IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SCHOLTEN ROOF ENTERPRISES, INC. d/b/a HYTECH ROOFING, INC.,	)	No. 67045-0-I
Respondent,	)	DIVISION ONE
v.	)	UNPUBLISHED OPINION
WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES,	)	
Appellant.	)	FILED: December 3, 2012

Schindler, J. — A Hytech Roofing Inc. employee suffered severe and permanent injuries after falling 30 feet through an open ventilation shaft. The Board of Industrial Insurance Appeals (the Board) affirmed the "Citation and Notice of Assessment" against Hytech for serious violations of the Washington Industrial Safety and Health Act of 1973 (WISHA), chapter 49.17 RCW.[1] The superior court reversed and vacated the citation and the assessment of penalties. Because substantial evidence supports the Board's decision, we reverse the superior court and affirm the decision of the Board.

FACTS

Hytech does not challenge the relevant facts. Scholten Roof Enterprises Inc.

[1] The legislature amended chapter 49.17 RCW in 2010 to add "or her" after "his" throughout the chapter. Laws of 2010, ch. 8. We refer to the current version of the statutes.

d/b/a Hytech Roofing Inc. (Hytech) worked as the roofing subcontractor for Faber Brothers Construction on a commercial project at Bakerview Square in Bellingham. Daniel Gross is a part-owner of Hytech and the safety director for the company. Gross was the project manager for the Bakerview Square project. Gross assigned Joshua Allsop, Shannon Holleman, and Jeremy Moorlag to work on the Bakerview Square roofing project, and designated Allsop as the foreman.

In mid-December 2008, Gross met with the superintendent for the general contractor at the jobsite to coordinate scheduling, delivery of roofing materials, and address safety concerns. Gross testified, in pertinent part:

> I would always have [conversations] with a superintendent, and that is, how are you staging this project so that our crew is going to be able to perform their job safely. I'd be concerned about leading edge work, whether the walls were definitely framed and provided proper fall protection because of their height and to determine whether there were low edges. A question I would have asked him was what is it going to look like when we get there so that I know what proper materials to send along with my crew to -- to -- so that they have the proper safety equipment with them.

Gross testified that on December 17, he and the other Hytech employees went to the Bakerview Square jobsite to deliver and unload materials, and completed a "Fall Protection Work Plan." The Fall Protection Work Plan identified several work site hazards, including:

1) Falls from elevations exceeding 10 feet
2) Skylights, hatches, stairways, shafts, etc.
3) Perimeters.

The Plan states that fall restraints, a warning line, and a safety monitor will be used.[2]

[2] A safety monitor marks off a perimeter six feet from the edge of a roof and monitors workers to ensure they do not go beyond the perimeter or encounter any trip hazards.

On January 5, the Hytech crew worked on installing the insulation and roofing membrane on the northern portion of the roof. At the same time, Barron Heating employees were also on the roof working on the heating, ventilation, and air conditioning (HVAC) system. In order to install curbs around the HVAC openings, Barron employees removed the plywood covers. Allsop, Holleman, and Moorlag worked near four of the uncovered HVAC openings on January 5.

On January 13, Allsop, Holleman, and Moorlag installed insulation and the roofing membrane along the eastern side of the building, including next to the edge of the roof along the parapet wall. Hytech's roofing materials and tools were located next to uncovered HVAC openings.

After the morning break at approximately 10:30 a.m., Allsop and Moorlag returned to the roof to continue working while Holleman unloaded materials from the truck. As Allsop and Moorlag were unrolling the roofing membrane, Moorlag fell through an uncovered HVAC opening 30 feet to the concrete floor below. As a result of the fall, Moorlag suffered severe, permanent injuries.

Keith Koskela, a compliance safety and health officer for the Division of Occupational Safety and Health of the Washington State Department of Labor and Industries (Department), arrived at the Bakerview Square project at approximately 1:00 p.m. Koskela interviewed Allsop, Gross, and the superintendent for the general contractor, and inspected the work site.

Allsop told Koskela that the HVAC openings were uncovered on January 5 and remained uncovered on January 13. Koskela said that Allsop also admitted that the

crew "worked around the four northern HVAC units . . . that weren't covered" on January 5 and January 13. During his inspection of the work site, Koskela took photographs of the five uncovered HVAC openings on the roof.

Koskela cited Hytech for failure to comply with safety regulations while working near the uncovered HVAC openings. Koskela testified the hazard could have been prevented if Hytech had complied with safety regulations:

> Numerous things. Fall arrest, fall restraint, cover over the opening, an effective monitoring system. Any number of things could have prevented employee exposure to this hazard.
>
> Koskela also cited Hytech for failure to use fall protection.
>
> Q. And what does WAC 296-155-2451[0] require based on your training and understanding?
> A. It requires employees who are working over ten feet to be protected from falls.
> Q. Why did you cite Hytec[h] Roofing for violation of this rule?
> A. I cited them because they were working in the southwest area at the end of the parapet wall where there was no -- it was just a roof edge. There was no parapet wall or no fall protection, no harnesses or anything like that used. And they worked up to the roof edge or in proximity of the roof edge without any kind of fall protection or monitoring.

The Department issued a Citation and Notice of Assessment on April 3, 2009. The Citation and Notice of Assessment states, in pertinent part:

> **Violation 1 Item 1** **Violation Type: Serious**
> WAC 296-155-505(4)(a)
>
> The employer did not ensure that 5 approximately 26"x36" HVAC floor openings on the upper roof area were uncovered. An employee fell through one of the openings approximately 30 feet to the ground, sustaining severe, permanent injuries.
>
> Falls of 30 feet to concrete could potentially cause severe permanent injury or death.

This violation was corrected during the inspection.
Assessed penalty: $1,350.00

Violation 1 Item 2 **Violation Type: Serious**
WAC 296-155-24510

The employer did not ensure that three employees, installing roofing material on the SE corner of the roof of a commercial building under construction, used fall protection.

The employees were exposed to falls of up to approximately 30 feet to dirt, which could potentially cause severe permanent disability or death.

This violation was corrected during the inspection.
Assessed penalty: $300.00

Hytech appealed the Citation and Notice of Assessment to the Board. The Board scheduled a hearing before an industrial appeals judge (IAJ). At the beginning of the hearing, Hytech conceded that "there was a 26" by 36" opening in the roof; that the opening was not covered; that the employee was not wearing any fall protection (arrest or restraint) equipment; [and] that the opening was not properly guarded with fall protection monitor." Hytech also conceded that its employees were exposed to a serious hazard substantially likely to cause serious injury or death.[3]

Nonetheless, Hytech claimed the Citation and Notice of Assessment should be vacated because it did not have any knowledge of the hazards, and in the alternative asserted the affirmative defense of unpreventable employee misconduct. A number of witnesses testified at the three-day hearing including Gross, Allsop, and Koskela.

Gross testified about Hytech's safety planning, accident prevention program, training for employees, and weekly safety meetings. However, Gross admitted that

[3] Consistent with Hytech's concessions, finding of fact 2 of the proposed decision and order states:

> In regards to Item Nos. 1-1 and 1-2 of the Citation and Notice, employer does not contest that on January 13, 2009 at the site of the inspection, there was a 26" by 36" opening on the roof; that the opening was not covered; that the employee was not wearing any fall protection (arrest or restraint) equipment; that the opening was not properly guarded with fall protection monitor; or that there was a serious exposure to a hazard.

Hytech had no documentation for site visits to ensure compliance with safety regulations, and that he did not visit the jobsite while the crew was working on the Bakerview Square project. Gross also testified that from August 2007 to January 12, 2009, only two Hytech employees had been disciplined. One employee was disciplined for causing property damage, and Gross could not recall the details of the other disciplinary action.

Allsop testified that he was responsible for following the safety plan, and admitted the crew did not use fall protection or a safety monitor while working on the Bakerview Square project. Allsop testified that he knew the uncovered HVAC openings were a hazard but he took a "short cut" because "I was behind from the beginning on this project, and I was worried about falling further behind."

Koskela testified about the safety violations, his interviews, calculation of the penalty, and his inspection of the work site. The IAJ admitted into evidence a number of photographs showing the uncovered HVAC openings on the roof.

In a proposed decision and order, the IAJ concluded Hytech committed a serious violation of WAC 296-155-505(4)(a) and WAC 296-155-24510 but vacated the citation and assessment of penalties.

The IAJ found the Department established the serious WISHA violations, and rejected Hytech's argument that it did not have knowledge of the work site hazard created by the uncovered HVAC openings. Finding of fact 3 states:

> Employer knew or with exercise of reasonable diligence could have known, that Mr. Moorlag would fall through an HVAC opening on the roof on which Scholten Roof Enterprises, Inc., dba Hytech Roofing Inc. (Scholten), employees were working.

However, the IAJ concluded Hytech met its burden of establishing the affirmative defense of unpreventable employee misconduct.[4]

The Department filed a petition for review of the proposed decision and order. The Department argued that Hytech did not meet its burden of proving the affirmative defense of unpreventable employee misconduct because it did not take adequate steps to discover and correct safety violations, and did not effectively enforce its safety plan.

The Board accepted review and issued a "Decision and Order." The Board ruled that Hytech committed serious violations of WAC 296-155-505(4)(a) and WAC 296-155-24510, and that Hytech did not meet its burden of proving the affirmative defense of unpreventable employee misconduct.

The Board notes there was evidence that supported the affirmative defense. The Decision and Order states, in pertinent part:

> A summary of the facts related to the defense as codified at RCW 49.17.120(5)(a) reveals the following facts that support the employee misconduct defense:
>
> 1. The employer had regular weekly safety meetings that were documented and actually focused on planned safety topics.
> 2. The employer had safety orientation for all employees (also documented).
> 3. The employer had a safety director responsible for safety planning and training.
> 4. The employer had a comprehensive accident prevention program.

[4] The proposed decision and order states, in pertinent part:

4. The affirmative defense of unpreventable employee misconduct as defined in RCW 49.17.120(5), applies to the circumstances of Citation and Notice No. 312812852.
5. The employer, Scholten, showed the existence of a thorough safety program, including work rules, training, and equipment designed to prevent the violations.
6. The employer, Scholten, showed the existence of adequate communication of these rules to the employees.
7. The employer, Scholten, showed the existence of taking steps to discover and correct violations of its safety rules.
8. The employer, Scholten[,] showed the existence of effective enforcement of its safety program as written in practice and not just in theory.

5. The employer had a fall protection plan on site for this job.
6. The employer had a graduated disciplinary process for safety violations.

However, the Board found the evidence also showed that Hytech failed to effectively enforce the safety program, and "did not take adequate steps to discover and correct violations." The Decision and Order states, in pertinent part:

> On the negative side, worksite visits to determine safety compliance were sporadic, at best. In fact, there was no documentary evidence to support any such visits. Also, there was little evidence of actual discipline for safety violations prior to the January 13, 2009 incident. True, Mr. Allsop was disciplined for the incident at hand, but of the other two disciplinary incidents alluded to in the record, one was primarily for property damage and Mr. Gross could not recall the details of the second. In addition, there is no mention of any disciplinary process in the accident prevention program. (See, Exhibit 21). We 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. We also are not satisfied that Hytech has taken adequate steps to discover and correct violations of its safety rules. Hytech conducts only minimal worksite visits, which are undocumented. We affirm the citation and notice.

The findings of fact state, in pertinent part:

3. On January 5, 2009, and January 13, 2009, Hytech failed to effectively enforce safety rules regarding fall protection when its foreman on site knew that workers, including himself, should have used fall protection to protect themselves from a serious hazard.
4. Hytech has an adequate safety program, including safety rules and safety training for its employees.
5. Hytech did not take adequate steps to discover and correct violations of its safety rules.
6. 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.

Hytech appealed the Board's Decision and Order. The superior court reversed the decision of the Board and vacated the citation and penalties. The Department

appeals.

ANALYSIS

The Department contends the court erred in reversing the decision of the Board and vacating the Citation and Notice of Assessment for the serious WISHA violations.

We review a decision by the Board based on the record before the agency. Legacy Roofing, Inc. v. Dep't of Labor & Indus., 129 Wn. App. 356, 363, 119 P.3d 366 (2005). In a WISHA appeal, the Board's findings of fact are conclusive if supported by substantial evidence. RCW 49.17.150(1); Inland Foundry Co., Inc. v. Dep't of Labor & Indus., 106 Wn. App. 333, 340, 24 P.3d 424 (2001). Substantial evidence is evidence in sufficient quantity to persuade a fair-minded person of the truth of the declared premise. Mowat Constr. Co. v. Dep't of Labor & Indus., 148 Wn. App. 920, 925, 201 P.3d 407 (2009). We view the evidence and reasonable inferences in the light most favorable to the prevailing party; here, the Department. Erection Co., Inc. v. Dep't of Labor & Indus., 160 Wn. App. 194, 202, 248 P.3d 1085 (2011). Unchallenged findings are verities on appeal. Moreman v. Butcher, 126 Wn.2d 36, 39, 891 P.2d 725 (1995). If there is substantial evidence to support the findings, we then determine whether the findings support the conclusions of law. RCW 49.17.150(1); Mid Mountain Contractors, Inc. v. Dep't of Labor & Indus., 136 Wn. App. 1, 4, 146 P.3d 1212 (2006).

The purpose of WISHA is to "assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington." RCW 49.17.010. WISHA statutes and regulations are interpreted

liberally in order to achieve the purpose of providing safe working conditions for workers in Washington. Inland Foundry, 106 Wn. App. at 336. See RCW 49.17.050, .120, and .180.[5]

WISHA requires an employer to "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." RCW 49.17.060(1). WISHA also imposes a specific duty requiring employers to "comply with the rules, regulations, and orders promulgated under [WISHA]." RCW 49.17.060(2); J.E. Dunn Nw., Inc., v. Dep't of Labor & Indus., 139 Wn. App. 35, 48, 156 P.3d 250 (2007). RCW 49.17.180 mandates the Department assess a penalty against an employer for a serious violation of WISHA. The Department bears the initial burden of proving a WISHA violation. WAC 263-12-115(2)(b); SuperValu, Inc. v. Dep't of Labor & Indus., 158 Wn.2d 422, 433, 144 P.3d 1160 (2006).

A serious violation in the workplace is defined as follows:

> [A] substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use in such work place, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

RCW 49.17.180(6).

To establish a serious violation of a WISHA safety regulation, the Department has the burden of proving that

"(1) the cited standard applies; (2) the requirements of the standard were

[5] In interpreting WISHA, Washington courts look to federal decisions interpreting similar provisions of the Occupational Safety & Health Act of 1970, 29 U.S.C. chapter 15. Wash. Cedar & Supply Co., Inc. v. Dep't of Labor & Indus., 119 Wn. App. 906, 914, 83 P.3d 1012 (2004).

> not met; (3) employees were exposed to, or had access to, the violative condition; (4) the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition; and (5) there is a substantial probability that death or serious physical harm could result from the violative condition."

Wash. Cedar & Supply Co., Inc. v. Dep't of Labor & Indus., 119 Wn. App. 906, 914, 83 P.3d 1012 (2004)[6] (quoting D.A. Collins Constr. Co. v. Sec'y of Labor, 117 F.3d 691, 694 (2d Circ. 1997)).

The Department cited Hytech for committing two serious WISHA violations: (1) failure to guard floor openings in violation of WAC 296-155-505(4)(a), and (2) not using fall protection in violation of WAC 296-155-24510.

The Department contends substantial evidence supports the finding that Hytech knew or, with the exercise of reasonable diligence, could have known that there were uncovered HVAC openings that exposed employees to the hazard of falling.

"[C]onstructive knowledge is sufficient to prove knowledge of the violative condition." BD Roofing, Inc., 139 Wn. App. 98, 109, 161 P.3d 387 (2007). Constructive knowledge of a WISHA violation may be established in a number of ways, including evidence showing that the violation was readily observable, or in a conspicuous location in the area where the employees are working. BD Roofing, 139 Wn. App. at 109.

> "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., 160 Wn. App. at 206-07 (quoting Kokosing Constr. Co. v. Occupational

[6] (Internal quotation marks and citation omitted.)

Safety & Hazard Review Comm'n, 232 Fed. App'x 510, 512 (6th Cir. 2007)).

In Secretary of Labor v. Kokosing Construction Co., Inc., 17 BNA OSHC 1869, 1996 WL 749961 (No. 92-2596), the commission found that although there was no direct evidence that the employer knew that a dangerous section of rebar was uncovered, the compliance officer "observed the unguarded rebar in plain view when he entered the work area to conduct his inspection and that it would have been in plain view of Kokosing's employees because the work area was 'traveled.' " Kokosing, 1996 WL 749961 at *2. The Board held that the "conspicuous location, the readily observable nature of the violative condition, and the presence of Kokosing's crews in the area warrant[ed] a finding of constructive knowledge." Kokosing, 1996 WL 749961 at *2.

While there is no dispute that Hytech did not have actual knowledge, there is substantial evidence that Hytech had constructive knowledge of the WISHA violations. When compliance safety officer Koskela arrived at the work site at approximately 1:00 p.m. on January 13, the uncovered and unguarded HVAC openings on the roof were in plain view in a conspicuous location, and the violations of the WISHA safety regulation was readily observable.[7] Further, there is no dispute that Hytech employees were

[7] Because we conclude substantial evidence establishes that the serious WISHA violations were in plain view and readily apparent, we need not address Hytech's argument that Allsop's knowledge cannot be imputed to it. However, we note that "[k]nowledge or constructive knowledge may be imputed to an employer through a supervisory agent." N.Y. State Elec. & Gas Corp. v. Sec'y of Labor, 88 F.3d 98, 105 (2nd Cir. 1996); Danis-Shook Joint Venture XXV v. Sec'y of Labor, 319 F.3d 805, 811 (6th Cir. 2003); Dover Elevator Co. v. Sec'y of Labor, 16 BNA OSHC 1281, 1993 WL 275823 at *7 (No. 91-862); W.G. Yates & Sons Constr. Co. Inc. v. Occupational Safety & Health Review Comm'n, 459 F.3d 604, 607 (5th Cir. 2006). The cases Hytech relies on distinguish violations that affect only a supervisor and violations that affect the employees. See W.G. Yates, 459 F.3d at 609 n.7 (The court expressly distinguished the violation of only the foreman and imputed to the employer knowledge of the safety violations of the employees he supervised, and held the "the supervisor's knowledge of an employee's unsafe conduct is imputable to his 'master,' the employer."); Mountain States Tel. & Tel. Co. v. Occupational Safety & Health Review Comm'n, 623 F.2d 155, 158 (10th Cir. 1980) (a supervisor's

working around uncovered and unguarded HVAC openings on January 5 and 13, and that the crew worked near the edge of the roof without fall protection.

When viewed in the light most favorable to the Department, substantial evidence supports finding that Hytech knew or, with the exercise of reasonable diligence, could have known that the HVAC openings created a substantial probability of serious physical harm or death.

Substantial evidence also supports the Board's determination that Hytech did not meet its burden of proving the affirmative defense of unpreventable employee misconduct. If the Department establishes a WISHA violation, the burden shifts to the employer to prove "unpreventable employee misconduct" was the cause of the violation. RCW 49.17.120(5)(a); Wash. Cedar & Supply Co., Inc. v. Dep't of Labor & Indus., 137 Wn. App. 592, 602, 154 P.3d 287 (2007).

RCW 49.17.120(5)(a) sets out the elements the employer must prove to establish the affirmative defense of unpreventable employee misconduct:

> No citation may be issued under this section if there is unpreventable employee misconduct that led to the violation, but the employer must show the existence of:
>
> (i) A thorough safety program, including work rules, training, and equipment designed to prevent the violation;
>
> (ii) Adequate communication of these rules to employees;
>
> (iii) Steps to discover and correct violations of its safety rules; and
>
> (iv) Effective enforcement of its safety program as written in practice and not just in theory.

While the Board found that Hytech held regular safety meetings and had a written safety program, including a disciplinary process for safety violations, substantial evidence supports the findings that Hytech failed to take steps to discover and correct

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knowledge that employees are not complying with safety standards is imputed to the employer).

violations, and that it did not effectively enforce its safety program.[8]

The evidence showed that "worksite visits to determine safety compliance were sporadic, at best." Gross testified that he met with the superintendant of the Bakerview Square project in December and identified safety hazards at the work site, but admitted he did not return to the jobsite while Hytech employees were working on the project. Gross also testified that he was project manager for 75 percent of Hytech's flat-roof projects but generally only visited work sites every two weeks, depending on the job, and did not document site visits. The record also supports the findings that there was "little evidence of actual discipline for safety violations prior to the January 13, 2009 incident," and "there is no mention of any disciplinary process in the accident prevention program." The evidence shows that no employees had been disciplined for a safety violation before January 13, 2009.

We reverse the superior court and affirm the decision of the Board.

Schindler, J.

WE CONCUR:

Leach, C.J.

Cox, J.

[8] The Board also "question[ed] 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."