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NO. 67045-0-I

67045-0

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

SCHOLTEN ROOF ENTERPRISES, dba HYTECH ROOFING, INC.,

Respondent,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Appellant.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The Board of Industrial Insurance Appeals (Board) affirmed the citation that charged Hytech Roofing, Inc. (Hytech) with a serious violation of the guarding of floor openings regulation and with a serious violation of the fall protection regulation. In so doing, it correctly concluded that the Department of Labor and Industries (Department) established all of the facts necessary to establish Hytech's serious violations, including that Hytech knew or should have known of the violative conditions associated with the work being performed by its employees on multiple days at the same job site. The Board also correctly concluded that Hytech failed to meet its strict burden under law in advancing the affirmative employee misconduct defense.

The arguments advanced by Hytech in its Brief of Respondent fail on multiple grounds. First, while arguing that the Department failed to establish the requisite employer knowledge of the safety violations which exposed Hytech employees to serious hazards, Hytech wholly ignores the constructive knowledge established by the hazard being in plain view and readily observable in a conspicuous location proximate to this employer's employees. Hytech also misconstrues and misapplies the law regarding

the imputed knowledge of a supervising employee. A supervisor's knowledge of a violation is generally imputable, establishing employer knowledge, unless the employer shows, in pertinent part here, the effective enforcement of safety rules through adequate supervision and discipline. Here, substantial evidence shows that Hytech did not adequately supervise its employees, or discipline employees when violations occurred.

Further, in advancing the affirmative defense of employee misconduct, Hytech fails to address in any manner its failure to adequately engage in or document self-inspection or employee discipline for rule violations. Instead, Hytech simply relies on an argument that the actions of its supervisor were contrary to prior training. In so doing, Hytech fails to address the third and fourth elements of the employee misconduct test, which requires a showing that it took *all* feasible steps to monitor, discover, document, and sanction violations and that its program was effective in practice.

II. ARGUMENT

A. **The Department Proved The Requisite Employer Knowledge Of The Cited Violations Through Constructive Employer Knowledge, As Demonstrated By Evidence Showing That The Violative Conditions Were In Plain View And Known To A Supervising Foreman**

Hytech attempts to narrow the inquiry into its knowledge of the fall hazards at its Bakerview Square project site to the alleged

unforeseeable malfeasance of its job foreman, and then argues that its foreman's knowledge of the safety hazards cannot be imputed to it as the employer. *See generally* Brief of Respondent (Br. Resp't) at 20-33.

The Department does not argue, as Hytech seems to imply, that constructive knowledge must be imputed under a strict liability standard because Hytech's foreman was aware of the violations at issue. However, evidence that the foreman received training on safety rules does not, as Hytech asserts, preclude the Department from establishing imputed knowledge through that foreman. When violations are in plain view and readily observable in a conspicuous location proximate to employees, an employer will be deemed to have constructive knowledge of violations. In addition, to prove that the employer could have known of the violation with the exercise of reasonable diligence, the Department may show that the employer did not take all the measures available to prevent the occurrence, including but not limited to its past efforts to discover, document, and discipline safety violations. Here, substantial evidence supports the Board's conclusion that the Department established the requisite employer knowledge.

1. Constructive Knowledge May Be Demonstrated By The Department In A Number Of Ways

To prove a serious violation of WISHA, the Department must show the employer actually knew, or with the exercise of reasonable diligence, could have known of the presence of the violative condition. RCW 49.17.180(b); *Wash. Cedar & Supply Co., v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 914, 83 P.3d 1012 (2003).

The Department does not argue that Hytech upper management or ownership had actual knowledge that on multiple days at the Bakerview Square job site its work crew was exposed to multiple fall hazards due to violations of two separate safety rules. However, the Department does assert that substantial evidence shows that Hytech had constructive knowledge of the violations, in that it did not exercise reasonable diligence to discover the dangerous conditions.

“Reasonable diligence involves several factors, including an employer’s obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence.” *Erection Co., v. Dep't of Labor & Indus.*, 160 Wn. App. 194, 206-07, 248 P.3d 1085 (2011) (quoting *Kokosing Constr. Co., Inc., v. Occupational Safety & Hazard Review Comm'n*, 232 Fed. App'x 510, 512 (6th Cir. 2007)), *review denied*, 171 Wn.2d 1033, 257 P.3d 664.

Constructive knowledge of a violative condition may be demonstrated by the Department in a number of ways, “including evidence showing that the violative condition was readily observable or in a conspicuous location in the area of the employer’s crews.” *Erection Co., Inc.*, 160 Wn. App. at 207; *BD Roofing, Inc. v. Dep’t of Labor & Indus.*, 139 Wn. App. 98, 109, 161 P.3d 387 (2007) (citing *Sec’y of Labor v. Kokosing Constr. Co.*, 17 O.S.H. Cas. (B.N.A.) 1869, 1871-72, 1995-1996 O.S.H. Dec. (C.C.H.) P 31207, 1996 WL 749961, *2 (O.S.H.R.C. 1996)); *In re Wilder Constr. Co.*, BIIA Dckt. No. 06 W1078, 2007 WL 3054874 (2007) (citing Mark A. Rothstein, *Occupational Safety and Health Law*, § 5:15 (7th ed. 2007)).

In *Kokosing*, the Commission found that where a compliance officer testified that he observed unguarded rebar in plain view when he entered a work area, the “conspicuous location, the readily observable nature of the violative condition, and the presence of Kokosing’s crews in the area warrant a finding of constructive knowledge.” *Sec’y of Labor v. Kokosing Constr. Co.*, 17 O.S.H. Cas. (B.N.A.) 1869, 1871-72, 1995-1996 O.S.H. Dec. (C.C.H.) P 31207, 1996 WL 749961, *2 (O.S.H.R.C. 1996).

Further, constructive knowledge may be imputed to the employer through a supervisory agent or foreman. *New York State Elec. & Gas Corp. v. Sec’y of Labor*, 88 F.3d 98, 105 (2d Cir. 1996); *See Magco of*

Maryland v. Barr, 33 Va. App. 78, 531 S.E.2d 614 (2000) (held that under Virginia's OSHA plan, a foreman's knowledge of the danger posed by improperly covered holes on the roof of a worksite would be imputed to the employer).

A showing that safety rules were communicated to a supervisor is insufficient, on its own, to establish an employer's reasonable diligence. "[I]t is not sufficient simply to communicate safety rules to the supervisor . . . The employer must make a specific showing that its safety rules were effectively enforced, by discipline, if necessary." *Sec'y of Labor v. Niagara Mohawk Power Corp.*, 7 O.S.H. Cas. (B.N.A.) 1447, 1449, 1979 O.S.H.D. (C.C.H.) P 23670, 1979 WL 8449 (O.S.H.R.C. 1979).

2. Substantial Evidence of Hytech's Constructive Knowledge Was Established By Evidence That The Violations Were In Plain View

As noted above, when a violative condition is in plain view, the employer has constructive notice that the condition occurred. *See Erection Co., Inc.*, 160 Wn. App. at 207. The testimony of Keith Koskela, the Department's Compliance Safety and Health Officer, coupled with the photographs taken by Mr. Koskela, constitutes substantial evidence that

the fall safety violations were in plain view of Hytech's supervisor and the employees in his crew. BR Koskela at 11-12, 19-40; BR Exs. 2-3, 5-10. The evidence shows that whether the HVAC openings were covered or uncovered could be readily determined by anyone on the roof work area or from the ground below. BR Koskela at 11-12, 19-40; BR Exs. 2-3, 5-10. Thus, the HVAC guarding violations were "readily observable or in a conspicuous location in the area of the employer's crews." *Erection Co., Inc.*, 160 Wn. App. at 207.

Hytech seems to argue that the violation only occurred on January 13, 2009, and only during "a brief duration" between the end of a work break and when the Hytech employee, Jeremy Moorlag, experienced a "bump and fall" through an uncovered and unguarded HVAC opening. Br. Resp't at 29, 47. If Hytech means to infer with this argument that the violation was of such short duration as to not be conspicuous and/or in plain sight, Hytech advances an argument that is inconsistent with substantial evidence in the record establishing employee exposures to multiple uncovered HVAC openings on multiple days, as well as exposure to an unprotected roof edge, establishing exposures in plain sight for much longer than Hytech implies in its briefing.

On January 5, 2009, Hytech employees worked on the northern portion of the roof, installing insulation and membrane around four HVAC

openings. BR Allsop at 115-17; *see also* BR Ex. 4. During the course of work on January 5, 2009, the HVAC opening covers were removed. BR Allsop at 115-17. This was in plain view. Moreover, the Hytech foreman at this job site, Josh Allsop, was aware that the covers had been removed and allowed Hytech employees to continue working in the area without ensuring the covers were replaced or Hytech employees were otherwise protected from the hazards of the HVAC openings. BR Allsop at 115-17.

On January 13, 2009, Hytech employees arrived at the job site to continue the insulation and membrane installation. BR Allsop at 113. This work required Hytech employees to continue to access materials and equipment stored next to or adjacent to four uncovered HVAC openings. BR Allsop at 160-61. As part of its work installing insulation and membrane, Hytech needed to install insulation up to the edge of the roof on the eastern side of the building. BR Allsop at 118. During the installation process, a Hytech employee worked directly up to the roof edge next to a parapet wall. BR Allsop at 119. Yet, as conceded by Hytech's foreman, work was performed by Hytech employees at the roof's edge without the use of any fall protection system, such as fall restraint or a safety monitor system. BR Allsop at 112, 119. This again was in plain view.

Following a break at 10:30 a.m., on January 13, 2009, Mr. Allsop and one of the of the Hytech employees he was supervising, Jeremy Moorlag, returned to the roof to continue work. BR Allsop at 119-20. When Mr. Allsop got back up on the roof, he noticed that an HVAC opening in the area he and Mr. Moorlag would be working was not covered. BR Allsop at 120-22. Again, this hazardous condition was in plain view. Despite the readily visible hazard, Mr. Allsop took no action to ensure that he and Mr. Moorlag would be protected from this opening, and he allowed work to continue. BR Allsop at 122. During the course of this work, Mr. Moorlag backed up to and fell through the HVAC opening 30 feet to the concrete floor below. BR Allsop at 122.

Hytech makes no attempt to argue that the cited violation of WAC 296-155-24510, for lack of fall protection at the edge of the roof, was not conspicuous and in plain view. Nor could a credible argument be advanced on such grounds. The evidence shows that Hytech employees worked near the uncovered HVAC openings on both January 5, 2009, and January 13, 2009, and also near the edge of the building on January 13, 2009. BR Allsop at 115-17, 119-22. This work, which occurred on multiple days and for extended periods of time, was in plain view. From

these plainly visible conditions, Hytech could have known of the violative condition.

3. Substantial Evidence Of Hytech's Constructive Knowledge Was Further Established Through Its Foreman's Knowledge

a. A Foreman's Knowledge Is Imputable Absent Evidence Of Workplace Rules, Their Communication, And Their Enforcement Through Adequate Supervision And Discipline

A supervisor's knowledge of a violation is generally imputable, establishing a prima facie showing of employer constructive knowledge, unless the employer shows: (1) it established effective work rules that effectively implement the requirements of the standards; (2) the effective communication of the work rules to the employees; and (3) the effective enforcement of the rules through adequate supervision and discipline. Mark A. Rothstein, *Occupational Safety and Health Law*, § 5:16 (7th ed. 2007); *Sec'y of Labor v. Superior Elec. Co.*, 17 O.S.H. Cas. (B.N.A.) 1635, 1995-1997 O.S.H. Dec. (C.C.H.) P 31069, 1996 WL 304540, *2 (O.S.H.R.C. 1996) (When a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies his burden of proving knowledge without having to demonstrate any inadequacy or defect in the employer's safety program.), *rev'd on other grounds*, 124 F.3d 199 (6th

Cir. 1997); *Sec'y of Labor v. Dover Elevator Co.*, 16 O.S.H. Cas. (B.N.A.) 1281, 1993 O.S.H. Dec. (C.C.H.) P 30148, 1993 WL 275823, *7 (O.S.H.R.C. 1993).

Unless an employer takes these steps to prevent the occurrence of violations, it has not exercised reasonable diligence to anticipate hazards and take measure to prevent the occurrence. *Erection Co. Inc.*, 160 Wn. App. at 206-207 (Reasonable diligence involves several factors, including an employer's obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence.) (quotation omitted); *Sec'y of Labor v. North Landing Line Construction Co.*, 19 O.S.H. Cas. (B.N.A.) 1465, 2001 O.S.H.D. (C.C.H.) P 32391, 2001 WL 826759, *9 (O.S.H.R.C. 2001) (reasonable diligence includes "adequate supervision of employees, and the formulation and implementation of adequate training programs and work rules to ensure that work is safe."). Thus, since the steps to prevent the occurrence of violations were not taken, for purposes of the knowledge requirement it was foreseeable that a violation will occur, and that knowledge is imputed to the employer.

Imputation to the employer of a supervising foreman's knowledge of a hazard is in accord with the remedial purpose and liberal construction mandate behind WISHA. *See* RCW 49.17.180; *Inland Foundry Co., v.*

Dep't of Labor & Indus., 106 Wn. App. 333, 336, 24 P.3d 424 (2001).

When an employer entrusts to a supervisory employee its duty to assure employee compliance with safety standards, it is neither unreasonable nor in error of law to charge the employer with constructive knowledge through the supervisor. The employer should not be able to delegate its supervisory responsibility and then deny that it is responsible for the consequences of that delegation.

The Department does not argue, as Hytech seems to imply, that constructive knowledge must be imputed under a strict liability standard because its foreman was aware of the violations at issue. *See* Br. Resp't at 22, 24-25. Rather, the employer may show that through the exercise of reasonable diligence, it could not have foreseen the violative conduct. But in determining whether an employer could not know of the violation, even with the exercise of reasonable diligence, all the measures available to prevent the occurrence will be reviewed, including but not limited to its past efforts to discover, document, and discipline safety violations. *See Erection Co., Inc.*, 160 Wn. App. at 206-207. It is not adequate, as Hytech implies, to simply establish that safety rules were communicated to the supervisor prior the occurrence of the violations. *See* Br. Resp't at 22, 24-25, 30-31. Even the decision upon which Hytech in large part relies, *W.G. Yates*, acknowledged that the inquiry into whether a supervisor's

knowledge of violations was foreseeable may include a broader inquiry into “the employer’s safety policy, training, and discipline.” *W.G. Yates & Sons Constr. Co., Inc., v. Occupational Safety & Health Review Comm’n*, 459 F.3d 604, 608-09 (5th Cir. 2006) (citing *Horne Plumbing & Heating Co. v. Occupational Safety Health Review Comm’n*, 528 F.2d 564, 568-69 (5th Cir.1976)).

Further, and as acknowledged by Hytech, *see* Br. Resp’t at 25, Fifth Circuit holdings placing not just the prima facie showing of employer constructive knowledge, but also the burden of proving foreseeability of a supervisor’s conduct upon the government, is at variance with decisions of the Occupational Safety and Health Review Commission. *See Superior Elec.*, 1996 WL 304540, at *2; *Dover Elevator*, 1993 WL 275823, at *7. Hytech also relies upon *Brennan v. Occupational Safety and Health Review Comm’n*, 511 F.2d 1139 (9th Cir. 1975) and other federal cases, for the proposition that a supervisor’s knowledge “is not automatically” imputed to an employer. Br. Resp’t at 32, 25-26. The Department does not contend that the supervisor’s knowledge is automatically imputed on the employer. Rather, if the Department shows a supervisor had knowledge, then the burden shifts to the employer to show: (1) it established effective work rules that effectively implement the requirements of the standards; (2) the effective

communication of the work rules to the employees; and (3) the effective enforcement of the rules through adequate supervision and discipline. *See* Rothstein § 5:16.

b. Ample Evidence Shows Hytech Did Not Exercise Reasonable Diligence

Ultimately, under any construction of the rule, substantial evidence shows that Hytech did not take sufficient steps to ensure that its foreman would follow safety standards, and thus it was foreseeable that violations of safety standards could occur. It is undisputed that Hytech's foreman knew of the violation. As of January 2009, Hytech had just twelve employees working in the field. BR Gross at 4. Hytech had four foreman, typically assigned to a crew of three. BR Gross at 5. But despite this limited number of employees and crews, safety inspection efforts were sporadic at best. Before January 13, 2009, Mr. Gross only visited job sites for which he was the project manager. At best, that amounted to visiting jobs "of size" once every two weeks and not visiting small jobs. BR Gross at 5-7.

Job site visits were *never* documented, except for one isolated occasion where the only pre-January 13, 2009 documentation of employee corrective action following a site inspection indirectly documented the site visit. BR Gross at 7-11. Mr. Gross did not visit the Bakerview Square job

site during any time when his employees were working at that site.¹ BR Gross at 11. Further, Mr. Gross could not document when the other Hytech project managers actually visited the other projects for which they were project manager and had safety and health oversight responsibility. BR Gross at 7. This glaring lack of supervision shows that Hytech was not exercising the reasonable diligence necessary to overcome the Department's prima facie showing of constructive knowledge through imputed supervisory knowledge. The foreman was not engaging in "rogue conduct" as asserted at Br. Resp't at 32, rather Hytech had systemic failures in supervision.

Regarding the steps this employer took communicate and enforce its safety program, Hytech points out that it disciplined Mr. Allsop *after* the incidents that lead to the Department's citation. Br. Resp't at 31. This is not sufficient to show that Hytech exercised reasonable diligence *before* the violations and accident occurred. Mr. Allsop was unaware, even as a foreman, of any Hytech employee being disciplined for not following safety or health rules before January 13, 2009. BR Allsop at 122. In fact, Hytech could only produce documentation of having taken corrective action with respect to two employees, and only one for a safety violation,

¹ The site visits by Mr. Gross that Hytech refers to occurred on December 17, 2008, or earlier, well before work on the roof commenced. See Br. Resp't at 14-15; BR Gross at 13.

before January 13, 2009.² BR Gross at 8. The other action was against an employee for what amounted to property damage issues involving either Hytech property or that of private individuals, rather than as a result of a safety violation. BR Gross at 9-11.

If a foreman is not aware of any discipline actions, either discipline was not taking place or the company did not effectively use discipline as a teaching tool and deterrent for all of its employees. This is evidence of a lack of effective enforcement of a safety program, which supports the imputation of supervisor knowledge and refutes the claim that the foreman was engaged in “rogue conduct.” See *North Landing Line*, 2001 WL 826759, *11 (superintendent’s knowledge imputed where there was no evidence of enforcement of safety rules, including no evidence that the employer monitored employees).

Finally, Hytech points out that Mr. Allsop was just a “working foreman” with no authority to sign contracts or speak for the company on legal matters. Br. Resp’t at 32. This distinction is irrelevant for purposes of determining constructive knowledge through a supervisor.

“An employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes

² While the record does not establish the date Hytech first went into business, Mr. Gross testified that he had worked for Hytech for 25 years, since 1984. BR Gross at 3.

of imputing knowledge to an employer.” *Sec’y of Labor v. A.P. O’Horo Co.*, 14 O.S.H. Cas. (B.N.A.) 2004, 1991 O.S.H.D. (C.C.H.) P 29223, 2001 WL 881247, *3-4 (O.S.H.R.C. 1991).

B. Hytech’s Affirmative Unpreventable Employee Misconduct Defense Fails Because Mere Evidence That Safety Rules Were Communicated To A Foreman Is Insufficient To Establish All Of The Elements Of The Employee Misconduct Test

Hytech asserts that even assuming that it had the requisite knowledge of hazards to which its employees were exposed at the Bakerview Square job site, the company should be excused under the affirmative defense of “employee misconduct.” *See generally* Br. Resp’t at 33-47. Hytech bases this assertion on evidence that it communicated fall protection rules to its foreman, arguing that this prior training was sufficient to establish that the violations were due solely to the malfeasance of that foreman and thus unavoidable. Br. Resp’t at 33, 45-47. It claims that the “only means that may have possibly curbed its supervisor’s misconduct would have been constant supervision of its employees.” Br. Resp’t at 35.

Hytech’s argument fails because communication of safety rules is but one of four statutory elements that must be proved by an employer in order to establish employee misconduct. Hytech fails to address the third and fourth elements of the test, and in so doing fails to show that it took

adequate steps to discover and correct violations of its safety rules, and, that its safety program was effective in practice and not just in theory.

1. Because Hytech Has The Burden Of Establishing The Affirmative Defense Of Employee Misconduct, The Department Is Not Required To “Establish The Preclusion” Of The Defense

Hytech asserts that “the Department has failed to establish the preclusion of the employer’s affirmative defense.” Br. Resp’t at 7, 33. It later engages in a discussion regarding whether the employer or the Department has the burden of proof under the defense. Br. Resp’t 41-44.³ Any argument that the Department has the burden to disprove application of the employee misconduct defense should be rejected as contrary to law.

It is well-established that in Washington employee misconduct is an affirmative defense to be proven by the employer. *Legacy Roofing, Inc. v. Dep’t of Labor & Indus.*, 129 Wn. App. 356, 370, 119 P.3d 366 (2005) (In 1999, our state legislature provided an employer with a statutory affirmative ‘unpreventable employee misconduct’ defense.).

³ In so doing, Hytech seemingly attempts to meld the knowledge requirement discussed *supra* with the separate, statutorily established employee misconduct defense to create some overriding Department burden of proof. This Court rejected such an approach. *See Asplundh Tree Expert Co. v. Dep’t of Labor & Indus.*, 145 Wn. App. 52, 61-62, 185 P.3d 636 (2008) (issue of “which party bore the burden of proving the employer knew of the violation is unrelated to whether an employer is excused from a violation because it resulted from unpreventable employee misconduct”).

RCW 49.17.120(5) provides for the affirmative defense of unpreventable employee misconduct, allowing an employer to avoid liability upon showing the following:

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

See Wash. Cedar & Supply Co., 119 Wn. App. at 911.

An employer advancing an “employee misconduct” defense will be held to its burden of proof on each element of the test. RCW 49.17.120(5); *Legacy Roofing, Inc.*, 129 Wn. App. at 370; *Brock v. L.E. Myers Co., High Voltage Div.*, 818 F.2d 1270, 1277 (6th Cir. 1987). Yet, Hytech fails in its brief to address the third and fourth elements of the test, even in light of the Board’s express findings that “Hytech did not take adequate steps to discover and correct violations of its safety rules” and that “Hytech did not effectively enforce its safety program” BR at 6 (Findings of Fact Nos. 5-6). Substantial evidence supports these findings; thus, the Decision and Order of the Board should be affirmed.

2. Hytech Did Not Prove That It Took All Feasible Precautions In The Hiring, Training, Sanctioning, And Monitoring Of Its Employees In Order To Show That It Took Sufficient Steps To Discover And Correct Violations

To establish the third, “steps to discover and correct violations” element of the employee misconduct test, Hytech was required to show that it took *all* feasible precautions, including but not limited to regular management inspections and employee discipline, to prevent multiple employees from working unprotected on multiple days while exposed to fall hazards. *See* RCW 49.17.120(5)(iii). Where, as here, the Department presented substantial evidence establishing that Hytech management took inadequate steps to discover, document, and correct employee violations of safety rules, this Court should affirm the decision of the Board.

Under the employee misconduct defense “evidence must support the employer’s assertion that the employees’ misconduct was an isolated occurrence and was not foreseeable.” *BD Roofing*, 139 Wn. App. at 111; *Wash. Cedar & Supply Co.*, 119 Wn. App. at 912. The defense is viable where the violative conduct was truly idiosyncratic, implausible, and unforeseeable. Rothstein §5:27. For example, citations have been vacated in cases where the employee went to the wrong worksite and was exposed to a hazard. *Id.* (citing *Sec’y of Labor v. Hogan Mech., Inc.*, 6 O.S.H. Cas.

(B.N.A.) 1221, 1977-1978 O.S.H. Dec. (C.C.H.) P 22429, 1977 WL 7911 (O.S.H.R.C. 1977)).

In contrast, conduct that can be prevented by feasible precautions by the employer is not idiosyncratic or unforeseeable. Richard P. Shafer, J.D., Annotation, *Employee Misconduct as Defense to Citation*, 59 A.L.R. Fed. 395, § 2 (1982). Thus, an employer must show that it has taken all feasible steps to prevent the misconduct, including adequate instruction and supervision of its employees, so that the misconduct in question violated a well-enforced safety rule. Shafer, 59 A.L.R. 395 § 2; see *Daniel Int'l Corp. v. Occupational Safety & Health Review Comm'n*, 683 F.2d 361, 364 (11th Cir. 1982). The employer must further establish it exercised reasonable diligence in making attempts to discover and correct work place hazards and violations of established work rules. Rothstein § 5:27.

Where there is widespread noncompliance by employees, both in numbers of employees in violation and duration of the exposure, there is a strong inference that the employer's efforts to discover and correct violations is lacking. See *Gem Indus., Inc.*, 17 O.S.H. Cas. (B.N.A.) 1861, 1996 O.S.H.D. ¶ 21, 263, 1996 WL 710982, *4 (O.S.H.R.C. 1976); *Sec'y of Labor v. Ted Wilkerson, Inc.*, 9 O.S.H. Case. (B.N.A.) 2012, 1981 O.S.H.D. (C.C.H.) P 25551, 1981 WL 18797, *7-8 (O.S.H.R.C. 1981).

Moreover, evidence submitted by an employer to establish the defense must include more than testimony; evidence must include documentation supportive of its claims that it took steps to discover and correct violations to support its claim that it effectively implements and enforces its program. *BD Roofing*, 139 Wn. App. at 113 (*citing Legacy Roofing*, 129 Wn. App. at 366).

In its Brief of Respondent, Hytech highlights the testimony of its foreman, Mr. Allsop, in support of its argument that it communicated the safety rules to Mr. Allsop. Br. Resp't at 45. This testimony addresses the second element of the employee misconduct test, which requires a showing of adequate communication of safety rules to employees. RCW 49.17.120(5)(ii). Yet in its decision, the Board did not take issue with Hytech's written safety program, or with its communication of the program to its employees. BR at 5-6. Rather, the Board pointed out that Hytech's "worksite visits to determine safety compliance were sporadic, at best" and that there was no documentary evidence to support any such visits. BR at 5. The Board also noted that "there was little evidence of actual discipline for safety violations prior to the January 13, 2009 incident" and that "there is no mention of any disciplinary process" in Hytech's accident prevention program. BR at 5. From this evidence, the Board found that "Hytech did not take adequate steps to discover and

correct violations of its safety rules.” BR at 6 (Finding of Fact No. 5). As demonstrated *supra* in Part II.A.3, substantial evidence supports these findings. *See also* Br. Appellant at 27-29. Without directly addressing this evidence, Hytech cannot hope to establish application of the unpreventable employee misconduct defense.

3. Hytech Did Not Prove That Its Safety Program Was Effective In Practice

Under the fourth and final element of the affirmative defense, Hytech is required to show that its safety program was effective in practice, and not just in theory. RCW 49.17.120(5)(iv); *Wash. Cedar & Supply Co.*, 119 Wn. App. at 911.

“[I]n cases involving negligent behavior by a supervisor or foreman which results in dangerous risks to employees under his or her supervision, *such fact raises an inference of lax enforcement and/or communication of the employer’s safety policy.*” *Brock*, 818 F.2d at 1277 (emphasis added); *see also Donovan v. Capital City Excavating Co.*, 712 F.2d 1008, 1010 (6th Cir. 1983) (actions of supervisor are imputed to the company). Where a supervisory employee is involved, as here, “the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor’s duty to protect the safety of employees under his or her supervision.” *Sec’y of Labor v.*

Archer-Western Contractors, Ltd., 15 O.S.H.C. 1013, 1991 O.S.H.D (C.C.H.) P 29317, 1991 WL 81020, *5 (O.S.H.R.C. 1991).

Ultimately however, the proper focus in employee misconduct cases is on the effectiveness of the employer's implementation of its safety program and not on whether the employee misconduct is that of a foreman as opposed to an employee. "Congress has specifically imposed on the employer the 'responsibility to assure compliance by his own employees. Final responsibility for compliance with the requirements of this Act remains with the employers.'" *Brock*, 818 F.2d at 1277 (quoting S. Rep. 1282, 91st Cong. 2d Sess. 10-11, *reprinted in* 1970 U.S.C.C.A.N. 5177, 5182). This responsibility is in accord with WISHA's accepted remedial purpose and policy. *See* RCW 49.17.010.

In its Decision and Order, the Board stated that "[w]e question whether a safety program can be deemed effective in practice when a site foreman participates in unsafe behavior on multiple occasions on multiple days, as in this case." BR at 5. Under such circumstances, combined with the substantial evidence showing that Hytech failed to discover, document, and sanction violations, Hytech fails to prove that the Board was in error when it stated that Hytech did not effectively enforce its safety program and did not meet the requirements for vacating the Department's citation under the unpreventable employee misconduct defense. BR at 6-7. On

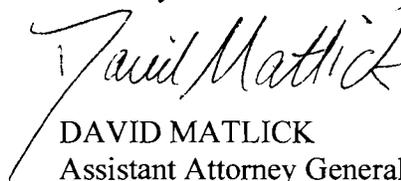
January 5, 2009 and January 13, 2009, a foreman *and* multiple Hytech employees in his charge did not implement mandated fall protection. The failure to assure safe working conditions for Hytech employees at the Bakerview Square job site was at least in part systemic, rather than due solely to the unforeseeable inaction of just one supervising employee. Hytech should not be excused from its final responsibility for compliance with the requirements of this Act.

III. CONCLUSION

For the reasons expressed above, the Department asks that the court affirm the Board's affirmance of the WISHA citation issued to Hytech.

RESPECTFULLY SUBMITTED this 10th day of November 2011.

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