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NO. 67045-0-1

**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.

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON

**BRIEF OF APPELLANT**

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ORIGINAL

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## I. INTRODUCTION

This case involves a citation issued by the Department of Labor and Industries (Department) to employer Scholten Roof Enterprises, Inc., dba Hytech Roofing, Inc., (Hytech) for violations of the Washington Industrial Safety and Health Act (WISHA), RCW 49.17. The citation charged Hytech with a serious violation of the guarding of floor openings regulation and with a serious violation of the fall protection regulation. A Department compliance officer inspected the Hytech job site and issued the citation after a Hytech employee fell 30 feet through an uncovered heating, ventilation, and air conditioning (HVAC) roof opening.

The Board of Industrial Insurance Appeals (Board), in affirming the citation, concluded that Hytech committed both serious violations and failed to establish the citations should be vacated based upon the affirmative defense of unpreventable employee misconduct. The Board's decision was reversed by the superior court. The Department appeals.

There is no basis in law or fact for the employer's claim that it did not have the requisite knowledge of the violations for which it was cited, or in the alternative, that its violations must be excused due to an isolated and unforeseeable incident of employee misconduct. The Department established all of the facts necessary to establish Hytech's serious violations, including that Hytech knew or should have known of the hazard associated

with the work being performed by its employees at the jobsite. The job foreman was aware of the hazards and did not correct them. Conversely, Hytech failed to establish that it took all feasible steps, including adequate supervision of its employees, and adequate steps to discover and correct violations of its safety rules, to prevent the violation. Thus, Hytech was unable to establish that its safety program was effective in practice, and accordingly was unable to meet its strict burden under law in advancing the affirmative employee misconduct defense.

The decision of the Board should be affirmed.

## **II. STATEMENT OF THE ISSUES**

1. Does substantial evidence support the Board's decision that Hytech committed serious violations and did the Department establish all the elements of its prima facie case, including the requisite employer knowledge, when the work in question was in plain view, created hazards that were typical for the work performed by Hytech employees, and was directly supervised by a Hytech foreman with actual knowledge of the hazard and non-compliance with safety regulations?
2. Does substantial evidence support the Board's findings that Hytech did not take adequate steps to discover, document, and correct violations of safety rules and that it did not effectively enforce its safety plan as demonstrated by the failure of its foreman to either guard floor openings or require fall protection such that the Hytech has not proven the affirmative defense of unpreventable employee misconduct?

### III. STATEMENT OF THE CASE

#### A. **The Department Issued A WISHA Citation After A Hytech Foreman Failed To Enforce Safety Rules And An Employee Fell Thirty Feet Though An Unprotected Opening On A Roof**

##### 1. **Workers Were Exposed To Uncovered HVAC Openings, Exposing Them To A Fall Hazard**

On January 5 and 13, 2009, Hytech employees were installing roofing insulation and membrane at a job site located at the Bakerview Square project in Bellingham, Washington. CABR Koskela at 11; CABR Allsop at 113.<sup>1</sup>

On January 5, 2009, Hytech employees worked on the northern portion of the roof, installing insulation and membrane around four HVAC openings. CABR Allsop at 115-17; *see also* CABR at Ex. 4. During the course of work on January 5, 2009, the HVAC opening covers were removed. CABR Allsop at 115-17. 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. *Id.*

On January 13, 2009, Hytech employees arrived at the job site to continue the insulation and membrane installation. CABR Allsop at 113.

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<sup>1</sup> The Certified Appeal Board Record will be cited as CABR, with the witness testimony cited by name and page number.

As part of this work, Hytech needed to install insulation up to the edge of the roof on the eastern side of the building. CABR Allsop at 118. During the installation process, a Hytech employee worked directly up to the roof edge next to a parapet wall. CABR Allsop at 119. The Hytech employee was not protected by either fall arrest or fall restraint, or by a safety monitor during this work. *Id.* The distance from the roof edge to the ground was 30 feet. CABR Koskela at 21.

The continued insulation and membrane installation on other portions of the roof also required Hytech employees to access materials and equipment stored in the northern portion of the roof next to or adjacent to four uncovered HVAC openings. CABR Allsop at 160-61. There was nothing in that area of the roof preventing the Hytech employees from accessing or being exposed to the uncovered HVAC openings. CABR Allsop at 164.

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. CABR 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. CABR Allsop at 120-22. Yet Mr. Allsop took no action to ensure that he and Mr. Moorlag would be protected from this opening, and

he allowed work to continue. CABR Allsop at 122. Sadly, during the course of this work, Mr. Moorlag backed up to and fell through the HVAC opening 30 feet to the concrete floor below. *Id.*

Keith Koskela, a Compliance Safety and Health Officer with the Department, inspected the job site after the accident. CABR Koskela at 8-9, 20. When Mr. Koskela arrived at the work site, he observed several HVAC openings in the roof that were uncovered and unguarded. CABR at Koskela 12.

During the course of his walk around inspection, Mr. Koskela accessed the roof and took numerous photographs showing at least five HVAC openings in the roof that were uncovered and unguarded. CABR Koskela at 11-12, 19-40; CABR at Exs. 2-3, 5-10.

## **2. Hytech Only Sporadically Inspected Job Sites And Rarely Disciplined Employees For Safety Violations**

As the Hytech foreman at the Bakerview Square job site, Mr. Allsop was responsible for ensuring Hytech employees (including himself) worked safely and followed safety and health policies and rules. CABR Allsop at 107-09. Indeed, Mr. Allsop was the on-site Hytech representative who was ultimately responsible for ensuring compliance with safety and health rules and policies. CABR Allsop at 110. As such, if Mr. Allsop observed a safety hazard, or observed an employee working

unsafely, he had responsibility and authority to correct the hazard or the employee behavior. *Id.* Mr. Allsop was also responsible for ensuring that Hytech employees were protected from hazards at the job site, and he was expected to ensure that hazards were corrected before Hytech employees working. CABR Allsop at 107-09. In addition, Mr. Allsop was responsible for holding crew safety meetings before January 13, 2009. CABR Allsop at 134. Dan Gross, one of Hytech's owners, acknowledged that as the supervisory personnel on-site, Hytech foremen, including Mr. Allsop, were responsible for ensuring Hytech employees worked safely. CABR Gross at 5.

Regarding Hytech's safety program and steps this employer took to communicate and enforce its program (elements of a possible affirmative defense against issuance of the Department's citation), 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. CABR 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, before January 13, 2009. CABR Gross at 8. One such 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. CABR Gross at 9-11.

Despite being Hytech's safety director as well as one of Hytech's owners, before January 13, 2009, Mr. Gross only visited job sites for which he was the project manager. CABR Gross at 5-7. Mr. Gross managed approximately 75 percent of Hytech's flat roof jobs (to be distinguished from steep pitch roofing work Hytech may have been doing) but, at best, only visited job sites "of size" every two weeks. *Id.* None of these job site visits were documented before January 13, 2009.<sup>2</sup> CABR Gross at 7. 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. CABR Gross at 7.

Mr. Allsop stated that Hytech had provided him training on the fall protection standards and that he knew the methods for protecting employees at the Bakerview Square job site. CABR Allsop at 134-35, 137, 140-41. Mr. Allsop further acknowledged that during work at the Bakerview Square job site, Mr. Gross did not visit the job while Hytech

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<sup>2</sup> Hytech could only produce documentation before January 13, 2009, of having taken corrective action with respect to one employee as a result of a safety violation. This documentation only indirectly documented one job site visit. CABR Gross at 8-11.

employees were working. CABR Allsop at 122, 166; *see also* CABR Gross at 11.

As a result of Mr. Koskela's inspection, a citation was issued for two WISHA violations. CABR Koskela at 11-12. First, Hytech was cited for a serious violation of WAC 296-155-505(4)(a), the guarding of floor openings regulation. CABR Koskela at 12. In addition, Hytech was cited for a serious violation of WAC 296-155-24510, the fall protection regulation. CABR Koskela at 44.

**B. The Board Of Industrial Insurance Appeals Affirmed The Citation Issued To Hytech By The Department**

Hytech appealed the citation to the Board. CABR at 6. Hytech did not challenge the Department's determination that its employees were exposed to serious safety hazards that presented a substantial probability of serious bodily injury. CABR at 4; CABR at 10-16, 123-136; *see* RCW 49.17.180(6). Nor did Hytech challenge that the Department cited the violations under the appropriate WISHA administrative code provisions. CABR at 4; CABR at 10-16, 123-136. However, Hytech asserted that the Department could not establish that Hytech knew or should reasonably have known of the hazardous condition, or in the alternative the violations should be excused under the affirmative defense of unpreventable employee misconduct. *Id.*

On May 10, 2010, the industrial appeals judge issued a proposed decision finding that the employer had knowledge of the fall hazard, but vacating the Department's citation based upon the affirmative employee misconduct defense. CABR at 44-51. The Department filed a petition for review of the proposed decision to the 3-member Board. CABR at 9, 27-40.

On July 26, 2010, the Board issued its decision. CABR at 2-8.<sup>3</sup> Agreeing with the Department's contention that the citation should not have been vacated because Hytech failed to meet its burden of proof to establish the affirmative defense of unpreventable employee misconduct, the Board found its industrial appeals judge's proposed decision to be in error, and it affirmed the Department's citation. *Id.*

While the Board noted that a number of facts supported Hytech's contention of unpreventable employee misconduct, it conversely noted that "worksite visits to determine safety compliance were sporadic at best." CABR at 5. Also, while Hytech had a graduated disciplinary process for safety violations, "there was little evidence of actual discipline for safety violations before the January 13, 2009 incident." *Id.* Nor was there any mention of any disciplinary process in the accident prevention program. *Id.*; *see* CABR at Ex. 21. The Board further stated that it was "not satisfied that Hytech has taken adequate steps to discover and correct violations of its

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<sup>3</sup> The Board's decision is in Appendix A.

safety rules. Hytech conducts only minimal worksite visits, which are undocumented.” *Id.*

Rejecting the argument that the actions of the foreman could not be imputed to the employer, the Board found that “Hytech did not effectively enforce its safety program as demonstrated by the failure of its site foreman to require the use of property fall protection on January 5, 2009, and January 13, 2009.” CABR at 6. Additionally, the Board found that “its foreman on site knew that workers, including himself, should have used fall protection to protect themselves from a serious hazard. CABR at 6. The Board also found that “Hytech did not take adequate steps to discover and correct violations of its rules.” CABR at 6.

**C. Hytech Appealed The Board’s Decision To Superior Court**

Hytech filed a petition for judicial review in Whatcom County Superior Court. CP at 1. After review, the court entered a judgment, vacating the Department’s citation. CP at 15. The Department appeals.

**IV. SUMMARY OF ARGUMENT**

The Department is responsible for enforcing WISHA. In this role, it enacts rules that protect workers from unsafe working conditions by imposing certain duties on employers, and it inspects employers to ensure that they and their employees use safe work practices.

Here, substantial and unchallenged evidence supports the finding that Hytech employees were exposed to serious safety hazards that presented a substantial probability of serious bodily injury. The record further supports the conclusion that the Department established Hytech's violations of WAC 296-155-505(4)(a) and WAC 296-155-24510, including establishing Hytech's requisite "knowledge" of their employees' exposure to serious hazardous conditions. Substantial evidence established that Hytech knew of the presence of the hazard associated with the work being performed by its employees, as a site specific fall protection work plan listed falls from high elevations and through skylights and/or hatches as (among others) the identified hazards at the work site at issue. On multiple work days Hytech's foreman had specific knowledge of unprotected fall hazards, but took no steps to ensure the hazards were corrected or that Hytech employees were protected from these hazards. Mr. Allsop's knowledge is imputed to Hytech.

Additionally, substantial evidence supports the Board's conclusion that Hytech failed to meet its affirmative, strict burden of showing that the violations at issue were due to employee misconduct. The violations were not due to an isolated incidence of unforeseeable and unpreventable misconduct. Hytech's worksite visits to determine safety compliance were undocumented and sporadic at best, there was little evidence of actual

discipline for safety violations before the January 13, 2009 incident. Hytech failed to establish that it took adequate steps to discover and correct violations of its safety rules. The failure to enforce safety rules in the instant case involved multiple days, multiple employees, and an on-site supervisor. Thus, the employer failed to establish that it took the required necessary steps to discover and correct violations of its safety rules, or that enforcement of its safety program was effective in practice and not just in theory.

## V. STANDARD OF REVIEW

### A. Questions Of Fact Are Reviewed Under the Substantial Evidence Standard

The appellate court performs a review of the decision of the Board, based upon the record created before the agency. *Legacy Roofing, Inc. v. Dep't of Labor & Indus.*, 129 Wn. App. 356, 363, 119 P.3d 366 (2005).<sup>4</sup>

Under WISHA, the Legislature enacted a scope of review for appeals to superior court that requires great deference to the Board “with respect to questions of fact”:

The findings of the board or [industrial appeals judge] where the board has denied a petition or petitions for review with respect to questions of fact, if supported by

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<sup>4</sup> It is the decision of the Board that is reviewed, not the proposed decision. RCW 49.17.150; see *Stratton v. Dep't of Labor & Indus.*, 1 Wn. App. 77, 79, 459 P.2d 651 (1969) (a proposed decision is not the decision of the Board and a “rejected proposal has no standing.”).

substantial evidence on the record considered as a whole, shall be conclusive.

RCW 49.17.150(1). Substantial evidence is “evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.” *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). “The appellate court gives deference to factual decisions [rendered by agencies].” *Id.*

**B. Questions Of Law Are Reviewed De Novo, But Substantial Deference Should Be Given To The Department’s Interpretation Of WISHA**

Issues of law, including matters of statutory construction, are reviewed de novo. *Wash. Cedar & Supply Co. v. Dep’t of Labor & Indus.*, 119 Wn. App. 906, 912, 83 P.3d 1012 (2003).

WISHA is remedial legislation designed to protect the health and safety of all workers. *See* RCW 49.17.010. As a remedial statute, WISHA is liberally construed to carry out its purpose. *Elder Demolition, Inc. v. Dep’t of Labor & Indus.*, 149 Wn. App. 799, 806, 207 P.3d 453 (2009).

In applying the facts to the law, substantial deference should be given to the Department’s interpretation of the law under WISHA. When the legislature charges a state agency with the responsibility of administering a statute, the agency is entitled to deference in its interpretation of the statute. *Multicare Med. Ctr. v. Dep’t of Soc. & Health Serv.*, 114 Wn.2d 572, 589,

790 P.2d 124, 133 (1990); *J&S Serv., Inc. v. Dep't of Labor & Indus.*, 142 Wn. App. 502, 508, 174 P.3d 1190 (2007) (We further accord L & I's interpretation deference because it is plausible, not contrary to legislative intent, and within the scope of its expertise in promoting workplace safety.).

## VI. ARGUMENT

### A. **The Department Established All The Elements Of Its Prima Facie Case, Including The Requisite Employer Knowledge Of The Potential Hazard**

In the proceedings before the Board, Hytech argued that the Department did not establish that Hytech knew of the presence of the violative condition or practice, and therefore could not establish a prima facie case for issuance of the citation. CABR at 12.

For a “serious” violation, the Department must show that there is a substantial probability that death or serious physical harm could result from a condition which exists, or from practices which are used in the work place, *unless the employer did not, and could not with the exercise of*

*reasonable diligence, know of the violative condition.* RCW 49.17.180(6) (emphasis added).<sup>5</sup>

The Board determined that Hytech had knowledge, finding that “its foreman on site knew that workers, including himself, should have used fall protection to protect themselves from a serious hazard. CABR at 6. The Board’s finding is supported by substantial evidence.

**1. The Department Showed Either Actual Or Constructive Employer Knowledge By Establishing That Hytech Either Knew Or, With The Exercise Of Reasonable Diligence Could Have Known, Of The Presence Of The Hazard**

The knowledge requirement may be satisfied by proof either that the employer actually knew, or with the exercise of reasonable diligence, could have known of the presence of the violative condition. *Wash. Cedar & Supply Co.*, 119 Wn. App. at 914. The Board has consistently held that “employer knowledge” in this context means knowledge of the hazardous conduct or condition and does not require knowledge of a specific incident. *In re Gen. Sec. Serv. Corp.*, BIIA Dec., 96 W376, 1998 WL 960837 (1998).

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<sup>5</sup> In an appeal of a WISHA violation, the Department has the burden of establishing a prima facie case. To meet that burden in a serious violation, in addition to actual or constructive knowledge, the Department must show that (1) a specific standard applies; (2) there was a failure to comply with the standard; and (3) the employer’s employees had access to the hazard or violative condition. *In re Exxel Pacific, Inc.*, BIIA Dec., 96 W182, 1998 WL 718040 (1998). These elements were not disputed at the Board. See CABR January 5, 2010 at 3-4.

Evidence that the hazard was “in plain view” will establish an employer’s constructive knowledge of a violative condition. *In Re Wilder Constr. Co.*, BIIA Dkt. No. 06 W1078, 2007 WL 3054874 (2007) (citing Mark A. Rothstein, *Occupational Safety and Health Law*, § 5:15 (7th ed. 2007)). Constructive knowledge also has been found where the employer failed to discover readily apparent hazards, where there were inadequate safety instructions, and where safety rules were not enforced. Rothstein at §5:15.

**2. A Foreman’s Knowledge Of A Hazardous Condition May Be Imputed To The Employer**

Knowledge or constructive knowledge may be imputed to the employer through a supervisory agent. *New York State Elec. & Gas Corp. v. Sec’y of Labor*, 88 F.3d 98, 105 (2nd Cir. 1996); *Sec’y of Labor v. Danis Shook Joint Venture XXV*, 19 O.S.H. Cas. (B.N.A.) 1497, 2001 O.S.H.D. (C.C.H.) P 32397, 2001 WL 881247, \*4-\*5 (O.S.H.R.C. 2001) (Actual or constructive knowledge of an employer’s foreman can be imputed to the employer.)<sup>6</sup> “An employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer.” *Sec’y of Labor v. A.P.*

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<sup>6</sup> In interpreting WISHA, courts look for guidance to federal cases interpreting similar provisions of the federal Occupational Safety & Health Act (OSHA). *Lee Cook Trucking & Logging v. Dep’t of Labor & Indus.*, 109 Wn. App. 471, 478, 36 P.3d 558 (2001). OSHA contains similar provisions regarding the knowledge and employee misconduct provisions at issue. *See Brock*, 818 F.2d at 1277..

*O'Horo Co.*, 14 O.S.H. Cas. (B.N.A.) 2004, 1991 O.S.H.D. (C.C.H.) P29223, 2001 WL 881247, \*3-\*4 (O.S.H.R.C. 1991).

In *O'Horo*, a foreman observed the trenching process that resulted in inadequately sloped walls. The commission found that in light of the foreman's "supervisory status, his knowledge is imputable to O'Horo and establishes a prima facie showing of knowledge." *Id.*

In *Shook*, a supervising foreman's actual knowledge of his own failure to wear personal protective equipment was imputed to his employer. *Shook*, 2001 WL 881247, \*4-\*5.

Supervisor knowledge is imputed to the employer unless the employer can show that it has taken all necessary steps to comply with WISHA, including adequate supervision of its supervisory personnel. *Niagra Mohawk Power Corp.*, 7 O.S.H.C. (B.N.A.) 1447, 1449 (1979). "[I]t is not sufficient simply to communicate safety rules to supervisor . . . The employer must make a specific showing that its safety rules were effectively enforced, by discipline if necessary." *Id.*

**3. Hytech Had Both Actual And Constructive Knowledge Of The Hazard Through A Site Specific Fall Protection Work Plan And Its Foreman's Specific Knowledge Of Uncovered HVAC Openings And Non-Use Of Fall Protection By Himself And His Crew**

In this case, substantial evidence established that Hytech knew of the presence of the hazard associated with the work being performed by its

employees. First, a site specific fall protection work plan listed falls from high elevations and through skylights and/or hatches as (among others) the identified hazards at the work site at issue. CABR Allsop at 107-09; CABR at Ex. 11. Indeed, since Hytech is a roofing company, it would be hard to imagine many if any jobs where Hytech management would not be aware that its employees would be exposed to potential fall hazards. This express recognition of the fall hazard at the Bakerview Square jobsite, on its own, is sufficient evidence to establish a prima facie showing of employer knowledge.

Moreover, Hytech's foreman, Mr. Allsop, had specific knowledge on January 5, 2009, that there were uncovered HVAC openings on the northern portion of the roof. CABR Allsop at 115-17. Mr. Allsop continued to allow Hytech employees to work in this area without use of a safety monitor system, covers for the HVAC openings, or use of other fall protection such as fall restraint or fall arrest. *Id.* Again, on January 13, 2009, Mr. Allsop knew that a Hytech employee worked right up to the roof edge to install roofing insulation without use of any type of fall protection. CABR Allsop at 118-19. Further, Mr. Allsop knew that the roof access ladder required Hytech employees to access the northern roof area in which there were four uncovered HVAC openings. CABR Allsop at 160-61. Mr. Allsop also knew that material and equipment Hytech employees would need to access

and use on January 13, 2009, was placed next to or in the vicinity of the uncovered HVAC openings. CABR Allsop at 120-22. Finally, after Mr. Allsop and Mr. Moorlag returned to the roof after the morning break, Mr. Allsop was specifically aware that there was an uncovered HVAC in the immediate vicinity that he and Mr. Moorlag would be working. CABR Allsop at 119-22. All of Mr. Allsop's knowledge should be imputed to Hytech, establishing at least constructive if not actual knowledge of not only the fall hazards, but that no steps were taken during work on January 5, 2009 or January 13, 2009, to ensure the hazards were corrected or that Hytech employees were protected from these hazards. *See New York State Elec.*, 88 F.3d at 105.

In addition, and as is discussed in more detail *infra* Part VI.B., Hytech failed to establish that it took all necessary steps to comply with WISHA, including adequate supervision of its supervisory personnel. *See Niagra Mohawk Power Corp.*, 7 O.S.H.C. (B.N.A.) at 1449. As a result, Mr. Allsop's knowledge again is imputed to Hytech. In addition to supervisor knowledge, the evidence also showed that the hazards were in plain view and that Hytech did not adequately enforce its safety rules. The Department has therefore established the knowledge prong of its prima facie case.

Hytech asserted below that the Department did not establish that Hytech knew or should reasonably have known of the violative condition because it could not have anticipated its foreman's bad decisions at this job site, decisions which left its employees exposed to a fall hazard. CP at 9. In essence, Hytech argued that it should be excused from its violations because there was no evidence that it had actual knowledge that *a particular employee* was exposed to a fall hazards *at this particular jobsite*. In so doing, the employer attempts to shift the focus of the inquiry from the hazard associated with the work being performed by its employees, *Danis Shook*, 19 O.S.H. Cas. (B.N.A.) 1497, to the actions (or inaction) of its foreman.

Hytech's argument is not only contrary to law, but contrary to common sense. Hytech invites this court to adopt a rule that in essence would require the Department establish, before issuing any serious violation, that the employer knew its employees were breaking safety rules yet, presumably, took no steps to remedy the deficiency.<sup>7</sup> Hytech's attempt to narrow the scope of the employer knowledge inquiry should be rejected.

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<sup>7</sup> Such a heightened disregard of safety rules would constitute a "willful violation" by an employer, a circumstance that subjects an employer to penalties ten times higher than those assessed for a serious violation, with a statutory minimum penalty of \$5,000 per violation. See WAC 296-900-14020.

**B. The Unpreventable Employee Misconduct Defense Requires A High And Strict Burden Of Proof Be Met By An Employer Before It Will Be Excused Of A Safety Violation**

Hytech asserted below that, even assuming that its workers violated the rules requiring floor guarding and fall protection and that it had the requisite knowledge of the violations, the company should be excused because it has met its burden of proof regarding the affirmative defense of “employee misconduct.” CABR at 156-160; CP at 9.

Substantial evidence in the record, including the lax supervision by Hytech’s management combined with Hytech’s failure to establish that it took all feasible steps, including adequate instruction and supervision of its employees, and adequate steps to discover and correct violations of its safety rules, to prevent the violation, supports the Board’s rejection of this assertion. Hytech was unable to establish that its safety program was effective in practice, and accordingly was unable to meet its strict burden under law in advancing the affirmative employee misconduct defense.

**1. Employers Must Prove That They Took All Feasible Precautions In The Hiring, Training, Sanctioning, And Monitoring Of The Its Employees In Order To Show That A Violation Was Idiosyncratic And Unforeseeable**

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.

*Wash. Cedar & Supply Co.*, 119 Wn. App. at 911.<sup>8</sup>

The employer must prove in advancing an “employee misconduct” defense that its enforcement of safety has been effective in practice as well as in theory. RCW 49.17.120(5)(iv); *Brock v. L.E. Myers Co., High Voltage Div.*, 818 F.2d 1270, 1277 (6th Cir. 1987). While each of the four parts of the above test must be met by the employer in order to meet their burden of proof, *Brock* emphasizes that merely showing a good “paper program” does not demonstrate “effectiveness in practice.” *Id.*

*Brock* emphasizes that an employer will be strictly held to its burden of proof on each element of the test. *Id.* *Brock* notes that the

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<sup>8</sup> As noted above, a similar provision is found in the OSHA. See *Brock*, 818 F.2d at 1277. In construing the OSHA provision, federal courts have recognized the affirmative defense of “unpreventable employee misconduct.” Before the *Washington Cedar* decision, in the absence of Washington appellate decisions on this issue the Board properly relied upon federal decisions construing OSHA. See *Jeld-Wen of Everett*, BIIA Dec., 88 W144, 1990 WL 205725 (1990); *The Erection Co.*, BIIA Dec., 88 W142, 1990 WL 255020 (1990). In *Jeld-Wend* at \*7, the Board adopted the leading federal case on “employee misconduct,” *Brock*, 818 F.2d 1270. *Jeld-Wend* followed *Brock* and held that “unpreventable employee misconduct” is an affirmative defense for which the employer bears the burden of proof. In 1999, the Legislature codified *Brock* in RCW 49.17.120. Laws of 1999, ch. 93, § 1. The bill report notes that the legislation merely codifies existing case law. Final Bill Report to SB 5614.

employer's duty includes providing "training, supervision, and disciplinary action designed to enforce the rules." *Id.*

Further, the employer must show that the conduct of its employees in violating the employer's safety policies was:

[i]diosyncratic and unforeseeable . . . we emphasize that the employer who wishes to rely on the presence of an effective safety program to establish that it could not reasonably have foreseen the aberrant behavior of its employees must demonstrate that program's effectiveness in practice as well as in theory.

*Id.*

Under Washington case law, to show that a safety program is effective in practice, "evidence must support the employer's assertion that the employees' misconduct was an isolated occurrence and was not foreseeable." *BD Roofing v. Dep't of Labor & Indus.*, 139 Wn. App. 98, 111, 161 P.3d 387 (2007); *Wash. Cedar & Supply Co.*, 119 Wn. App. at 912.

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. *Id.*; see *Daniel Int'l Corp. v. Occup. Safety & Health Rev. Comm'n*, 683 F.2d 361, 364 (11th Cir. 1982).

In addition, the employer must establish that it took sufficient steps to discover and correct violative conduct by its employees. In other words, the employer must establish it exercised reasonable diligence in making attempts to discover and correct work place hazards and violations of established work rules. Rothstein at §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.C. 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.C. 2012, 1983 O.S.H.D. ¶25,551, 1981 WL 18797, \*7-\*8 (O.S.H.R.C. 1981).

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. The employer must present sufficient evidence 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 the *BD Roofing* case, the court found that the employer failed to

provide documentary evidence that it actually inspected and disciplined employees for rule violations. *BD Roofing*, 139 Wn. App. at 113. “The fact that a company’s written policy on the date of the inspection provided that an employee could face dismissal for failing to follow the employer’s safety protocols is not sufficient evidence that the employer actually enforced the policy or dismissed any employees.” *Id.* The court therefore rejected BD Roofing’s argument because the employer had failed to submit any evidence indicating it had consistently enforced its discipline policy. *Id.* at 114.

In *Legacy Roofing*, the court upheld the Board’s finding that the employer’s steps to discover and correct safety violations were inadequate to deter future violations, the company’s unannounced inspections were infrequent, and employees caught violating the rules were not consistently counseled or fined. *Legacy Roofing*, 129 Wn. App. at 365. The court held that Legacy’s program was not “effective in practice as well as in theory.” *Id.* at 367.

**2. Involvement Of A Supervisory Employee Raises An Inference Of Lax Enforcement And/Or Communication**

Here a foreman is involved. “[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., Inc.*, 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 ¶29,317, 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. Code Cong. & Admin. News 5177, 5182).

**3. Hytech's Employee Misconduct Defense Fails Because It Failed To Establish That It Took All Feasible Steps To Discover, Document, And Sanction Violations**

Hytech's employee misconduct defense fails because it failed to establish that it took all feasible steps to monitor for, discover, document, and sanction violations, thus ultimately failing to establish that its program was effective in practice where a foreman and two employees on multiple days allowed fall hazards at the job site to exist unabated for an extended time. The Board found that Hytech "did not take adequate steps to discover and correct violations of its safety rule." CABR at 6. The Board also found that "Hytech did not effectively enforce its safety program as demonstrated by the failure of its site foreman to require the use of proper fall protection on January 5, 2009, and January 13, 2009." *Id.* These findings are supported by substantial evidence.

**a. Hytech Failed To Have Frequent Unannounced Inspections**

In its briefing below, Hytech argues that the only manner in which it could have prevented the violation of the two fall safety rules was by constant surveillance by supervisors and that constant surveillance is not required under law. CP at 9. This argument fails because it assumes that supervisory surveillance is the *only* feasible means of preventing

violations.<sup>9</sup> However, as discussed *supra*, frequent, unannounced, and documented safety inspections, resulting in consistent and documented penalties for violations are other feasible means for employers to enforce safety. See *BD Roofing*, 139 Wn. App. at 113; *Legacy Roofing*, 129 Wn. App. at 365; *Daniel Int'l*, 683 F.2d at 364. Yet, the evidence demonstrated that Hytech's unannounced inspections were infrequent and undocumented, Hytech further presented little evidence of actual discipline for safety violations before the January 13, 2009 accident.

As of January 2009, Hytech had just 12 employees working in the field. CABR Gross at 4. It had four foreman, typically assigned to a crew of three. CABR 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, Hytech's safety director and co-owner, 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. CABR 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. CABR Gross at 7-

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<sup>9</sup> The argument also ignores that a supervisor not only was in fact present at all times at the Bakerview Square job site, but that the supervisor failed to enforce the safety regulations at issue.

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. CABR Gross at 7.

Mr. Gross did not visit the Bakerview Square job site during any time when his employees were working at that site. CABR Gross at 11.

**b. Hytech Failed To Document Self-Inspections Or Employee Discipline For Rule Violations**

The only documentary evidence Hytech submitted in support of its affirmative defense were: (1) the company's accident prevention program; (2) documentation of safety meetings; and (3) a *post-accident* discipline document for Mr. Allsop. See CABR Allsop at 134-35; CABR Gross at 5-36; CABR Starcher at 53.

Hytech's failure to adequately engage in or document self-inspection or employee discipline for rule violations is similar to the factual situations in *BD Roofing* and *Legacy Roofing* where in each case the employee misconduct defense was rejected. Here, Hytech failed to document safe violations, enforce its progressive discipline policy, and document site visits; it certainly could not establish that a paper program was effective in practice and not just in theory.

**c. The Foreman Failed To Enforce Safety Rules And This Raises An Inference Of Lax Enforcement And/Or Communication Of The Safety Policy**

Further, as the supervisory foreman at the Bakerview Square job site, Mr. Allsop was delegated responsibility for ensuring that employees worked safely, were protected from hazards, and that hazards to which Hytech employees could be exposed were corrected before he allowed work to continue. CABR Allsop at 107-09. Thus, the inference of lax enforcement and/or communication of the employer's safety policy should be applied in this case. *Brock*, 818 F.2d at 1277.

Hytech claims it could not have known that its foreman would violate the safety rules by taking a short cut. CABR at 22-24. But if Hytech engaged in and documented regular inspections, this type of behavior could have been corrected. Despite his safety responsibilities, it is undisputed that Mr. Allsop allowed the serious hazardous conditions at the site to exist unabated for an extended time and on multiple days. Mr. Allsop allowed Hytech employees (including himself) to work around five HVAC openings and at the roof edge without protection and exposed to a 30-foot fall hazard. CABR Allsop at 107-09, 113, 115-22. Mr. Allsop's failure to correct these hazards resulted in a 30 foot fall by a Hytech employee.

Hytech was unable to show that it took all feasible steps to enforce its safety program, and ultimately, that its program was effective in practice. This court should affirm the Board's rejection of the affirmative employee misconduct defense.

## VII. 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 5<sup>th</sup> day of August, 2011.

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