattle</i> , 121 Wn. App. 429, 89 P.3d 291 (2004).....	16
<i>Doss v. ITT Rayonier, Inc.</i> , 60 Wn. App. 125, 803 P.2d 4 (1999).....	10, 15
<i>Goucher v. J.R. Simplot Co.</i> , 104 Wn.2d 662, 709 P.2d 774 (1985).....	passim
<i>Kamla v. Space Needle Corp.</i> , 147 Wn.2d 114, 52 P.3d 472 (2002).....	10, 11, 13, 17
<i>Kelley v. Howard S. Wright Constr. Co.</i> , 90 Wn.2d 323, 582 P.2d 500 (1978).....	9
<i>Martinez Melgoza &amp; Assocs. v. Dep't of Labor &amp; Indus.</i> , 125 Wn. App. 843, 106 P.3d 776 (2005).....	7, 11, 12, 13
<i>Stute v. P.B.M.C., Inc.</i> , 114 Wn.2d 454, 788 P.2d 545 (1990).....	9, 13, 14, 15
<i>SuperValu, Inc. v. Dep't of Labor &amp; Indus.</i> , 158 Wn.2d 422, 144 P.3d 1160 (2006).....	2, 4, 5
<i>Weinert v. Bronco Nat'l Co.</i> , 58 Wn. App. 692, 795 P.2d 1167 (1990).....	10, 15

### Federal Cases

<i>Anning-Johnson Co. v. OSHRC</i> , 516 F.2d 1081 (7th Cir. 1975).....	8
--	---

<i>Beatty Equip. Leasing, Inc.</i> , 577 F.2d 534 (9th Cir. 1978) .....	14
<i>Brennan v. OSHRC</i> , 513 F.3d 1032 (2d Cir. 1975) .....	8
<i>Marshall v. Knutson Constr. Co.</i> , 566 F.2d 596 (8th Cir. 1977) .....	7
<i>Melerine v. Avondale Shipyards, Inc.</i> , 659 F.2d 706 (5th Cir. 1981) .....	8
<i>Solis v. Summit Contractors, Inc.</i> , 558 F.3d 815 (8th Cir. 2009) .....	11
<i>Teal v. E.I. DuPont de Nemours &amp; Co.</i> , 728 F.2d 799 (6th Cir. 1984) .....	8
<i>Universal Constr. Co. v. OSHRC</i> , 182 F.3d 726 (10th Cir. 1999) .....	7, 14

**Statutes**

**Washington Industrial Safety & Health Act (WISHA)**

RCW 49.17 .....	1
RCW 49.17.010 .....	2, 5, 15
RCW 49.17.020 .....	5
RCW 49.17.040 .....	2, 16
RCW 49.17.060 .....	passim
RCW 49.17.070 .....	16
RCW 49.17.075 .....	16
RCW 49.17.120 .....	16

**Federal Occupational Safety & Health Act**

29 U.S.C. § 654(a) ..... 7

29 U.S.C. § 667(c)(2)..... 4

**Administrative Regulations**

WAC 296-863 .....4

**Other Authorities**

[http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=DIRECTIVES&p\\_id=2024](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=2024) ..... 12

**Appendix**

Appendix A - OSHA multi-employer policy

## I. INTRODUCTION

Amicus curiae Department of Labor & Industries (L&I) addresses an employer's duty under the Washington Industrial Safety & Health Act (WISHA), chapter 49.17 RCW, with respect to a safety hazard in a worksite involving multiple employers. The WISHA specific duty clause, RCW 49.17.060(2), requires each employer to ensure compliance with all applicable safety regulations. This Court has read this clause in the context of a multi-employer worksite to place a primary, nondelegable duty on an employer who has supervisory control over the worksite and is in the best position to ensure WISHA compliance. The controlling employer's WISHA duty extends beyond its own employees to protect all affected employees in the worksite. This interpretation follows the federal multi-employer worksite doctrine developed under the equivalent specific duty clause of the Occupational Safety & Health Act (OSHA).

In this case, the Court of Appeals correctly concluded that the controlling employer's WISHA duty towards third-party employees does not depend on any specific contractual relationship between the controlling employer and the affected employees. The duty stems from a consideration as to how best to achieve worker safety in a multi-employer worksite and does not exempt an employer, who licenses others to work in its worksite, as opposed to hiring them to do so for it or on its behalf.

## II. IDENTITY AND INTEREST OF AMICUS

L&I is the state agency charged with creating and enforcing the safety and health standards pursuant to WISHA. RCW 49.17.040; *SuperValu, Inc. v. Dep't of Labor & Indus.*, 158 Wn.2d 422, 425, 144 P.3d 1160 (2006). As the WISHA enforcement agency, L&I must ensure that its safety and health standards are equal to or exceed the standards set by OSHA. *See* RCW 49.17.010. L&I thus has a vital interest in this case with respect to the application of WISHA specific duty clause, RCW 49.17.060(2), and Washington's controlling employer rule adopted under the clause, consistent with the federal multi-employer worksite doctrine developed under the OSHA equivalent clause.

## III. ISSUES OF INTEREST TO AMICUS

1. Under RCW 49.17.060(2), as interpreted by this Court, and the multi-employer worksite doctrine, does an employer, who owns and controls a worksite involving multiple employers and is best situated to ensure compliance with applicable safety regulations, have a duty to do so for all affected employees in the worksite, not just for its own employees? Does it matter whether the affected employees work under a license agreement with the worksite owner, instead of a contract to work for or on behalf of the owner?<sup>1</sup>

## IV. FACTS RELEVANT TO AMICUS

This case arose from an injury sustained by Brandon Afoa at the Seattle-Tacoma International Airport (Airport) owned and operated by the

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<sup>1</sup> Afoa also sued the Port of Seattle under common law doctrines. L&I limits this amicus brief to the WISHA issues raised.

Port of Seattle (Port). *Afoa v. Port of Seattle*, 160 Wn. App. 234, 237, 247 P.3d 482 (2011). The Port is a municipal corporation, and the airport business generates about \$4.3 billion in annual revenue. CP 363.

The Airport is a worksite for multiple employers, including the Port, airlines, and ground service operators such as Evergreen Aviation Ground Logistics Enterprises (EAGLE), Afoa's employer at the time of his injury. CP 285-86 ¶ 2. The Port employed about 22,000 employees at the Airport. CP 363. It allowed airlines to use the Airport through a lease and operating agreement (CP 396-452), under which the airlines paid landing fees and terminal rents to the Port and used the Airport "subject at all times to the exclusive control and management by the Port." CP 402.

Ground service operators, such as EAGLE, must apply to the Port for a license, pay a license fee, and sign an agreement in order to provide services at the Airport. CP 202. To obtain an operator license, an applicant must have a certificate from an airline having an operating agreement with the Port. CP 203. The Port's agreement with ground service operators allows the operators to use the air operations area solely to provide ground services, such as loading and unloading cargo and moving, fueling, and maintaining aircrafts. CP 205. The agreement requires the operators to pay user fees and parking and storage space fees and comply with the Port rules and all applicable laws. CP 203-04, 207.

When injured, Afoa was operating a powered industrial vehicle in a terminal area. *Afoa*, 160 Wn. App. at 237. The use of such a vehicle is subject to WISHA regulations (chapter 296-863 WAC). Afoa sued the Port, alleging that the brakes and steering on the vehicle failed, causing him to collide with a broken piece of equipment. *Afoa*, 160 Wn. App. at 237. He claimed the Port breached common law and WISHA duties. *Id.*

King County Superior Court granted summary judgment for the Port, finding the Port owed no common law or WISHA duty to Afoa as a matter of law. *Id.* at 237-38. The Court of Appeals reversed, finding genuine issues of material fact on both common law and WISHA duties. *Id.* at 239-49. This Court has granted review. L&I solely addresses the existence of the Port's WISHA duty towards Afoa.

## V. ARGUMENT

### A. **Washington Follows OSHA's Multi-Employer Worksite Doctrine and Places a Primary WISHA Duty on an Employer Having Control over a Multi-Employer Worksite**

Congress enacted OSHA in 1970, allowing states to develop their own work safety standards, while requiring that state standards be "at least as effective in providing safe and healthful employment and places of employment" as OSHA standards. 29 U.S.C. § 667(c)(2); *SuperValu*, 158 Wn.2d at 425. Three years later in 1973, the Washington Legislature enacted WISHA, giving L&I authority to create and enforce safety

standards to “assure, insofar as may reasonably be possible, safe and healthful working conditions” for every worker in Washington. RCW 49.17.010; *SuperValu*, 158 Wn.2d at 425. WISHA standards “shall equal or exceed the standards prescribed by [OSHA].” RCW 49.17.010.

The term “employer” that triggers a WISHA duty includes any entity, including cities and municipal corporations, which engages in any business or activity in this state and “employs one or more employees.” RCW 49.17.020(4). There is no dispute the Port is an “employer” under this definition, employing about 22,000 employees at the Airport in operating the airport. CP 363-64; Port Supp. Br. 11 (“Port has never contended that it is not an employer.”). Nor is there any dispute that Afoa, when injured, was an “employee” of EAGLE working within the scope of his EAGLE employment. See RCW 49.17.020(5) (“employee” includes “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 his or her personal labor for an employer”). The issue is whether the Port’s WISHA duty as an “employer” at the Airport extends to Afoa, an “employee” of another employer providing ground services on Port property.

The employer and employee definitions “do not alone determine what duty, if any, [an employer] owed to [an employee]” in a multi-employer worksite. *Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 671,

709 P.2d 774 (1985). “Reference must be made to RCW 49.17.060 to determine the duty of an employer.” *Goucher*, 104 Wn.2d at 671.

In the 1985 *Goucher* decision, this Court read RCW 49.17.060 to create a twofold duty for each employer. *Id.* Subsection (1) creates a “general duty” for each employer to “protect *its* employees from hazards that are likely to cause death or serious bodily injury.” *Id.* (emphasis added); RCW 49.17.060(1) (“his or her employees”). Subsection (2) creates a duty for each employer to comply with specific WISHA regulations, without reference to the class of protected employees. *Goucher*, 104 Wn.2d at 671; RCW 49.17.060(2).<sup>2</sup>

*Goucher* addressed whether a chemical fertilizer retailer had a specific WISHA duty under subsection (2) towards an employee of its contractor, who was injured while loading anhydrous ammonia into a railroad tank car used by the retailer to store the chemical. *Goucher*, 104 Wn.2d at 669-73. This Court looked for guidance to federal law

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<sup>2</sup> RCW 49.17.060 provides as follows (emphasis added):

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 order promulgated under this chapter.

interpreting the OSHA “counterpart to Washington’s twofold duty statute, 29 U.S.C. § 654(a).” *Goucher*, 104 Wn.2d at 671 (citing cases).<sup>3</sup>

Under the OSHA specific duty clause, 29 U.S.C. § 654(a)(2), the majority of federal circuit courts have adopted what is known as the multi-employer worksite doctrine, under which “an employer who controls or creates a worksite safety hazard may be liable under OSHA even if the employees threatened by the hazard are solely employees of another employer.” *Martinez Melgoza & Assocs. v. Dep’t of Labor & Indus.*, 125 Wn. App. 843, 848-49, 106 P.3d 776 (2005) (citing OSHA cases).<sup>4</sup>

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<sup>3</sup> The OSHA counterpart to RCW 49.17.060 provides that each employer:

- (1) Shall furnish to each of *his* employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to *his* employees;
- (2) Shall comply with occupational safety and health standards promulgated under this chapter.

29 U.S.C. § 654(a) (emphasis added).

<sup>4</sup> Except for the Fifth Circuit, the federal circuits that have addressed the doctrine have either adopted or at least discussed it with apparent approval. *See Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 818 (8th Cir. 2009) (“Subsection (a)(1) creates a general duty running only to an employer’s own employees, while subsection (a)(2) creates a specific duty to comply with standards for the good of *all* employees on a multi-employer worksite.”); *Universal Constr. Co. v. OSHRC*, 182 F.3d 726, 728 (10th Cir. 1999) (“We now join the majority of circuits and adopt the multi-employer doctrine.”); *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 804 (6th Cir. 1984) (“Congress enacted Sec. 654(a)(2) for the special benefit of all employees, *including the employees of an independent contractor, who perform work at another employer’s workplace.*”); *Beatty Equip. Leasing, Inc.*, 577 F.2d 534, 536-37 (9th Cir. 1978) (imposing liability on a “subcontractor who creates a hazard or has control over the condition on a multi-employer construction site even though only employees of other subcontractors are exposed”); *Marshall v. Knutson Constr. Co.*, 566 F.2d 596, 599 (8th Cir. 1977) (“duty of a general contractor is not limited to the protection of its own employees from safety hazards, but extends to the protection of *all the employees engaged at the worksite*”);

The *Goucher* Court followed the multi-employer doctrine, citing the Sixth Circuit's *Teal* decision. *Goucher*, 104 Wn.2d at 672-73. The *Teal* court held that a jobsite owner (DuPont) owed a specific OSHA duty towards an employee of its contractor, who was injured while performing work at a DuPont plant. *Teal*, 728 F.2d at 803-05. The court explained that although an employer's general duty is limited to its own employees, the employer's specific duty extends to "all of the employees who work at a particular job site." *Id.* at 804. The court held that the scope of an employer's specific duty is "defined with reference to control of the workplace and opportunity to comply with" the safety regulations. *Id.*

The *Goucher* Court followed this interpretation and rationale as sound and consistent with the remedial purpose of WISHA. *Goucher*, 104 Wn.2d at 673. Following *Teal*, the *Goucher* Court held that a chemical retailer had a duty to comply with applicable WISHA rules and that this duty extended to the injured employee of the retailer's contractor. *Id.*

*Goucher* thus involved the liability of an employer who *created* a safety hazard violating specific WISHA regulations for the affected

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*Brennan v. OSHRC*, 513 F.3d 1032, 1038 (2d Cir. 1975) (employer who "is in control of an area, and responsible for its maintenance" has a duty to comply with specific OSHA regulations to protect its own employees "or those of other employers engaged in a common undertaking"); *Anning-Johnson Co. v. OSHRC*, 516 F.2d 1081, 1091 n.21 (7th Cir. 1975) (doubting in dicta "that a general contractor, who has no employees of his own exposed to a cited violation is necessarily excused from liability" under OSHA). *But see Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 712 (5th Cir. 1981) ("In this circuit, therefore, the class protected by OSHA regulations [under the OSHA specific duty clause] comprises only employers' own employees.").

employees of another employer. In the 1995 *Stute* decision, this Court re-affirmed *Goucher* and applied the multi-employer worksite doctrine to an employer who *controlled* a safety hazard in a construction worksite *created by another employer*. See *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 459-64, 788 P.2d 545 (1990).

The *Stute* Court held that a general contractor has a nondelegable, primary duty to ensure compliance with all applicable WISHA regulations for “every employee on the jobsite.” *Stute*, 114 Wn.2d at 456. This duty arises from “the general contractor’s innate supervisory authority,” which “constitutes sufficient control over the workplace.” *Id.* at 464. This Court held all general contractors “as a matter of law” have “per se control over the workplace,” which places them “in the best position to ensure compliance with safety regulations.” *Id.* at 463-64. This Court explained that 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.” *Id.* at 464.<sup>5</sup>

*Goucher* and *Stute* thus recognized a specific WISHA duty under RCW 49.17.060(2) of an employer who creates or controls a work hazard

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<sup>5</sup> The *Stute* Court also pointed out pre-WISHA case law, which had recognized “a nondelegable duty” under WISHA’s predecessor on the part of “general contractors to provide a safe place to work for employees of subcontractors.” *Stute*, 114 Wn.2d at 463 (citing cases such as *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978)). “The policy reasons behind the court’s holdings have not changed and give added force to the language of WISHA.” *Stute*, 114 Wn.2d at 464.

in a multi-employer worksite. The courts have applied this duty to jobsite owners having supervisory control over the work and ability to ensure WISHA compliance. See *Doss v. ITT Rayonier, Inc.*, 60 Wn. App. 125, 128-29, 803 P.2d 4 (1999) (logging company, which hired a contractor to clean a boiler at its mill, “had innate supervisory authority that gave it control over the workplace”); *Weinert v. Bronco Nat’l Co.*, 58 Wn. App. 692, 696, 795 P.2d 1167 (1990) (apartment complex owner/developer who hired a contractor to install siding had “innate overall supervisory authority” and was “in the best position” to enforce WISHA compliance).

However, unlike general contractors, jobsite owners do not have per se supervisory control over the work performed by their contractors on their premises. *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 122-23, 52 P.3d 472 (2002). For example, in *Kamla*, Space Needle hired a contractor to install a fireworks display, and this Court upheld a summary judgment for Space Needle, saying, “Although jobsite owners *may* have a similar degree of authority to control jobsite work conditions [that general contractors have], they do not *necessarily* have a similar degree of knowledge or expertise about WISHA compliant work conditions.” *Kamla*, 147 Wn.2d at 122-25 (emphasis added). “Because jobsite owners may not have knowledge about the manner in which a job should be performed or about WISHA compliant work conditions, it is unrealistic to

conclude *all* jobsite owners *necessarily* control work conditions.” *Kamla*, 147 Wn.2d at 124 (emphasis added). Thus, in the case of a jobsite owner, the existence of control triggering the WISHA duty may not be presumed but must be shown. “If a jobsite owner does not retain control over the manner in which an independent contractor completes its work, the jobsite owner does not have a duty under WISHA.” *Id.* at 125.

These cases are consistent with the OSHA multi-employer policy, which imposes liability on a “creating, exposing, correcting, or controlling employer.” *Martinez*, 125 Wn. App. at 850; OSHA Directive CPL 2-0.124, ¶ X.A-E (1999) (attached as Appendix A); *Solis*, 558 F.3d at 821 (upholding the federal Secretary of Labor’s multi-employer policy). A “creating employer” has a duty, because it “caused a hazardous condition” violating a specific rule. OSHA Directive, ¶ X.B. A “controlling employer” has a duty because of its “supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them.” OSHA Directive, ¶ X.E. “Control can be established by contract or, in the absence of explicit contractual provisions, by the exercise of control in practice.” OSHA Directive, ¶ X.E. Although the multiple-employer situation usually arises in the

construction context, the policy applies to multi-employer worksites “in all industry sectors.” OSHA Directive, ¶ X.A.<sup>6</sup>

Our court has applied the “controlling employer” duty under the multi-employer doctrine outside the general contractor and jobsite owner contexts to an asbestos consultant on an asbestos abatement project. *Martinez*, 125 Wn. App. at 848-53. In the project, the Port contracted with several companies for asbestos removal, including Martinez Melgoza and Associate (MMA), and MMA acted as a sub-consultant in the Port’s contracts with other consulting services. *Id.* at 845. The evidence showed MMA assumed a general foreman’s role and directed the abatement contractor employees on what to do and how to do it. *Id.* at 852-53. Following a worker’s complaint of unsafe asbestos work practices and conditions, L&I cited MMA for violations of WISHA regulations, finding MMA was the on-site asbestos abatement consultant and project agent for the Port and had the authority and responsibility to ensure compliance with appropriate asbestos abatement procedures. *Id.* at 846-47.

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<sup>6</sup> Exposing employer” is an “employer whose own employees are exposed to the hazard,” and “correcting employer” is an employer “who is engaged in a common undertaking, on the same worksite, as the exposing employer and is responsible for correcting a hazard.” OSHA Directive, ¶ X.C, D. The current OSHA multi-employer policy (Appendix A) is available on the federal Department of Labor website at [http://www.osha.gov/pls/oshaweb/owadis.show\\_document?p\\_table=DIRECTIVES&p\\_id=2024](http://www.osha.gov/pls/oshaweb/owadis.show_document?p_table=DIRECTIVES&p_id=2024).

The *Martinez* court concluded that MMA “exercised sufficient control over the worksite so as to be liable for the WISHA citations under the multi-employer worksite doctrine.” *Martinez*, 125 Wn. App. at 853. The court pointed out that “the deciding factor in those [multi-employer] cases was not how much the employer participated in the planning or the execution of that plan, but how much supervisory control it had.” *Id.* (citing OSHA cases).

Here, the Court of Appeals correctly followed the multi-employer worksite doctrine as applied by this Court in *Goucher*, *Stute*, and *Kamla*. Under the doctrine, the existence of the Port’s specific WISHA duty towards Afoa is “fact-based” and turns on whether it “retained control over the manner in which EAGLE and its employees did their work” and whether the Port had “the greater practical opportunity and ability to insure compliance with safety standards.” *Afoa*, 160 Wn. App. at 247.

**B. Specific WISHA Duty Turns on an Employer’s Supervisory Control over the Worksite and Ability to Ensure Work Safety, Measured by the Reality, Not Technicalities, of Relationships**

The parties disagree on whether the Port’s specific WISHA duty is limited to its own employees and the employees of its contractors hired to work for it or on its behalf or whether the duty extends to EAGLE employees, such as Afoa, who worked under a license agreement with the Port. The multi-employer worksite doctrine is based on the worker safety

rationale and turns on the reality, not technicalities, of the parties' relationships in a multi-employer worksite.

When there are multiple employers in a worksite, the doctrine places a duty on an employer who has supervisory control over the worksite and "the greater practical opportunity and ability to ensure compliance with safety standards." *Stute*, 114 Wn.2d at 462 (citation omitted). This duty extends to "all employees on the job site." *Id.* at 460 (emphasis added). This statutory duty may exist even where there is no contractual relationship between the controlling (or creating) employer and the employer of the injured employee. *See, e.g., Betty*, 577 F.2d at 534 (subcontractor creating hazard at a multi-employer worksite owes duty to affected employees of other subcontractors).<sup>7</sup>

Thus, when a jobsite owner acts as an "employer" with respect to its activity on its property, the owner becomes subject to WISHA. If the owner/employer assumes supervisory control over the work performed on its property by an employee of another employer, such that it can be said the owner/employer is best situated to ensure safety rule compliance by the employee, the owner/employer may become liable towards the

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<sup>7</sup> The employee's direct employer may also be cited for a WISHA violation. *See Universal*, 182 F.3d at 730 n.3 (direct employer "remains responsible for taking reasonable steps to protect its employees from hazards it neither controlled nor created"); OSHA Directive CPL 2-0.124, ¶ X.A ("more than one employer may be citable").

employee under RCW 49.17.060(2) and the multi-employer doctrine. *See Doss*, 60 Wn. App. at 128-29; *Weinert*, 58 Wn. App. at 696.

The multi-employer doctrine assesses an employer's control from a worker safety standpoint based on the practical reality, not technicality, of the parties' relationships. For example, it was immaterial in *Stute* there was no express contractual assumption of safety responsibility by the general contractor, because, "*as a practical matter*, the general contractor must have control over the property and working conditions." *Stute*, 114 Wn.2d at 462 (emphasis added). The doctrine furthers the WISHA goal to assure safe and healthful working conditions for every worker in Washington. *Goucher*, 104 Wn.2d at 673; RCW 49.17.010. The best way to achieve this goal in a multi-employer worksite is to place a primary duty on an employer who has control over the worksite and is in the best position to ensure WISHA compliance. *Stute*, 114 Wn.2d at 463-64.

From the multi-employer doctrine and its worker safety standpoint, it does not matter whether an affected employee was licensed to work or hired to do so for or on behalf of the controlling employer. Categorically exempting license relationships from WISHA specific duty clause would undermine the WISHA safety goal. *See Goucher*, 104 Wn.2d at 673 (WISHA "must be liberally construed" to carry out its remedial goal).

**C. If the Port is Liable under WISHA, the Liability Arises from Its Control as an Employer over the Multi-Employer Worksite, Not from Its Exercise of Regulatory Authority as a Sovereign**

There is a concern raised in this case about government entities becoming potentially liable for merely exercising their regulatory authority. Amici 8-9.<sup>8</sup> Regulatory agencies may require compliance with the law as conditions for a license. L&I agrees that merely asserting regulatory authority to require compliance with the law, without more, does not create a WISHA liability. Rather, liability under the WISHA specific duty clause and the multi-employer doctrine arises from an entity exercising its supervisory control over a worksite in its capacity as an *employer*, not as a result of a *sovereign* asserting its regulatory authority.

For example, L&I, pursuant to its enforcement authority, may inspect worksites and issue citations for WISHA violations. *See* RCW 49.17.040, .070, .075, .120; *Awana v. Port of Seattle*, 121 Wn. App. 429, 432, n.1, 89 P.3d 291 (2004) (L&I cited the Port for safety rule violations in asbestos removal). But L&I's exercise of its regulatory authority does not subject it to WISHA liability, because in enforcing WISHA in a workplace, L&I is not acting as an employer in the workplace but is instead exercising its authority as a sovereign. Similarly, a city would not

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<sup>8</sup> "Amici" refer to the brief in support of review filed by five amici in this case (Association of Washington Business, Washington Retail Association, Washington Public Ports Association, City of Kent, and Airports Council International North America).

become liable under WISHA for merely asserting its regulatory authority for public safety in requiring a contractor to meet all applicable city ordinances for a license to perform work on a city street.<sup>9</sup>

However, there is a difference between a sovereign asserting its regulatory authority on one hand and an employer controlling its worksite on the other. For example, a city may employ its employees to engage in an activity and for that activity involve (by contracting with or licensing) other employers to work under its supervisory control in its worksite. In such a case, the city may become liable under WISHA and the multi-employer doctrine as the “controlling employer” to protect not only its own employees but all affected employees in the worksite.

Here, there are unresolved factual questions as to the nature and extent of the Port’s control over Afoa’s ground service work at the Airport for purposes of determining the presence of the Port’s WISHA liability. The Port’s WISHA liability, if any, must arise from its supervisory control as an employer, not from its regulatory authority as a sovereign.

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<sup>9</sup> In addition, control that justifies liability must be one over the details of work performance. “It is one thing to retain a right to oversee compliance with contract provisions and a different matter to so involve oneself in the *performance* of the work,” and only the latter justifies the WISHA controlling employer liability. *Kamla*, 147 Wn.2d 120-21 (citation omitted). “The retention of the right to inspect and supervise to insure the proper completion of the contract” does not constitute the control that justifies an employer liability. *Id.* (citation omitted).

## VI. CONCLUSION

L&I asks the Court to hold that the Port's specific WISHA duty under RCW 49.17.060(2) towards Afoa depends on whether the Port, acting as an employer, retained supervisory control over the manner of his work at the Airport and was thus in the best position to ensure compliance with applicable safety regulations with respect to his work.

RESPECTFULLY SUBMITTED this 10th day of January, 2012.

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NO. 85784-9

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SUPREME COURT OF THE STATE OF WASHINGTON

BRANDON APELA AFOA,

Respondent,

v.

PORT OF SEATTLE,

Petitioner.

CERTIFICATE OF  
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The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that she caused copies of the **Motion to File Brief of Amicus Curiae Department of Labor and Industries; Amicus Curiae Brief by Washington State Department of Labor and Industries** and this **Certificate of Service** to be served and delivered to the parties of record by United States mail, postage prepaid, as follows:

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DATED this 10th day of January, 2012 at Seattle, Washington.

  
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**Subject:** Amicus Curiae Brief by the Department of L&I and Motion to File Amicus Curiae Brief, No. 85784-9 - Afoa v. Port of Seattle

Dear Clerk,

Attached for filing are the following documents by the Department of Labor & Industries in *Afoa v. Port of Seattle*, No. 85784-9.

1. amicus curiae brief
2. motion to file amicus curiae brief
3. certificate of service

<<Amicus Curiae Brief by L&I.pdf>> <<Motion to File Amicus Brief.pdf>> <<Certificate of Service.pdf>>

The attorneys for the parties and some of the amici in this case (whose email addresses are available) are receiving this email as courtesy, with the paper copies being delivered to them under applicable rules.

Sincerely,

Masako Kanazawa, WSBA #32703

Assistant Attorney General

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# APPENDIX A



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All DOL OSHA Advanced Search

A to Z Index | En Español | Contact Us | FAQs | About OSHA

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OSHA QuickTakes Newsletter RSS Feeds Print This Page Text Size

Occupational Safety & Health Administration We Can Help

What's New | Offices

Home

Workers

Regulations

Enforcement

Data & Statistics

Training

Publications

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Directives - Table of Contents

- Record Type: Instruction
- Directive Number: CPL 02-00-124
- Old Directive Number: CPL 2-0.124
- Title: Multi-Employer Citation Policy.
- Information Date: 12/10/1999

# OSHA INSTRUCTION

U.S. DEPARTMENT OF LABOR

Occupational Safety and Health Administration

**DIRECTIVE NUMBER:** CPL 2-0.124 **EFFECTIVE DATE:** December 10, 1999

**SUBJECT:** Multi-Employer Citation Policy

### ABSTRACT

- Purpose:** To Clarify the Agency's multi-employer citation policy
- Scope:** OSHA-wide
- References:** OSHA Instruction CPL 2.103 (the FIRM)
- Suspensions:** Chapter III, Paragraph C. 6. of the FIRM is suspended and replaced by this directive
- State Impact:** This Instruction describes a Federal Program Change. Notification of State Intent is required, but adoption is not.
- Action Offices:** National, Regional, and Area Offices
- Originating Office:** Directorate of Compliance Programs
- Contact:** Carl Sall (202) 693-2345  
Directorate of Construction  
N3468 FPB  
200 Constitution Ave., NW  
Washington, DC 20210

By and Under the Authority of  
R. Davis Layne  
Deputy Assistant Secretary, OSHA

### TABLE OF CONTENTS

I. Purpose

II. ScopeIII. SuspensionIV. ReferencesV. Action InformationVI. Federal Program ChangeVII. Force and Effect of Revised PolicyVIII. Changes in Web Version of FIRMIX. BackgroundA. Continuation of Basic PolicyB. No Changes in Employer DutiesX. Multi-employer Worksite PolicyA. Multi-employer WorksitesB. The Creating EmployerC. The Exposing EmployerD. The Correcting EmployerE. The Controlling EmployerF. Multiple Roles

I. Purpose. This Directive clarifies the Agency's multi-employer citation policy and suspends Chapter III. C. 6. of OSHA's Field Inspection Reference Manual (FIRM).

II. Scope. OSHA-Wide

III. Suspension. Chapter III. Paragraph C. 6. of the FIRM (CPL 2.103) is suspended and replaced by this Directive.

IV. References. OSHA Instructions:

- CPL 02-00.103; OSHA Field Inspection Reference Manual (FIRM), September 26, 1994.
- ADM 08-0.1C, OSHA Electronic Directive System, December 19, 1997.

V. Action Information

- A. Responsible Office. Directorate of Construction.
- B. Action Offices. National, Regional and Area Offices
- C. Information Offices. State Plan Offices, Consultation Project Offices

VI. Federal Program Change. This Directive describes a Federal Program Change for which State adoption is not required. However, the States shall respond via the two-way memorandum to the Regional Office as soon as the State's intent regarding the multi-employer citation policy is known, but no later than 60 calendar days after the date of transmittal from the Directorate of Federal-State Operations.

VII. Force and Effect of Revised Policy. The revised policy provided in this Directive is in full force and effect from the date of its issuance. It is an official Agency policy to be implemented OSHA-wide.

VIII. Changes in Web Version of FIRM. A note will be included at appropriate places in the FIRM as it appears on the Web indicating the suspension of Chapter III paragraph 6. C. and its replacement by this Directive, and a hypertext link will be provided connecting viewers with this Directive.

IX. Background. OSHA's Field Inspection Reference Manual (FIRM) of September 26, 1994 (CPL 2.103), states at Chapter III, paragraph 6. C., the Agency's citation policy for multi-employer worksites. The Agency has determined that this policy needs clarification. This directive describes the revised policy.

- A. Continuation of Basic Policy. This revision continues OSHA's existing policy for issuing citations on multi-employer worksites. However, it gives clearer and more detailed guidance than did the earlier description of the policy in the FIRM, including new examples explaining when citations should and should not be issued to exposing, creating, correcting, and controlling employers. These examples, which address common situations and provide general policy guidance, are not intended to be exclusive. In all cases, the decision on whether to issue citations should be based on all of the relevant facts revealed by the inspection or investigation.

- B. **No Changes in Employer Duties.** This revision neither imposes new duties on employers nor detracts from their existing duties under the OSH Act. Those duties continue to arise from the employers' statutory duty to comply with OSHA standards and their duty to exercise reasonable diligence to determine whether violations of those standards exist.

X. **Multi-employer Worksite Policy.** The following is the multi-employer citation policy:

- A. **Multi-employer Worksites.** On multi-employer worksites (in all industry sectors), more than one employer may be citable for a hazardous condition that violates an OSHA standard. A two-step process must be followed in determining whether more than one employer is to be cited.

1. **Step One.** The first step is to determine whether the employer is a creating, exposing, correcting, or controlling employer. The definitions in paragraphs (B) - (E) below explain and give examples of each. Remember that an employer may have multiple roles (see paragraph H). Once you determine the role of the employer, go to Step Two to determine if a citation is appropriate (NOTE: only exposing employers can be cited for General Duty Clause violations).
2. **Step Two.** If the employer falls into one of these categories, it has obligations with respect to OSHA requirements. Step Two is to determine if the employer's actions were sufficient to meet those obligations. The extent of the actions required of employers varies based on which category applies. Note that the extent of the measures that a controlling employer must take to satisfy its duty to exercise reasonable care to prevent and detect violations is less than what is required of an employer with respect to protecting its own employees.

B. **The Creating Employer**

1. **Step 1: Definition:** The employer that caused a hazardous condition that violates an OSHA standard.
2. **Step 2: Actions Taken:** Employers must not create violative conditions. An employer that does so is citable even if the only employees exposed are those of other employers at the site.

- a. **Example 1:** Employer Host operates a factory. It contracts with Company S to service machinery. Host fails to cover drums of a chemical despite S's repeated requests that it do so. This results in airborne levels of the chemical that exceed the Permissible Exposure Limit.

**Analysis: Step 1:** Host is a creating employer because it caused employees of S to be exposed to the air contaminant above the PEL. **Step 2:** Host failed to implement measures to prevent the accumulation of the air contaminant. It could have met its OSHA obligation by implementing the simple engineering control of covering the drums. Having failed to implement a feasible engineering control to meet the PEL, Host is citable for the hazard.

- b. **Example 2:** Employer M hoists materials onto Floor 8, damaging perimeter guardrails. Neither its own employees nor employees of other employers are exposed to the hazard. It takes effective steps to keep all employees, including those of other employers, away from the unprotected edge and informs the controlling employer of the problem. Employer M lacks authority to fix the guardrails itself.

**Analysis: Step 1:** Employer M is a creating employer because it caused a hazardous condition by damaging the guardrails. **Step 2:** While it lacked the authority to fix the guardrails, it took immediate and effective steps to keep all employees away from the hazard and notified the controlling employer of the hazard. Employer M is not citable since it took effective measures to prevent employee exposure to the fall hazard.

C. **The Exposing Employer**

1. **Step 1: Definition:** An employer whose own employees are exposed to the hazard. See Chapter III, section (C)(1)(b) for a discussion of what constitutes exposure.
2. **Step 2: Actions taken:** If the exposing employer created the violation, it is citable for the violation as a creating employer. If the violation was created by another employer, the exposing employer is citable if it (1) knew of the hazardous condition or failed to exercise reasonable diligence to discover the condition, and (2) failed to take steps consistent with its authority to protect its employees. If the exposing employer has authority to correct the hazard, it must do so. If the exposing employer lacks the authority to correct the hazard, it is citable if it fails to do each of the following: (1) ask the creating and/or controlling employer to correct the hazard; (2) inform its employees of the hazard; and (3) take reasonable alternative protective measures. In extreme circumstances (e.g., imminent danger situations), the exposing employer is citable for failing to remove its employees from the job to avoid the hazard.

- a. **Example 3:** Employer Sub S is responsible for inspecting and cleaning a work area in Plant P around a large, permanent hole at the end of each day. An OSHA standard requires guardrails. There are no guardrails around the hole and Sub S employees do not use personal fall protection, although it would be feasible to do so. Sub S has no authority to install guardrails. However, it did ask Employer P, which operates the plant, to install them. P refused to install guardrails.

**Analysis: Step 1:** Sub S is an exposing employer because its employees are exposed to the fall hazard. **Step 2:** While Sub S has no authority to install guardrails, it is required to comply with OSHA requirements to the extent feasible. It must take steps to protect its employees and ask the employer that controls the hazard - Employer P - to correct it. Although Sub S asked for guardrails, since the hazard was not corrected, Sub S was responsible for taking reasonable alternative protective steps, such as providing personal fall protection. Because that was not done, Sub S is citable for the violation.

- b. **Example 4:** Unprotected rebar on either side of an access ramp presents an impalement hazard. Sub E, an electrical subcontractor, does not have the authority to cover the rebar. However, several times Sub E asked the general contractor, Employer GC, to cover the rebar. In the meantime, Sub E instructed its employees to use a different access route that avoided most of the uncovered rebar and required them to keep as far from the rebar as possible.

**Analysis: Step 1:** Since Sub E employees were still exposed to some unprotected rebar, Sub E is an exposing employer. **Step 2:** Sub E made a good faith effort to get the general contractor to correct the hazard and took feasible measures within its control to protect its employees. Sub E is not citable for the rebar hazard.

#### D. The Correcting Employer

1. **Step 1: Definition:** An employer who is engaged in a common undertaking, on the same worksite, as the exposing employer and is responsible for correcting a hazard. This usually occurs where an employer is given the responsibility of installing and/or maintaining particular safety/health equipment or devices.
2. **Step 2: Actions taken:** The correcting employer must exercise reasonable care in preventing and discovering violations and meet its obligations of correcting the hazard.

- a. **Example 5:** Employer C, a carpentry contractor, is hired to erect and maintain guardrails throughout a large, 15-story project. Work is proceeding on all floors. C inspects all floors in the morning and again in the afternoon each day. It also inspects areas where material is delivered to the perimeter once the material vendor is finished delivering material to that area. Other subcontractors are required to report damaged/missing guardrails to the general contractor, who forwards those reports to C. C repairs damaged guardrails immediately after finding them and immediately after they are reported. On this project few instances of damaged guardrails have occurred other than where material has been delivered. Shortly after the afternoon inspection of Floor 6, workers moving equipment accidentally damage a guardrail in one area. No one tells C of the damage and C has not seen it. An OSHA inspection occurs at the beginning of the next day, prior to the morning inspection of Floor 6. None of C's own employees are exposed to the hazard, but other employees are exposed.

**Analysis: Step 1:** C is a correcting employer since it is responsible for erecting and maintaining fall protection equipment. **Step 2:** The steps C implemented to discover and correct damaged guardrails were reasonable in light of the amount of activity and size of the project. It exercised reasonable care in preventing and discovering violations; it is not citable for the damaged guardrail since it could not reasonably have known of the violation.

#### E. The Controlling Employer

1. **Step 1: Definition:** An employer who has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them. Control can be established by contract or, in the absence of explicit contractual provisions, by the exercise of control in practice. Descriptions and examples of different kinds of controlling employers are given below.
2. **Step 2: Actions Taken:** A controlling employer must exercise reasonable care to prevent and detect violations on the site. The extent of the measures that a controlling employer must implement to satisfy this duty of reasonable care is less than what is required of an employer with respect to protecting its own employees. This means that the controlling employer is not normally required to inspect for hazards as frequently or to have the same level of knowledge of the applicable standards or of trade expertise as the employer it has hired.
3. **Factors Relating to Reasonable Care Standard.** Factors that affect how frequently and closely a controlling employer must inspect to meet its standard of reasonable care include:
  - a. The scale of the project;
  - b. The nature and pace of the work, including the frequency with which the number or types of hazards change as the work progresses;
  - c. How much the controlling employer knows both about the safety history and safety practices of the employer it controls and about that employer's level of expertise.
  - d. More frequent inspections are normally needed if the controlling employer knows that the other employer has a history of non-compliance. Greater inspection frequency may also be needed, especially at the beginning of the project, if the controlling employer had never before worked with this other employer and does not know its compliance history.
  - e. Less frequent inspections may be appropriate where the controlling employer sees strong indications that the other employer has implemented effective safety and health efforts. The most important indicator of an effective safety and health effort by the other employer is a consistently high level of compliance. Other indicators include the use of an effective, graduated system of enforcement for non-compliance with safety and health requirements coupled with regular jobsite safety meetings and safety training.
4. **Evaluating Reasonable Care.** In evaluating whether a controlling employer has exercised reasonable care in preventing and discovering violations, consider questions such as whether the controlling employer:
  - a. Conducted periodic inspections of appropriate frequency (frequency should be based on the factors listed in G.3.);
  - b. Implemented an effective system for promptly correcting hazards;
  - c. Enforces the other employer's compliance with safety and health requirements with an effective, graduated system of enforcement and follow-up inspections.
5. **Types of Controlling Employers**
  - a. **Control Established by Contract.** In this case, **the Employer Has a Specific Contract Right to Control Safety:** To be a controlling employer, the employer must itself be able to prevent or correct a violation or to require another employer to prevent or correct the violation. One source of this ability is explicit contract authority. This can take the form of a specific contract right to require another employer to adhere to safety and health requirements and to correct violations the controlling employer discovers.
    - (1) **Example 6:** Employer GH contracts with Employer S to do sandblasting at GH's plant. Some of the work is regularly scheduled maintenance and so is general industry work; other parts of the project involve new work and are considered construction. Respiratory protection is required. Further, the contract explicitly requires S to comply with safety and health requirements. Under the contract GH has the right to take various actions

against S for failing to meet contract requirements, including the right to have non-compliance corrected by using other workers and back-charging for that work. S is one of two employers under contract with GH at the work site, where a total of five employees work. All work is done within an existing building. The number and types of hazards involved in S's work do not significantly change as the work progresses. Further, GH has worked with S over the course of several years. S provides periodic and other safety and health training and uses a graduated system of enforcement of safety and health rules. S has consistently had a high level of compliance at its previous jobs and at this site. GH monitors S by a combination of weekly inspections, telephone discussions and a weekly review of S's own inspection reports. GH has a system of graduated enforcement that it has applied to S for the few safety and health violations that had been committed by S in the past few years. Further, due to respirator equipment problems S violates respiratory protection requirements two days before GH's next scheduled inspection of S. The next day there is an OSHA inspection. There is no notation of the equipment problems in S's inspection reports to GH and S made no mention of it in its telephone discussions.

**Analysis: Step 1:** GH is a controlling employer because it has general supervisory authority over the worksite, including contractual authority to correct safety and health violations. **Step 2:** GH has taken reasonable steps to try to make sure that S meets safety and health requirements. Its inspection frequency is appropriate in light of the low number of workers at the site, lack of significant changes in the nature of the work and types of hazards involved, GH's knowledge of S's history of compliance and its effective safety and health efforts on this job. GH has exercised reasonable care and is not citable for this condition.

(2) **Example 7:** Employer GC contracts with Employer P to do painting work. GC has the same contract authority over P as Employer GH had in Example 6. GC has never before worked with P. GC conducts inspections that are sufficiently frequent in light of the factors listed above in (G)(3). Further, during a number of its inspections, GC finds that P has violated fall protection requirements. It points the violations out to P during each inspection but takes no further actions.

**Analysis: Step 1:** GC is a controlling employer since it has general supervisory authority over the site, including a contractual right of control over P. **Step 2:** GC took adequate steps to meet its obligation to discover violations. However, it failed to take reasonable steps to require P to correct hazards since it lacked a graduated system of enforcement. A citation to GC for the fall protection violations is appropriate.

(3) **Example 8:** Employer GC contracts with Sub E, an electrical subcontractor. GC has full contract authority over Sub E, as in Example 6. Sub E installs an electric panel box exposed to the weather and implements an assured equipment grounding conductor program, as required under the contract. It fails to connect a grounding wire inside the box to one of the outlets. This incomplete ground is not apparent from a visual inspection. Further, GC inspects the site with a frequency appropriate for the site in light of the factors discussed above in (G)(3). It saw the panel box but did not test the outlets to determine if they were all grounded because Sub E represents that it is doing all of the required tests on all receptacles. GC knows that Sub E has implemented an effective safety and health program. From previous experience it also knows Sub E is familiar with the applicable safety requirements and is technically competent. GC had asked Sub E if the electrical equipment is OK for use and was assured that it is.

**Analysis: Step 1:** GC is a controlling employer since it has general supervisory authority over the site, including a contractual right of control over Sub E. **Step 2:** GC exercised reasonable care. It had determined that Sub E had technical expertise, safety knowledge and had implemented safe work practices. It conducted inspections with appropriate frequency. It also made some basic inquiries into the safety of the electrical equipment. Under these circumstances GC was not obligated to test the outlets itself to determine if they were all grounded. It is not citable for the grounding violation.

- b. **Control Established by a Combination of Other Contract Rights:** Where there is no explicit contract provision granting the right to control safety, or where the contract says the employer does not have such a right, an employer may still be a controlling employer. The ability of an employer to control safety in this circumstance can result from a combination of contractual rights that, together, give it broad responsibility at the site involving almost all aspects of the job. Its responsibility is broad enough so that its contractual authority necessarily involves safety. The authority to resolve disputes between subcontractors, set schedules and determine construction sequencing are particularly significant because they are likely to affect safety. (NOTE: citations should only be issued in this type of case after consulting with the Regional Solicitor's office).

(1) **Example 9:** Construction manager M is contractually obligated to: set schedules and construction sequencing, require subcontractors to meet contract specifications, negotiate with trades, resolve disputes between subcontractors, direct work and make purchasing decisions, which affect safety. However, the contract states that M does not have a right to require compliance with safety and health requirements. Further, Subcontractor S asks M to alter the schedule so that S would not have to start work until Subcontractor G has completed installing guardrails. M is contractually responsible for deciding whether to approve S's request.

**Analysis: Step 1:** Even though its contract states that M does not have authority over safety, the combination of rights actually given in the contract provides broad responsibility over the site and results in the ability of M to direct actions that necessarily affect safety. For example, M's contractual obligation to determine whether to approve S's request to alter the schedule has direct safety implications. M's decision relates directly to whether S's employees will be protected from a fall hazard. M is a controlling employer. **Step 2:** In this example, if M refused to alter the schedule, it would be citable for the fall hazard violation.

(2) **Example 10:** Employer ML's contractual authority is limited to reporting on subcontractors' contract compliance to owner/developer O and making contract payments. Although it reports on the extent to which the subcontractors are complying with safety and health infractions to O, ML does not exercise any control over safety at the site.

**Analysis: Step 1:** ML is not a controlling employer because these contractual rights are insufficient to confer control over the subcontractors and ML did not exercise control over safety. Reporting safety and health infractions to another entity does not, by itself (or in combination with these very limited contract rights), constitute an exercise of control over safety. **Step 2:** Since it is not a controlling employer it had no duty under the OSH Act to exercise reasonable care with respect to enforcing the subcontractors' compliance with safety; there is therefore no need to go to Step 2.

- c. **Architects and Engineers:** Architects, engineers, and other entities are controlling employers only if the breadth

of their involvement in a construction project is sufficient to bring them within the parameters discussed above.

(1) **Example 11:** Architect A contracts with owner O to prepare contract drawings and specifications, inspect the work, report to O on contract compliance, and to certify completion of work. A has no authority or means to enforce compliance, no authority to approve/reject work and does not exercise any other authority at the site, although it does call the general contractor's attention to observed hazards noted during its inspections.

**Analysis: Step 1:** A's responsibilities are very limited in light of the numerous other administrative responsibilities necessary to complete the project. It is little more than a supplier of architectural services and conduit of information to O. Its responsibilities are insufficient to confer control over the subcontractors and it did not exercise control over safety. The responsibilities it does have are insufficient to make it a controlling employer. Merely pointing out safety violations did not make it a controlling employer. **NOTE:** In a circumstance such as this it is likely that broad control over the project rests with another entity. **Step 2:** Since A is not a controlling employer it had no duty under the OSH Act to exercise reasonable care with respect to enforcing the subcontractors' compliance with safety; there is therefore no need to go to Step 2.

(2) **Example 12:** Engineering firm E has the same contract authority and functions as in Example 9.

**Analysis: Step 1:** Under the facts in Example 9, E would be considered a controlling employer. **Step 2:** The same type of analysis described in Example 9 for Step 2 would apply here to determine if E should be cited.

- d. **Control Without Explicit Contractual Authority.** Even where an employer has no explicit contract rights with respect to safety, an employer can still be a controlling employer if, in actual practice, it exercises broad control over subcontractors at the site (see Example 9). **NOTE:** Citations should only be issued in this type of case after consulting with the Regional Solicitor's office.

(1) **Example 13:** Construction manager MM does not have explicit contractual authority to require subcontractors to comply with safety requirements, nor does it explicitly have broad contractual authority at the site. However, it exercises control over most aspects of the subcontractors' work anyway, including aspects that relate to safety.

**Analysis: Step 1:** MM would be considered a controlling employer since it exercises control over most aspects of the subcontractor's work, including safety aspects. **Step 2:** The same type of analysis on reasonable care described in the examples in (G)(5)(a) would apply to determine if a citation should be issued to this type of controlling employer.

#### F. Multiple Roles

1. A creating, correcting or controlling employer will often also be an exposing employer. Consider whether the employer is an exposing employer before evaluating its status with respect to these other roles.
2. Exposing, creating and controlling employers can also be correcting employers if they are authorized to correct the hazard.

[Directives - Table of Contents](#)

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## OFFICE RECEPTIONIST, CLERK

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**To:** 'Kanazawa, Masako (ATG)'  
**Cc:** Raymond Bishop; Derek Moore; mschein@sullthor.com; mark\_northcraft@northcraft.com; krist@awb.org; pkirsch@kaplankirsch.com; pfitzpatrick@kentwa.gov  
**Subject:** RE: Amicus Curiae Brief by the Department of L&I and Motion to File Amicus Curiae Brief, No. 85784-9 - Afoa v. Port of Seattle

Received 1/10/12

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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**From:** Kanazawa, Masako (ATG) [<mailto:MasakoK@ATG.WA.GOV>]  
**Sent:** Tuesday, January 10, 2012 3:31 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** Raymond Bishop; Derek Moore; [mschein@sullthor.com](mailto:mschein@sullthor.com); [mark\\_northcraft@northcraft.com](mailto:mark_northcraft@northcraft.com); [krist@awb.org](mailto:krist@awb.org); [pkirsch@kaplankirsch.com](mailto:pkirsch@kaplankirsch.com); [pfitzpatrick@kentwa.gov](mailto:pfitzpatrick@kentwa.gov)  
**Subject:** Amicus Curiae Brief by the Department of L&I and Motion to File Amicus Curiae Brief, No. 85784-9 - Afoa v. Port of Seattle

Dear Clerk,

In the below email, I omitted to attached the Appendix A (attached below) to the Amicus Curiae Brief by the Department of Labor & Industries just filed in this case.

Please have the attached Appendix A filed with the Court. Thank you very much, and I apologize for the inconvenience.

<<Appendix A to L&I Amicus Brief.pdf>>

Sincerely,

Masako Kanazawa, WSBA #32703

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**From:** Kanazawa, Masako (ATG)  
**Sent:** Tuesday, January 10, 2012 3:23 PM  
**To:** 'supreme@courts.wa.gov'  
**Cc:** 'Raymond Bishop'; 'Derek Moore'; 'mschein@sullthor.com'; 'mark\_northcraft@northcraft.com'; 'krist@awb.org'; 'pkirsch@kaplankirsch.com'; 'pfitzpatrick@kentwa.gov'  
**Subject:** Amicus Curiae Brief by the Department of L&I and Motion to File Amicus Curiae Brief, No. 85784-9 - Afoa v. Port of Seattle

Dear Clerk,

Attached for filing are the following documents by the Department of Labor & Industries in *Afoa v. Port of Seattle*, No. 85784-9.

1. amicus curiae brief
2. motion to file amicus curiae brief

3. certificate of service

<< File: Amicus Curiae Brief by L&I.pdf >> << File: Motion to File Amicus Brief.pdf >> << File: Certificate of Service.pdf >>

The attorneys for the parties and some of the amici in this case (whose email addresses are available) are receiving this email as courtesy, with the paper copies being delivered to them under applicable rules.

Sincerely,

Masako Kanazawa, WSBA #32703

Assistant Attorney General

(206) 389-2126