

85784-9

NO. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

BRANDON APELA AFOA,

Plaintiff/Respondent,

v.

PORT OF SEATTLE,

Defendant/Petitioner,

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On Appeal from the Court of Appeals,
Division I
of the State of Washington
No. 64545-5-I

**PETITIONER PORT OF SEATTLE'S
PETITION FOR DISCRETIONARY REVIEW**

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I. IDENTITY OF PETITIONER

The Petitioner is the Port of Seattle.

II. CITATION TO COURT OF APPEALS DECISION

Afoa v. Port of Seattle, ___ Wn. App. ___, ___ P.3rd ___ (2011),
2011 Wash. App. LEXIS 437. (See Appendix A.)

III. ISSUES PRESENTED FOR REVIEW

This is a case of first impression in the state of Washington. The issues presented for review are (1) whether the retained control exception to *RESTATEMENT (SECOND) OF TORTS § 409* (1965) applies to a landowner, who is not a principal, but instead is a licensor, (2) whether such a landowner has a nondelegable duty to enforce specific safety regulations for the benefit of its licensee's employees, and (3) whether such a landowner owes a common law duty to its licensee's employees as licensees or as invitees. As to these issues, the Court of Appeals' decision is in direct conflict with decisions of the Supreme Court and with other decisions of the Court of Appeals, and presents issues of substantial public importance that should be determined by the Supreme Court. As discussed herein, review of the Court of Appeals' decision should be accepted as the requirements of RAP 13.4 (b)(1), (2), and (4) are met.

IV. STATEMENT OF THE CASE

Brandon Afoa was critically injured at approximately 12:45 a.m. on December 26, 2007, while working in the Air Operations Area (“AOA”) at Seattle Tacoma International Airport (“STIA”). (CP 62, 84, 96.) As part of the accident sequence, Mr. Afoa was driving a tug/pushback towards Gate S16 when he lost control of the vehicle. (CP 67, 71, 72, 73, 84, 90, 92.) The tug/pushback struck another vehicle that was parked next to a support wall for the jetway which extends from Gate S16 into the tarmac to where large aircraft are parked for passenger ingress and egress. (CP 88.)

STIA is owned by the Port of Seattle (“Port”) and where applicable regulated by the Federal Aviation Administration. (CP 123.) The Port has adopted the Sea-Tac International Airport Schedule of Rules & Regulations No. 4 (“Rules & Regulations”). (CP 129-197.) These Rules & Regulations were adopted “to provide for the safety and proper conduct of persons and property using [Sea-Tac].” (CP 123.)

Eagle Aviation Ground Logistics Enterprise, Inc. (“EAGLE”) is an airline ground support vendor that provides ground services operations for air carriers that fly in and out of STIA. (CP 124.) EAGLE does not do work for the Port as an independent contractor or in any other capacity. (CP 124.) The

Port did not and does not employ, manage, or supervise EAGLE or any of EAGLE's employees, including Brandon Afoa, either directly or indirectly. (CP 124-125.)

In order to perform ground services for an air carrier at STIA, EAGLE was required to apply for and obtain from the Port a license agreement titled Ground Service Operator Licensing Agreement ("License Agreement"). (CP 124-125.) This License Agreement is required of all companies providing aircraft ground handling operations within the AOA at STIA. (CP 125.) As a condition of the License Agreement, EAGLE agreed to comply with the Port's Rules & Regulations and all applicable federal, state and local laws and regulations. (CP 207.)

Mr. Afoa sued the Port on February 5, 2009 in King County Superior Court. (CP 1-11.) On November 20, 2009, the trial court granted the Port's motion for summary judgment and dismissed all of Mr. Afoa's claims. (CP 566-567.) On February 22, 2011, the Court of Appeals issued its decision which reversed the trial court's summary judgment in favor of the Port.

V. ARGUMENT

A. The Court of Appeals Erred in Ruling that the Retained Control Exception Applies to the Licensor of a License Agreement.

- 1. The retained control exception to the general rule of nonliability set forth in Restatement (Second) of Torts § 409 is premised upon the existence of a contract of employment pursuant to which the principal retains control over the manner in which the independent contractor performs its work; no contract of employment relationship exists between a licensor and its licensee and therefore the retained control doctrine does not apply thereto.**

Without citation to any authority, and without any analysis whatsoever of the material differences between a license agreement and an employment contract, the Court of Appeals applied the retained control exception set forth in *Restatement (Second) of Torts § 409* to a landowner/licensor. (Appendix A at 1, 3-10.) The Port of Seattle is not aware of any case anywhere in the United States where the retained control exception was applied to a licensor of a licensing agreement. Likewise, Mr. Afoa has not cited to any case which holds that the retained control exception is applicable to the facts of his case.

The Court of Appeals failed to cite any precedent for its unique holding (that retained control applies to a licensor in the absence of an employment relationship) because there is no such precedent. A cursory review of the common law to which the retained control exception applies reveals that the retained control doctrine has no application to licensors. As

set forth below, the common law to which the exception applies deals solely with the alteration of the employment relationship between an employer and its independent contractor, which in turn give rise to the retained control exception.

It is the general common law rule that, “[e]xcept as stated in [Restatement (Second) of Torts §§] 410-429 [1965], the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants. *RESTATEMENT (SECOND) OF TORTS § 409* (1965) (emphasis supplied), cited with approval in *Kelley v. Howard S. Wright Construction Co.*, 90 Wn.2d 323, 330, 582 P.2d 500 (1978). The common law defines an independent contractor as “a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking.” *RESTATEMENT (SECOND) OF AGENCY § 2(3)* (1958). (Emphasis supplied.) The common law defines an “employer” as “a person who controls and directs a worker under an express or implied contract of hire and who pays the worker's salary or wages.” Black's Law Dictionary, Seventh Edition (1999). The common law defines “hire” as engaging “the

labor or services of another for wages or other payment.” Black’s Law Dictionary, Seventh Edition (1999).

By contrast, a license in respect to real property grants the authority to do a particular act or series of acts upon another’s land, which would amount to a trespass without such permission. *Barnett v. Lincoln*, 162 Wash. 613, 619, 299 P. 392 (1931) (citing *Meers v. Munsch-Protzmann Co.*, 217 A.D. 541, 217 N.Y.S. 256 (1926)). A license affords the licensee mere ““permission to do certain acts, which he can assert against the licensor only, and which is ordinarily terminable or revocable at the will of the latter, and is not transferable.”” *Id.*, at 618 (citing Tiffany, *Landlord and Tenant*, Vol. 1, p. 23.) As the foregoing definitions reflect, a license agreement is in no way comparable to an employment agreement between an employer and its independent contractor whereby the independent contractor agrees to perform work for the benefit of its employer.

Even the definition of the retained control exception, which is set forth in *Restatement (Second) of Torts § 414* (1965), belies its application to a licensor. This exception provides as follows:

One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise

reasonable care, which is caused by his failure to exercise his control with reasonable care. (Emphasis supplied.)

In the Afoa case, the Port was not the employer of Mr. Afoa and did not hire EAGLE to do any work on behalf of the Port. (CP 124-125.) Instead, the Port entered into a License Agreement with EAGLE, Mr. Afoa's employer, only after receiving the requisite Certification of Carrier Support from an air carrier holding a current operating agreement with the Port. (CP 203.) This License Agreement provided that EAGLE's only use of the AOA shall be for the purpose of providing aircraft ground handling services, including, among other things, aircraft movement and the storing/parking of EAGLE's equipment. (CP 205.) A condition of the Port's license with EAGLE, and with all other ground support vendors, is that they "shall comply with all Port regulations including the Port's SCHEDULE OF RULES AND REGULATIONS FOR SEATTLE-TACOMA INTERNATIONAL AIRPORT, and all applicable federal, state and local laws and regulations." (CP 125, 207.) The License Agreement specifically provided that EAGLE must pay a \$500.00 license fee at the time of the application for and any renewal of the License Agreement with the Port. (CP 203, 204.) The license issued to EAGLE was revocable at will. (CP 204, 207.)

The License Agreement between the Port and EAGLE is not a contract of employment. (CP 125.) Nowhere in the License Agreement is it stated that the Port was hiring EAGLE for the purpose of EAGLE doing something for the Port. Nowhere in the License Agreement does it state that the Port is entrusting any work to EAGLE. Likewise, there is no provision in the License Agreement whereby the Port agreed to pay wages to EAGLE for the work it performs for the airlines with which EAGLE had contracted to provide ground support services.

The foregoing portrays the distinct differences between a principal-independent contractor employment agreement and a license agreement. The failure of the Court of Appeals to analyze and recognize these material differences led it to commit reversible error.

2. The Court of Appeals' Belief That the Distinction Between a License Agreement and An Employment Agreement is Immaterial and that the Only Issue is Whether the Licensor Retained Control Over the Manner in Which the Licensee Provided Services to Its Employer Reflects a Fundamental Flaw In Its Legal Analysis Which Led the Court to Commit Reversible Error.

When properly analyzed, it is readily apparent that there are marked differences between a principal-independent contractor employment contract and a license agreement. These material and substantial differences

completely undermine the Court of Appeals' belief that such differences are immaterial and that the only issue is whether a licensor retains control over the manner in which the licensee provided services to its employer. (Appendix A at 7.)

The underlying basis from which the retained control exception arises is the existence of a principal-agent relationship. As explained in Comment d to *RESTATEMENT (SECOND) OF AGENCY* § 1(2) (1958), a principal describes a person who has contracted with another to act on the principal's account and subject to the principal's control. A principal therefore includes both a person who has no control or right of control over the other's physical conduct, and also a person who does have such control or right of control over the other's physical conduct. *RESTATEMENT (SECOND) OF AGENCY* § 1(2) (1958), Comment d.

When a principal retains such control or the right to such control, the contractual relationship between the principal and the independent contractor as to the work entrusted to the independent contractor is materially altered. In essence, this type of retention of control or right to control creates a master-servant, i.e., employer-employee, relationship between the principal/employer and the independent contractor as to the work over which

such control was retained. *Id.* It is because of this fundamental change in the relationship from principal-independent contractor to employer-employee as to some aspect of the independent contractor's work that the principal becomes liable for the negligent acts of its independent contractor over which the principal retained control. *RESTATEMENT (SECOND) OF TORTS § 414* (1965), Comment a.¹

By contrast, and by legal definition, a license cannot and does not create any type of principal-agent or master-servant relationship whatsoever. These types of relationships are completely absent from a license agreement. Instead, in the case of a license to go onto the licensor's land, the licensor does nothing more than grant to the licensee mere "permission to do certain acts, which he can assert against the licensor only, and which is ordinarily terminable or revocable at the will of the latter, and is not transferable." *Id.*, at 618 (citing *Tiffany, Landlord and Tenant*, Vol. 1, p. 23.)

¹This is exactly the point made by the Court in *Kamla v. The Space Needle Corporation*, 147 Wn.2d 114, 119, 52 P.3d 472 (2002) when it said, "The difference between an independent contractor and an employee is whether the employer can tell the worker how to do his or her job. Employers are not liable for injuries incurred by independent contractors because employers cannot control the manner in which the independent contractor works. Conversely, employers are liable for injuries incurred by employees precisely because the employer retains control over the manner in which the employee works." (Emphasis supplied.)

Likewise, because there is no principal-agent relationship established by a license, the conditions of the license cannot be said to have an impact upon such a non-existent relationship. The conditions of a license, therefore, must exist for some other reason. Simply put, such conditions exist for the sole purpose of imposing parameters upon the licensee as to how the licensee can use the licensor's land or risk having the license unilaterally revoked. Equating the conditions attached to a license to go onto another's land with the manifested intention of a principal to retain control of the operative details of how its independent contractor performs its work for the principal incorrectly ignores the fundamental differences between an employment agreement and a license agreement.

The conditions attached to a license may impact how a licensee performs its work while on the land with the landowner's permission and consent. Notwithstanding, such conditions cannot reflect the intent of the licensor to retain control of the operative details of how the licensee performs its work. This is because a license does not include a principal-agent employment agreement pursuant to which the agent is performing a service for the benefit of the principal. Absent such an employment agreement, the

most that such conditions can express is the licensor's intent that while the licensee is on the licensor's land it must follow the rules or lose its license.

The Port's Rules & Regulations were adopted "to provide for the safety and proper conduct of persons and property using [Sea-Tac]." (CP 123, 140.) It is these rules to which the Court of Appeals referred as evidence of the Port's retention of control over EAGLE. (Appendix A at 7-10.) However, as discussed above, the Port's Rules & Regulations cannot be held to be evidence of the Port's intent to retain control over the work to be performed by one of the Port's licensees. This is because the license is not a contract of employment pursuant to which EAGLE was performing work for the Port. Instead, the Port's Rules & Regulations are an example of the types of conditions which can be imposed upon a licensee by a licensor so as to limit the use of the licensor's land by the licensee in the way the licensor chooses.² The licensee agrees to such limitations as a condition of receiving the license. Such agreement in no way compares to a manifestation of a principal to control how its contractor completes its work.

²Additional examples of conditional licenses which do not involve employment agreements include: a license to launch a boat conditioned upon the launch only occurring during certain hours; a license to fish or hunt which limits the type of fishing gear or weapon that can be used on the licensor's land; or a license to explore for natural resources conditioned upon the licensee and its employees or agents compliance with all applicable laws, rules and regulations.

In this case, the Court of Appeals failed to analyze the underlying basis for the retained control doctrine, which is the existence of an employment agreement between a principal and an independent contractor. It is the existence of such a relationship which gives rise to the general rule of non-liability and, where control is retained over how the contractor performs its work, the retained control exception thereto. In a license agreement, however, there is no employment relationship which can be altered such that it can be said that the licensor retained control over the work of the licensee. The failure of the Court of Appeals to analyze these differences led it to commit reversible error.

B. The Court of Appeals Erred When It Held That a Landowner Who Is a Licensor Could Have a Nondelegable Duty to Enforce Specific Safety Regulations for the Benefit of Its Licensee's Employees. (Appendix A at 10-14.)

- 1. Where there is no contract whereby a licensee agrees to perform work on the licensor's behalf, retention of control or supervisory authority over the performance of such non-existent work cannot exist.**

No other Washington case has ever decided whether a landowner who is a licensor, but who is not a general contractor³, an owner/developer⁴, or an

³*Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978).

⁴*Weinert v. Bronco Nat'l Co.*, 58 Wn. App. 692, 795 P.2d 1167 (1990).

owner who has employed an independent contractor⁵, has a duty to ensure compliance with WISHA duties for the benefit of its licensee's employees who are working on the landowner's land. Most recently, the *Kamla* Court determined that there was nothing in Chapter 49.17 RCW that imposes upon a landowner (The Space Needle Corporation) who had employed an independent contractor (Pyro-Spectaculars) an obligation to comply with WISHA. *Kamla*, 114 Wn.2d at 123. The *Kamla* Court also held that a landowner (The Space Needle Corporation) who has employed an independent contractor (Pyro-Spectaculars) does not "play a role sufficiently analogous to general contractors to justify imposing upon them the same nondelegable duty to ensure WISHA compliance when there is no general contractor." *Id.*, at 123-124.

However, the *Kamla* Court did analyze the retained control exception under the facts presented to determine whether The Space Needle Corporation did in fact did retain control over the manner in which its independent contractor, Pyro-Spectaculars, completed its work. *Id.*, at 125. After doing so, the *Kamla* Court determined that The Space Needle Corporation did not retain the right to control the manner in which Pyro-

⁵Doss v. ITT Rayonair Inc., 60 Wn. App. 125, 803 P.2d 4 (1991).

Spectaculars and its employees completed their work and thus did “not have a duty under WISHA to ‘comply with the rules, regulations, and orders promulgated under [chapter 49.17 RCW],’ *RCW 49.17.060(2)*.” *Id.*, at 125.

With respect to whether the Port had a nondelegable duty to enforce WISHA regulations for the benefit of Mr. Afoa the Court of Appeals stated as follows: “. . . the question is whether the business entity retains such control or supervisory authority over the performance of a subcontractor’s work as to be analogous to a general contractor. *Weinert*, 58 Wn. App. at 696.” (Appendix A at 13.) This is an incorrect statement of the law as decided by the Court in *Kamla*.

Kamla specifically rejected the notion that “jobsite owners play a role sufficiently analogous to general contractors to justify imposing upon them the same nondelegable duty to ensure WISHA compliance when there is no general contractor.” *Kamla*, 114 Wn.2d at 123-124. Instead, the Court in *Kamla* determined that the test with respect to whether a landowner who employs an independent contractor to do work on its land owes a duty to the employees of the independent contractor is determined by whether the landowner retains “. . . control over the manner in which an independent contractor completes its work. . . .” *Id.*, 114 Wn.2d at 125.

As discussed, the underlying factual basis for the general rule of nonliability from which the retained control exception arises is the existence of an employment agreement between a principal and an independent contractor.⁶ In the same way it misconstrued the application of common law duties, the Court of Appeals employed the same improper legal analysis to determine whether the Port owed Mr. Afoa any WISHA duties. In particular, the Court of Appeals again failed to acknowledge the material differences between a license and an employment contract and that the retained control exception only applies to principals to an employment contract who have retained control over the manner in which its independent contractor completes its work. In Mr. Afoa's case, no such employment agreement

⁶Consistent with the general rule of nonliability and the retained control exception thereto as set forth in the *Restatement (Second) of Torts* §§ 409 and 414 (1965), in every case cited by Mr. Afoa to the Court of Appeals, and in all other workplace cases decided in Washington, there existed an employment agreement between a jobsite owner, an owner/developer, or a general contractor with an independent contractor who in turn had a contract of employment with the injured worker or with the subcontractor employer of the injured worker. See, e.g., *Adkins v. Aluminum Co. of America*, 110 Wn.2d 128, 750 P.2d 1257 (1988); *Awana v. Port of Seattle*, 121 Wn. App. 429, 432, 89 P.3d 291 (Div. 1, 2004); *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 150 P.3d 545 (2007); *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 75 Wn. App. 480, 487-88, 878 P.2d 1246 (1994), *rev'd on other grounds*, 128 Wn.2d 745, 912 P.2d 472 (1996); *Goucher v. J.R. Simplot Co.*, 104 Wn. 2d 662, 709 P.2d 774 (1985); *Husfloen v. MTA*, 58 Wn. App. 686, 794 P.2d 859 (Div. 1, 1990); *Kamla v. Space Needle Corp.*, 147 Wn. 2d 114, 52 P.3d 472 (2002); *Kelley v. Howard S. Wright Const. Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978); *Kinney v. Space Needle Corp.*, 121 Wn. App. 242, 85 P.3d 918 (Div. 1, 2004); *Rogers v. Irving*, 85 Wn. App. 455, 463, 933 P.2d 1060 (Div. 2, 1997); *Smith v. Myers*, 90 Wn. App. 89, 950 P.2d 1018 (Div. 2, 1998); *Stute v. P.B.M.C.*, 114 Wn.2d 454, 788 P.2d 545 (1990); *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799 (6th Cir.1984); and *Weinert v. Bronco Nat. Co.*, 58 Wn. App. 692, 795 P.2d 1167 (Div. 1, 1990).

existed between the Port and EAGLE over which the Port could retain control. Therefore, the retained control exception cannot apply to the Port so as impose upon the Port a duty to comply with applicable WISHA duties for the benefit of Mr. Afoa. This failure of the Court of Appeals constitutes the basis for reversible error.

C. The Court of Appeals Erred When It Ruled that Mr. Afoa Was Present on the Port's Property for a Business Purpose that Benefitted Both Parties and Was Therefore a Business Invitee. (Appendix A at 15.)

As set forth in *Thompson v. Katzer*, 86 Wn. App. 280, 284-285, 936 P.2d 421 (1997), in order to have the status of either a public invitee or a business visitor, there must be evidence of an "invitation" by the landowner before such status can be inferred:

An invitee is either a public invitee or a business visitor. (Citation omitted.) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public. (Citation omitted.) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land. (Citation omitted.) (Emphasis supplied.)

Contrary to this well established law, the Court of Appeals rejected the Port's argument that Afoa was not a business invitee because the Port never "invited" him onto its property. (Appendix A at 15.) Instead, the Court of Appeals cited *Beebe v. Moses*, 113 Wn. App. 464, 467-68, 54 P.3d 188

(2002) (quoting *Thompson v. Katzer*, 86 Wn. App. 280, 286, 936 P.2d 421 (1997)) to support its conclusion that Mr. Afoa was a business visitor. In doing so, however, the Court of Appeals did not acknowledge the existence of the well established law set forth in the *Thompson* case, as quoted above, and then omitted the context of the discussion in the *Thompson* case from which the quotation in *Beebe* was taken. The entire context of the “benefit” discussion in *Thompson*, 86 Wn. App. at 286, is as follows:

We agree that the bestowing of an economic benefit is an important factor to consider when deciding whether an entrant is an invitee or licensee, and that one who bestows such benefit *may* be a business visitor. It does not follow, however, that the bestowing of an economic benefit is dispositive, or that one who bestows such benefit is *always* a business visitor. The ultimate goal is to differentiate (1) an entry made for a business or economic purpose that benefits both entrant and occupier, from (2) an entry made for a purpose that either (a) benefits only the entrant or (b) is primarily familial or social. Accordingly, an entrant will not be a "business visitor," even when he or she confers an economic benefit, if there is no "real or supposed mutuality of interest in the subject to which the visitor's business or purpose relates," or if the benefit is merely incidental to an entry that is primarily familial or social. (Footnote citations omitted; emphasis supplied.)

As the *Thompson* case explains, the conferring of an economic benefit is not the determinative issue. The determinative issue is whether there is “a real or supposed mutuality of interest in the subject to which the visitor’s business or purpose relates.” *Id.*

In this case, not only is there no evidence of any economic benefit provided by Mr. Afoa to the Port, there also is no mutuality of interest between the Port and Mr. Afoa as to whether or not EAGLE provides ground support services at STIA. There is no dispute that EAGLE can obtain a license from the Port to provide ground support services only if it can prove that it has received a Certification of Carrier Support from an air carrier holding a current operating agreement with the Port which reflects that an air carrier has contracted with EAGLE to provide ground support services. (CP 125-126, 203.) Additionally, EAGLE is only one of a number of ground support services operating at STIA. (CP 341, 346, 352.) Although it is in EAGLE's interest to provide ground support services to an air carrier, there is no evidence that the Port has any interest whatsoever in whether EAGLE or one of its competitors provides such services.

Likewise, there is no evidence whatsoever that the Port "invited" either EAGLE or Mr. Afoa onto STIA for the purpose of providing ground support services to EAGLE's air carrier clients. Consequently, because Mr. Afoa knew or had reason to know of the existence of the parked loader, which the tug/pushback struck, and any other nearby "clutter", as well as the

risk involved in striking the same, the Port did not breach any duty it owed to Mr. Afoa under *Restatement (Second) of Torts* § 342 (1965).

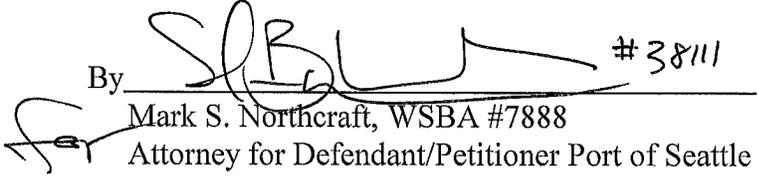
V. CONCLUSION

The Port requests that the decision of the Court of Appeals be reversed and the decision of the trial Court granting summary judgment be affirmed.

RESPECTFULLY SUBMITTED, this 23rd day of March, 2011.

NORTHCRAFT, BIGBY & BIGGS, P.C.

By

 #3811
Mark S. Northcraft, WSBA #7888

Attorney for Defendant/Petitioner Port of Seattle

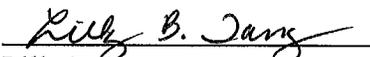
CERTIFICATE OF SERVICE

I, Lilly B. Tang, hereby certify under penalty of perjury under the laws of the state of Washington, that on March 23, 2011, I filed with the Court of Appeals, Division I, State of Washington via ABC Legal Services, the original and one copy of Petitioner Port of Seattle's Petition for Discretionary Review, and served a copy of same via messenger, upon:

Raymond E. S. Bishop
Derek K. Moore
Bishop Law Offices, P.S.
19743 - 1st Avenue South
Seattle, WA 98148-2401

Michael T. Schein
Sullivan & Thoreson
701 Fifth Avenue, Suite 4600
Seattle, WA 98104

SIGNED in Seattle, Washington, on March 23, 2011.


Lilly B. Tang

APPENDIX A

APPENDIX A

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

BRANDON APELA AFOA,)
)
 Appellant/Cross-Respondent,)
)
 v.)
)
 PORT OF SEATTLE,)
)
 Respondent/Cross-Appellant.)

No. 64545-5-1

PUBLISHED OPINION

FILED: February 22, 2011

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2011 FEB 22 AM 8:56

SPEARMAN, J.—In general, one who employs an independent contractor is not liable for injuries sustained by an independent contractor's employees. But a well established exception to the general rule is where an employer of an independent contractor retains control over some part of the work, in which case, the employer has a duty within the scope of that control to provide a safe place to work. At issue in this case is whether these same rules apply where the contract between the Port and appellant Brandon Afoa's employer is a "license agreement." We hold that they do and that questions of fact exist as to whether the Port retained sufficient supervisory authority over the manner in which Afoa performed his work. Accordingly, we reverse summary judgment and remand for further proceedings.

FACTS

Brandon Afoa was injured as a result of collision while he was operating a powered industrial vehicle on the airplane ramp at Seattle-Tacoma International Airport, which is owned and operated by the Port of Seattle. Mr. Afoa worked for Evergreen Aviation Ground Logistics Enterprises, Inc. ("EAGLE"). EAGLE provided "aircraft ground handling services" at the airport, including aircraft movement and loading and unloading aircraft cargo and baggage, under a "license agreement" with the Port. Afoa claims the brakes and steering on the vehicle failed while he was operating it, causing him to collide with a broken piece of equipment that had been left on the tarmac. The piece of equipment fell on him, crushing his spine and leaving him paraplegic. Afoa sued the Port, alleging it breached common law and statutory duties by failing to provide him with a safe workplace.

The Port moved for summary judgment, arguing that Afoa's suit was barred by the public duty doctrine, and that the Port did not owe any duty of care to the employees of EAGLE, because EAGLE was not an independent contractor with the Port and because the Port had no authority or control over EAGLE's work. The Port also argued that it owed no duty to Afoa under the Washington Industrial Safety and Health Act ("WISHA") because it is not an "employer," and Afoa is not an "employee" as those terms are defined in the statute. In addition, the Port sought sanctions against Afoa under CR 11. The trial court granted the motion for summary judgment, but denied the request for sanctions. Afoa appeals and the Port cross-appeals the denial of sanctions.

DISCUSSION

Standard of Review

When reviewing a motion for summary judgment, we engage in the same inquiry as the trial court. Marks v. Wash. Ins. Guar. Ass'n, 123 Wn. App. 274, 277, 94 P.3d 352 (2004). Summary judgment is appropriate if the pleadings, depositions, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). "Like the trial court, we consider facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party." Marks, 123 Wn.2d at 277. Summary judgment is appropriate only if, from all the evidence, reasonable persons could reach but one conclusion. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The existence of a legal duty is generally a question of law. Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 48, 914 P.2d 728 (1996). But where duty depends on proof of certain facts that may be disputed, summary judgment is inappropriate. Sjogren v. Props. of the Pac. N.W., LLC, 118 Wn. App. 144, 148, 75 P.3d 592 (2003).

Common Law Duty

Afoa argues there are material questions of fact regarding whether the Port owed him a common law duty to provide a safe workplace in the same manner as a general contractor that has control over the way in which jobs are performed at a construction site. The Port contends that summary judgment was proper because its actions were strictly limited to ensuring compliance with what it refers to as a simple "license

No. 64545-5-1/4

agreement" with Afoa's employer, EAGLE. We agree with Afoa for the reasons described herein.

In general, an employer who contracts with an independent contractor is not liable for injuries sustained by an independent contractor's employees. RESTATEMENT (SECOND) OF TORTS § 409 (1965); Kelley v. Howard S. Wright Constr. Co., 90 Wn.2d 323, 330, 582 P.2d 500 (1978); Stute v. P.B.M.C., Inc., 114 Wn.2d 454, 460, 788 P.2d 545 (1990). But where the employer retains control over some part of the independent contractor's work, the employer has a duty within the scope of that control to provide a safe place to work. Stute, 114 Wn.2d at 460; Kennedy v. Sea-Land Serv., Inc., 62 Wn. App. 839, 851, 816 P.2d 75 (1991); RESTATEMENT (SECOND) TORTS § 414 (1965). In Kamla v. Space Needle Corp., 147 Wn.2d 114, 119, 52 P.3d 472 (2002), the Supreme Court explained the rationale for holding employers who retain control over a jobsite liable for injuries incurred by employees of independent contractors:

Employers are not liable for injuries incurred by independent contractors because employers cannot control the manner in which the independent contractor works. Conversely, employers are liable for injuries incurred by employees precisely because the employer retains control over the manner in which the employee works.

Kamla, 147 Wn.2d at 119.

Regarding the issue of control, the test is not simply whether there is an actual exercise of control; rather, the test is whether the employer contracting with independent contractor retains a right to direct the manner in which the work is performed. Kamla, 147 Wn.2d at 121. Indeed, the right to control can exist even where

the employer does not actually interfere with the independent contractor's work. Phillips v. Kaiser Aluminum & Chem. Corp., 74 Wn. App. 741, 750, 875 P.2d 1228 (1994). "Whether a right to control has been retained depends on the parties' contract, the parties' conduct, and other relevant factors." Id.

Washington courts have recognized a difference between merely overseeing contract compliance and becoming involved in the manner in which the contractual obligations are performed. For example, "[t]he retention of the right to inspect and supervise to insure the proper completion of the contract does not vitiate the independent contractor relationship." Hennig v. Crosby Group, Inc., 116 Wn.2d 131, 134, 802 P.2d 790 (1991) (quoting Epperly v. Seattle, 65 Wn.2d 777, 785, 399 P.2d 591 (1965)). Instead, an employer must have retained a right "to so involve oneself in the performance of the work as to undertake responsibility for the safety of the independent contractor's employees." Id. The RESTATEMENT (SECOND) TORTS § 414 (1965) CMT. c. is instructive on this issue:

It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

In Kamla, the Space Needle hired an independent contractor to install a fireworks display on the Space Needle. Kamla, an employee of the independent contractor, was

injured when his safety line snagged on a moving elevator and dragged him through the elevator shaft. Kamla, 147 Wn.2d at 118. He argued that the Space Needle was liable as a jobsite owner under the retained control exception. The Supreme Court disagreed, noting that the Space Needle did not assume responsibility for worker safety or retain the right to control or interfere with the manner in which the independent contractor and its employees set up the fireworks. Id. at 121-22. Instead, the Space Needle merely agreed to provide access to the display site, crowd control, firefighters, permit fees, technical assistance, security, and public relations. Id.

Similarly, in Hennig, the Supreme Court held that a contract authorizing the Port of Seattle to inspect an independent contractor's work to ensure contract compliance did not impose liability on the Port:

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 as to undertake responsibility for the safety of the independent contractor's employees.

Hennig, 116 Wn.2d at 134.

By contrast, in Kelly, the general contractor expressly assumed responsibility for "supervising and coordinating all aspects of the work" and "agreed to be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the work[.]" Kelly, 90 Wn.2d at 327. As such, the Supreme Court held that the exception applied and the general contractor's contractual duty of care to the employees of its subcontractors was nondelegable. Id. at 333-34. The Court thus affirmed the judgment against the general contractor.

Afoa argues this case is more like Kelly than Kamla or Henning. We agree. The Port's argument that it owes no duty to Afoa because EAGLE is not an independent contractor with the Port and its contract with EAGLE is merely a "license agreement," misses the mark. Whether the agreement between the Port and EAGLE is called a "license agreement" or any other term is immaterial. Nor does it matter that the Port does not consider EAGLE to be an "independent contractor." The issue is whether the Port has a contractual relationship with EAGLE by which it retained control over the manner in which EAGLE provided ground services such as loading and unloading aircraft cargo and baggage and aircraft movement. The Port contends that it does not. But an examination of the agreement between EAGLE and the Port, when viewed in a light most favorable to Afoa, reveals questions of material fact on this issue.

The agreement provides that EAGLE "shall comply with all Port regulations including the Port's SCHEDULE OF RULES AND REGULATIONS FOR SEATTLE-TACOMA INTERNATIONAL AIRPORT" The Port's schedule includes a wide range of rules and regulations that appear to govern many details of EAGLE's operation of its own vehicles. For example, section 4 of the schedule includes the following provisions:

MOTOR VEHICLE OPERATIONS

A. GENERAL

...

7. No more than six (6) baggage or cargo carts will be towed by a single baggage tug or other vehicle at any one time and will not exceed fifteen (15) miles [24 km] per hour.

...

9. Operators of vehicles which, because of design/function, that restrict operator visibility to sides and rear of vehicle, shall utilize ground marshaller for guidance during backing operations or when operating within restricted space areas.

...

B. IN-TERMINAL BUILDING

1. Any person operating equipment within the passenger terminal building will abide by all posted speed regulations in these areas and in any event not exceed five (5) miles [8 km] per hour.
2. Any person operating equipment prior to entering into or exiting from any tunnel area or other area where vision is impaired shall, within three (3) feet [1 meter] of any exit or obstruction, bring the equipment to a complete stop and sound the horn before entering the apron or adjoining area.

...

C. FIELD

1. All vehicular equipment in the Air Operations Area, cargo, tunnel, access road, aircraft parking, or storage areas must at all times comply with any lawful signal or direction of Port employees. All traffic signs, lights, and signals shall be obeyed, unless otherwise directed by Port employees.

...

8. No person shall operate any motor vehicle or motorized equipment on the aircraft movement or parking areas of the Airport at a speed in excess of twenty (20) miles [32 km] per hour, or less where conditions warrant. Designated motor vehicle drive lanes shall be utilized where provided unless specific authorization to the contrary is given by a Port employee.

...

10. Any vehicular equipment operating within the Air Operations Area must display signs of commercial design on both sides of the vehicle which identify the vehicle to the Airport tenant,

construction firm, or vendor concerned. Firm names must appear in letters a minimum of two (2) inches [5 cm] high. In addition, any vendor's vehicle must display a current ramp permit issued by the Director [of Aviation of the Port of Seattle]. (See also Section 8, Enforcement, Security Violation Procedure subparagraph B.4.a(7).)

11. No person shall park any motor vehicle or other equipment or materials in the Air Operations Area of the Airport except in a neat and orderly manner and at such points as prescribed by the Director.
12. No person shall paint, repair, maintain, or overhaul any motor vehicle or other equipment or materials in the Air Operations Area of the Airport except in such areas and under such terms and conditions as prescribed by the Director.

Additionally, the regulations provide that EAGLE employees "shall comply with written or oral instructions issued by the Director or Port employees to enforce these regulations[.]" and that "the Director is empowered to issue such other instructions as may be deemed necessary for the safety and well-being of Airport users or otherwise in the best interests of the Port." Moreover, this comports with the declarations of Afoa and EAGLE ramp supervisor Toiva Gaoa, who both testified that the Port retained "exclusive control" over the area where Afoa was injured; that they were required to obey Port rules and personnel in the event of a conflict between Port and EAGLE directives; and that the Port required them to take a Port-administered driving test before being permitted to use the ramp area of the tarmac.

The Port disputes Afoa's evidence, claiming that it had nothing to do with training Afoa to operate his vehicle, and that it "does not employ, manage, or supervise EAGLE or any of its employees[.]" The Port contends its agreement with EAGLE and the Port rules and regulations merely require EAGLE employees to follow all applicable laws.

The Port also points to language in its agreement with EAGLE indicating that EAGLE is solely responsible for its own equipment, and that the Port “accepts no liability for [EAGLE’s] equipment.” But at best, this is conflicting evidence, showing that genuine issues of material fact exist regarding whether the Port so involved itself in the performance of EAGLE’s work as to undertake responsibility for the safety of EAGLE’s employees. As such, we hold summary judgment was improper, and reverse.

Statutory Duty

Afoa also argues that the Port owed him a statutory duty under the WISHA. We agree. RCW 49.17.060(2)¹ imposes a nondelegable duty on all general contractors to ensure compliance with WISHA regulations. Kamla, 147 Wn.2d at 122 (citing Stute, 114 Wn.2d at 464). The Supreme Court in Stute imposed primary responsibility for compliance with WISHA regulations on the general contractor because its “innate supervisory authority constitutes sufficient control over the workplace.” Stute, 114 Wn.2d at 464.

The rule set forth in Stute has been extended to other parties who are sufficiently analogous to justify imposing statutory liability. For example, in Weinert v. Bronco Nat’l Co., 58 Wn. App. 692, 795 P.2d 1167 (1990), this court held that the duty announced in Stute applied not only to general contractors, but also to jobsite owners who retain control or supervisory authority over the performance of a subcontractor’s work:

¹ RCW 49.17.060(2) provides that each employer “[s]hall comply with the rules, regulations, and orders promulgated under this chapter.”

We do not overlook the fact that Bronco is an owner/developer rather than a general contractor hired by an owner. We see no significance to this factor insofar as applying Stute to the facts of this case. The owner/developer's position is so comparable to that of the general contractor in Stute that the reasons for the holding in Stute apply here. The purpose of the statutes and regulations relied upon in Stute is to protect workers. The basis for imposing the duty to enforce those laws on a general contractor exists with respect to an owner/developer who, like the general contractor, has the same innate overall supervisory authority and is in the best position to enforce compliance with safety regulations.

Weinert, 58 Wn. App. at 696. Likewise, in Doss v. ITT Rayonier, Inc., 60 Wn. App. 125, 803 P.2d 4 (1991), an employee of an independent contractor hired by ITT Rayonier was killed in an accident at the jobsite. The estate alleged that ITT Rayonier violated a specific WISHA provision. The court noted ITT Rayonier was a jobsite owner and not a general contractor, but found "no significant difference . . . between an owner-independent contractor relationship and a general contractor-subcontractor relationship." Doss, 60 Wn. App. at 127 n.2.

By contrast, the Supreme Court in Kamla held that under the facts of that case, the Space Needle's relationship with an independent contractor who installed a fireworks display was not sufficiently analogous to that of a general and subcontractor to justify imposing a nondelegable duty to ensure WISHA compliance. Kamla, 147 Wn.2d at 123-24. The court reasoned that even though jobsite owners may have the authority to control jobsite work conditions, they may not have knowledge or expertise about WISHA regulations. Because such jobsite owners cannot instruct contractors on how to work safely, they may rely on their contractors to ensure WISHA compliance. Id. at 124-25. Accordingly, "[i]f 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 to 'comply with the rules, regulations, and orders promulgated under [chapter 49.17 RCW].'" Id. at 125. For this reason, the Supreme Court held the Space Needle was not liable to the contractor's employee because it did not retain the right to control the manner in which the contractor and its employees accomplished their work. Id.; see also Neil v. NWCC Investments v. LLC, 155 Wn. App. 119, 127, 229 P.3d 837, rev. denied, 169 Wn.2d 1018, 238 P.3d 502 (2010) (Stute's duty "does not extend to owners that do not retain the right to control the manner in which the independent contractor and its employees perform their work"). Kamla, 147 Wn.2d at 125.

Afoa argues that, as was the case with the businesses in Weinert and Doss, the Port's control and authority is sufficiently analogous to that of a general contractor to justify application of the Stute rule.² The Port responds that the Stute rule does not apply because it is not an "employer" and Afoa is not an "employee" as those terms are defined under WISHA. An "employer" is defined as:

any person . . . or other business entity which engages in any business . . . in this state and employs one or more employees or who contracts with one or more persons, the essence of which is the personal labor of such person or persons[.]

RCW 49.17.020(4). The term "employee" means:

[A]n employee of an employer who is employed in the business of his employer whether by way of manual labor or otherwise and every person in this state who is engaged in the employment of or who is working under an independent contract the essence of which

² Afoa contends the Port violated a variety of regulations regarding inspection, maintenance, and training for the use of powered industrial trucks: WAC 296-863-20005, -20025, -30005, -30010, -20020, -60005, and -40010.

is his or her personal labor for an employer under this chapter whether by way of manual labor or otherwise.

RCW 49.17.020(5).

The gravamen of the Port's argument on this issue is that "neither Mr. Afoa, EAGLE, nor the air carriers were working under an independent contract with the Port the essence of which was their personal labor for the Port." But this is not required by the statute. Rather, WISHA requires only that an employer "engage[] in any business . . . in this state and employ[] one or more employees[.]" RCW 49.17.020(4). Likewise, WISHA merely requires that Afoa be "[a]n employee of an employer who is employed in the business of his or her employer whether by way of manual labor or otherwise[.]" RCW 49.17.020(5).³

More importantly, whether Stute is applied does not turn on an analysis of the definitions of "employer" and "employee" under WISHA. Instead, the question is whether the business entity retains such control or supervisory authority over the performance of a subcontractor's work as to be analogous to a general contractor. Weinert, 58 Wn. App. at 696. If that is the case here, the Port has a nondelegable duty to ensure WISHA compliance for everyone employed at the work site. Id. Again, this determination is fact-based, and turns on factors such as whether the Port retained control over the manner in which EAGLE and its employees did their work, Kamla, 147 Wn.2d at 125; whether the Port had "the greater practical opportunity and ability to

³ The Port also claims the location where Afoa was injured was not a "work place" as is defined under WISHA. We reject this argument, however, because it rests on the Port's claim that it was not an employer and Afoa was not an employee.

insure compliance with safety standards," Stute, 114 Wn.2d at 462; and whether the Port had "innate supervisory authority," Doss, 60 Wn. App. at 128.

As is described above, the evidence viewed in a light most favorable to Afoa shows that genuine issues of material fact exist regarding whether the Port retained such control or supervisory authority over the performance of EAGLE's work as to be analogous to a general contractor. As such, we hold summary judgment was improperly granted on this issue.

Duty to Business Invitee

Afoa also argues that the Port breached a duty of care it owed to him as a business invitee. "The legal duty owed by a landowner to a person entering the premises depends on whether the entrant falls under the common law category of a trespasser, licensee, or invitee." Iwai v. State, 129 Wn.2d 84, 90-91, 915 P.2d 1089 (1996). With regard to an invitee, "[a] landowner is liable for harm caused by an open and obvious danger if the landowner should have anticipated the harm, despite the open and obvious nature of the danger." Kamla, 147 Wn.2d at 126. Here, Afoa provided an aerial photograph of the airport at the time of the accident purporting to show that the tarmac was cluttered with broken equipment. Although it is very difficult to make out any detail in the photograph, Afoa also testified that there was "a great amount of machinery cluttered in and around" the area where he had his accident, and that he was injured when he "collided with a broken piece of large machinery[.]"

The Port does not argue Afoa's evidence is insufficient to create a question of fact as to whether the Port breached a duty of care to a business invitee. Instead, the Port claims that Afoa was not a business invitee because it never "invited" him onto its property, and that Afoa was merely a licensee. According to the Port, therefore, it cannot be liable because Afoa knew or had reason to know of the clutter and the risk involved with the clutter. RESTATEMENT (SECOND) OF TORTS § 342 (1965). We reject this argument. To determine whether an entrant is a licensee or an invitee, "[t]he ultimate goal is to differentiate (1) an entry made for a business or economic purpose that benefits both entrant and occupier, from (2) an entry made for a purpose that either (a) benefits only the entrant or (b) is primarily familial or social." Beebe v. Moses, 113 Wn. App. 464, 467-68, 54 P.3d 188 (2002) (quoting Thompson v. Katzer, 86 Wn. App. 280, 286, 936 P.2d 421 (1997)). Afoa was present on the Port's property for a business purpose that benefited both parties, and was therefore a business invitee.

Given the Port declined to provide any argument on whether Afoa's testimony created a question of fact regarding breach of a duty to a business invitee, Afoa's evidence is unopposed, and we reverse summary judgment on this issue.

Public Duty Doctrine

The Port contends Afoa's claims are barred by the public duty doctrine. We reject this argument. The public duty doctrine merely recognizes the lack of an actionable duty to provide good government; in other words, that "a duty to all is a duty to no one." J & B Dev. Co. v. King County, 100 Wn.2d 299, 303, 669 P.2d 468 (1983)

(overruled on other grounds by Taylor v. Steven County, 111 Wn.2d 159, 759 P.2d 447

(1988)). In Taylor, our Supreme Court described the public duty doctrine as follows:

Under the public duty doctrine, no liability may be imposed for a public official's negligent conduct unless it is shown that 'the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general'

Taylor, 111 Wn.2d at 163 (quoting J & B Dev. Co., 100 Wn.2d at 303). Here, Afoa is not alleging a breach of a public duty, and as such the doctrine does not apply.

Sanctions

In its cross-appeal, the Port claims the trial court erred by declining to award sanctions against Afoa under CR 11, and it seeks fees and costs for what it contends is a frivolous appeal. Given our resolution of this appeal, we reject the Port's arguments as to sanctions.

Reversed and remanded for further proceedings consistent with this opinion.

Speckman, J.

WE CONCUR:

Leach, A.C.J.

Jan, J.

APPENDIX B

APPENDIX B

RCW 49.17.020
Definitions.

For the purposes of this chapter:

(1) The term "agriculture" means farming and includes, but is not limited to:

(a) The cultivation and tillage of the soil;

(b) Dairying;

(c) The production, cultivation, growing, and harvesting of any agricultural or horticultural commodity;

(d) The raising of livestock, bees, fur-bearing animals, or poultry; and

(e) Any practices performed by a farmer or on a farm, incident to or in connection with such farming operations, including but not limited to preparation for market and delivery to:

(i) Storage;

(ii) Market; or

(iii) Carriers for transportation to market.

The term "agriculture" does not mean a farmer's processing for sale or handling for sale a commodity or product grown or produced by a person other than the farmer or the farmer's employees.

(2) The term "director" means the director of the department of labor and industries, or his or her designated representative.

(3) The term "department" means the department of labor and industries.

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

(5) The term "employee" means an employee of an employer who is employed in the business of his or her employer whether by way of manual labor or otherwise and every person in this state who is engaged in the employment of or who is working under an independent contract the essence of which is his or her personal labor for an employer under this chapter whether by way of manual labor or otherwise.

(6) The term "person" means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons.

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

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

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

[2010 c 8 § 12005; 1997 c 362 § 2; 1973 c 80 § 2.]

Notes:

Department of labor and industries: Chapter 43.22 RCW.

RCW 49.17.060

Employer — General safety standard — Compliance.

Each employer:

(1) Shall furnish to each of his or her employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his or her employees; PROVIDED, That no citation or order assessing a penalty shall be issued to any employer solely under the authority of this subsection except where no applicable rule or regulation has been adopted by the department covering the unsafe or unhealthful condition of employment at the work place; and

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

[2010 c 8 § 12007; 1973 c 80 § 6.]