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A STUTE OBSERVATION: RE-EXAMINING WASHINGTON'S ENFORCEMENT OF WORKPLACE SAFETY REGULATIONS

Ben Moore*

Abstract: In 1973, the Washington State Legislature enacted the Washington Industrial Safety and Health Act. The stated purpose of the Act was to ensure safe working conditions for the working men and women of Washington. Seventeen years later, the Washington State Supreme Court held that general contractors are per se liable for the WISHA violations of their subcontractors. However, the Washington Department of Labor and Industries has adopted a policy of citing general contractors for subcontractor violations only in limited circumstances. This Comment first outlines the development of worker safety laws in Washington, then examines the effects of the Department's policy at both the administrative and appellate level. Finally, this Comment argues that the Department's policy is contrary to the governing law and should be altered to be in line with the law, avoid potential confusion on appeal, and fulfill the purpose of WISHA: to protect Washington's workers.

INTRODUCTION

In December 2016, approximately 193,000 people in Washington worked on a construction site.¹ Over the course of that year, 14 fatal² and 9,400 non-fatal injuries³ occurred on those sites. The incident rate for non-fatal injuries on Washington construction sites in 2016 was 6.4 per 100

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1. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, ECONOMY AT GLANCE: WASHINGTON (Feb. 22, 2018), https://data.bls.gov/timeseries/SMS5300000200000001?amp%253bdata_tool=XGtable&output_view=data&include_graphs=true [https://perma.cc/MR8R-W6KA].

2. WASH. DEP'T OF LABOR & INDUS., 2016 WASHINGTON STATE CENSUS OF FATAL OCCUPATIONAL INJURIES (CFOI), (2017), <http://www.lni.wa.gov/ClaimsIns/Files/DataStatistics/blsi/FATAL2016CFOIWA.pdf> [https://perma.cc/3F3S-SAEJ].

3. WASH. DEP'T OF LABOR & INDUS., INCIDENT RATES OF NONFATAL OCCUPATIONAL INJURIES AND ILLNESSES BY SELECTED INDUSTRIES AND CASE TYPES (2017), <http://www.lni.wa.gov/ClaimsIns/Files/DataStatistics/blsi/NONFATAL2016WASummary.pdf> [https://perma.cc/U4RH-8N2F].

full-time workers as compared to 3.2 per 100 full-time workers across the United States.⁴

Currently, the University of Washington is engaged in a \$99 million, two-year construction of a new building for the Burke Museum.⁵ The Capital Projects Office of the University of Washington awarded the construction contract to Skanska, which in turn acts as the general contractor for the museum project.⁶ In this role, Skanska oversees the construction and hires subcontractors to perform specialized work, such as laying foundation and installing plumbing, wiring, roofing, etc.⁷ While it may subcontract out tasks, Skanska is ultimately responsible for the museum's construction, including ensuring that all subcontracted work is completed on time and within budget.⁸ Skanska, beyond fulfilling the terms of its contract, must also ensure that it follows all relevant safety laws during construction.⁹ In Washington, the Department of Labor and Industries's Division of Occupational Safety and Health (DOSH) polices such compliance.¹⁰

Consider the following unfortunate possibility. Bob, a roofer, works regularly for a roofing contractor in the Seattle area. The roofing contractor secures a contract from Skanska to complete some roofing work at the Burke Museum. While completing the work, on a typical rainy Seattle day, Bob loses his footing on the slick roof and falls, breaking his leg. After being taken to the hospital, the incident is reported as a workplace injury to the Washington Department of Labor and Industries (Department).¹¹ That report triggers a DOSH investigation into the serious injury Bob sustained.¹² During the investigation, it comes to light that Bob fell off the side of the roof where a safety railing had been removed¹³ the previous day by an unknown actor on the busy construction site. The

4. *Id.*

5. *See Washington's Oldest Museum Is Becoming Washington's Newest Museum*, BURKE MUSEUM (2017), <http://newburke.org/construction> [<https://perma.cc/44LK-7HA7>].

6. *Skanska Announced as the General Contractor/Construction Manager for New Burke Museum*, BURKE MUSEUM (Mar. 19, 2015), <http://www.burkemuseum.org/press/skanska-announced-general-contractorconstruction-manager-new-burke-museum-0> [<https://perma.cc/WW4H-VLTM>].

7. *See Contractor*, BLACK'S LAW DICTIONARY 400 (10th ed. 2014).

8. *Id.*

9. *See* WASH. REV. CODE § 49.17.060 (2016).

10. *About WISHA, DOSH, and OSHA*, WASH. STATE DEP'T OF LABOR AND INDUS., <http://www.lni.wa.gov/SAFETY/TOPICS/ATOZ/ABOUT/DEFAULT.ASP#DOSH> [<https://perma.cc/YN62-TUSH>].

11. Pursuant to WASH. ADMIN. CODE § 296-27-031 (2016).

12. *Id.* § 296-900-12005.

13. In violation of WASH. ADMIN. CODE § 296-155-24609 (2016).

DOSH compliance officer must now make a determination: who violated the relevant safety regulation that led to Bob's injury? Is the roofing contractor that employs Bob responsible for the violation? Does ultimate responsibility lie with Skanska because it controls the entire worksite? Or is neither group liable, but rather the unknown employer—i.e. another subcontractor working on the project—of whomever removed the railing in the first place? Should the officer only cite one of the employers or should all three (Skanska, Bob's employer, and the employer of whomever removed the railing) be cited because all three could have prevented the injury?

This Comment argues that under the Washington Industrial Safety and Health Act (WISHA), ultimate responsibility may rest with all three actors. And, according to the Washington State Supreme Court's decision in *Stute v. P.B.M.C., Inc.*,¹⁴ the Department must, at the bare minimum, cite the general contractor.¹⁵

This Comment proceeds in five parts. Part I explores the history of worker safety laws in Washington State and the adoption of WISHA.¹⁶ Part II tracks the development of general contractor liability for subcontractor WISHA violations through Washington Court decisions. Part III addresses the Department's post-*Stute* policy decisions and guidelines for citing general contractors for subcontractor WISHA violations, with special emphasis on the current citation scheme. Part IV examines two administrative decisions from the agency that hears WISHA violation appeals and the agency's attempts to grapple with both the law and the Department's citation policy. Finally, Part V argues that the Department should change its current policy because it is not supported by current Washington law, causes confusion before both the administrative agency and courts, and harms Washington's workers.

I. WORKER SAFETY IN WASHINGTON: FROM CONSTITUTIONAL MANDATE TO COMPREHENSIVE REGULATORY SCHEME

Part I offers a brief overview of Washington's pre-1970 worker safety history, the enactment of the federal Occupational Safety and Health Act of 1970 (OSHA), and Washington's adoption of its state-run worker safety plan as allowed by the federal act. It then provides background on the Department's authority and duties under WISHA.

14. 114 Wash. 2d 454, 788 P.2d 545 (1990).

15. *See generally id.*

16. WASH. REV. CODE § 49.17 (2016).

A. *The Enactment of the Washington Industrial Safety and Health Act of 1973*

Like only twenty other states, Washington's Constitution mandates legislative protection of its workers.¹⁷ Specifically, the Washington Constitution states, "[t]he legislature shall pass necessary laws for the protection of persons working in mines, factories and other employments dangerous to life or deleterious to health; and fix pains and penalties for the enforcement of the same."¹⁸ In the first ninety years after the ratification of the Washington Constitution, the legislature passed numerous worker safety laws in compliance with its constitutional mandate.¹⁹ Those protections included the regulation of the work day, worker safety record-keeping requirements, the creation of the Bureau of Labor to perform workplace inspections, equipment and premises safeguards, and the establishment of a workers compensation program.²⁰ Many of these protections remain in force today.²¹

Beyond the State constitutional mandate, the Washington State Legislature decided to opt into a more rigorous safety program than the required federal system. In 1970, Congress created a federal program for protecting worker safety and health²² by enacting OSHA.²³ OSHA allows states to create their own systems for protecting worker safety and health so long as the individual state plan obtained certification from OSHA after review and approval.²⁴ As of 2017, Washington is one of twenty-two jurisdictions²⁵ that has an approved state plan.²⁶ In 1973, the Washington State Legislature enacted WISHA.²⁷ WISHA acts as the state-run counterpart to OSHA, allowing state control over occupational health and

17. EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 113–14 (2013).

18. WASH. CONST. art. II, § 35.

19. Alan S. Paja, *The Washington Industrial Safety and Health Act: WISHA's Twentieth Anniversary, 1973–1993*, 17 U. PUGET SOUND L. REV. 259, 259–62 (1994) (discussing the state of worker safety laws in Washington before the passage of WISHA).

20. *Id.* at 259–61.

21. *See, e.g.*, WASH. REV. CODE § 49.17 (workplace safety); WASH. REV. CODE § 51.04.010 (workers' compensation); WASH ADMIN. CODE § 296-17-35204 (workers' compensation).

22. *See* Paja, *supra* note 19, at 263.

23. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified at 29 U.S.C. §§ 651–678).

24. *See* Paja, *supra* note 19, at 264.

25. Twenty-one states and Puerto Rico.

26. MARK A. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW § 3:10 (2018).

27. WASH. REV. CODE § 49.17 (2016); *see also* Paja, *supra* note 19, at 259.

safety, so long as such control meets or exceeds federal standards.²⁸ WISHA begins with a statement of purpose declaring that it is in the public interest to protect the health and safety of Washington’s workers:

The legislature finds that personal injuries and illnesses arising out of conditions of employment impose a substantial burden upon employers and employees Therefore, in the public interest for the welfare of the people of the state of Washington and in order to assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington, the legislature . . . declares its purpose by provisions of this chapter to create, maintain, continue, and enhance the industrial safety and health program of the state²⁹

Scholars have noted that “[a]lthough the legislative history of WISHA is not extensive, there is enough to indicate that the legislative intent in passing WISHA was to strengthen and centralize the regulatory powers of the state in the area of job site safety.”³⁰ As per federal mandate, WISHA requires the State’s worker safety program to equal or exceed OSHA standards.³¹

B. How the Department Enforces WISHA

The Department manages and develops the WISHA-mandated worker safety program.³² WISHA establishes general safety principles and grants the Department broad authority to develop regulations to ensure those principles are met.³³ Under this broad statutory authority, the Department has promulgated a variety of worker safety regulations.³⁴ WISHA, as part of the general principles established in its statutory enactment, places a “two-fold duty” on employers.³⁵ WISHA requires that employers

28. 29 C.F.R. § 1902.42 (2018); *see also* Paja, *supra* note 19, at 265.

29. WASH. REV. CODE § 49.17.010.

30. Stephen L. Bulzomi & John L. Messina, *Washington’s Industrial Safety Regulations: The Trend Towards Greater Protection for Workers*, 17 U. PUGET SOUND L. REV. 315, 321 (1994).

31. WASH. REV. CODE § 49.17.010.

32. *See id.* § 49.17.040 (“The director shall make, adopt, modify and repeal rules and regulations governing safety and health standards for conditions of employment”); *Id.* § 49.17.020(2) (“The term ‘director’ means the director of the department of labor and industries, or his or her designated representative.”); Paja, *supra* note 19, at 265 (“WISHA entrusts to Labor and Industries full responsibility for occupational safety and health in the state.”).

33. *See* WASH. REV. CODE § 49.17.040.

34. *See* WASH. ADMIN. CODE §§ 296-05-001–296-901-14032 (2018).

35. *See* Paja, *supra* note 19, at 265 (“WISHA establishes the two-fold duty of every employer not only to comply with promulgated regulations but also to ‘furnish to each of his employees a place of

(1) provide “a place of employment free from recognized hazards” and (2) comply with all “rules, regulations, and orders” promulgated by the Department.³⁶ Thus, an employer is statutorily required to provide a safe work place and also comply with all relevant safety regulations.

As part of its enforcement of WISHA, the Department, through DOSH, conducts worksite inspections to determine compliance with safety statutes and regulations.³⁷ Violations are categorized as some combination of the following terms: general, serious, willful, or repeat.³⁸ A serious violation is one that creates a “substantial probability that death or serious physical harm could result” from the violation.³⁹ A general violation is one that has been “specifically determined not to be of a serious nature.”⁴⁰ Willful and repeat violations are modifiers of serious or general violations that exist when either of the necessary pre-conditions, willfulness or the repetitive nature of the violation, is present.⁴¹

If DOSH finds a violation during a compliance inspection, it issues a citation to the employer.⁴² The citation must be issued “with reasonable promptness” and must “describe with particularity the nature of the violation, including a reference to the provisions of the statute, standard, rule, regulation, or order alleged to have been violated.”⁴³ If DOSH issues a citation, absent specific limitations,⁴⁴ the Department may levy civil penalties against the employer.⁴⁵

Penalties for citations are levied based upon either a statutorily imposed amount or, for serious violations, an assigned “gravity.”⁴⁶ A citation’s gravity is calculated by multiplying the severity of the violation by the probability that the violation would result in an injury.⁴⁷ Severity is rated

employment free from recognized hazards that are causing or likely to cause serious injury or death to his employees.”).

36. WASH. REV. CODE § 49.17.060.

37. Paja, *supra* note 19, at 267–70.

38. WASH. REV. CODE § 49.17.180.

39. *Id.* § 49.17.180(6). However, a serious violation cannot be issued if the “employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.” *Id.*

40. *Id.* § 49.17.180(3).

41. *Id.* § 49.17.180(1).

42. WASH. REV. CODE § 43.05.090(2) (2016).

43. WASH. REV. CODE § 49.17.120.

44. WASH. REV. CODE § 43.05.090(2)(a)–(d) (“The citation shall not assess a penalty if the violations: (a) Are determined not be of a serious nature; (b) Have not been previously cited; (c) Are not willful; and (d) Do not have a mandatory penalty under chapter 49.17 RCW.”).

45. WASH. REV. CODE § 49.17.180.

46. WASH. ADMIN. CODE § 296-900-14010 (2017).

47. *Id.*

on a three point scale.⁴⁸ A severity of three signifies that a resultant injury would likely result in death or permanent disability.⁴⁹ A severity of one signifies that an injury would not require hospitalization.⁵⁰ Probability is also rated on a three point scale.⁵¹ A three indicates a high probability the injury would have occurred and a one indicates a low probability the injury would have occurred as a result of the violation.⁵² The highest possible gravity for a citation is a gravity of nine.⁵³ However, if the violation “could cause injury or illness to an employee but would not result in serious physical harm,” the violation is categorized as a “general violation” and does not result in a civil penalty for a first time offense.⁵⁴

Although the Act mandates that the Department “shall” issue citations, it also provides for three statutory exceptions to this requirement.⁵⁵ First, the Department may not issue a citation more than six months after the “compliance inspection, investigation, or survey” reveals the violation.⁵⁶ Second, a citation will not be issued if the Director prescribes procedures for “notice in lieu of a citation with respect to de minimis violations.”⁵⁷ And third, no citation will be issued if the violation was the result of unpreventable employee misconduct.⁵⁸ As the first two exceptions have not been affected by the Washington State Supreme Court’s general contractor jurisprudence, they are not explored further in this Comment. This Comment focuses on the legal consequences of the standards applied to the affirmative defense of unpreventable employee misconduct.

Unpreventable employee misconduct is a statutory defense to WISHA violations.⁵⁹ Under WISHA, unpreventable employee misconduct is an affirmative defense.⁶⁰ To assert the defense, the employer must show:

- (i) [a] thorough safety program, including work rules, training, and equipment designed to prevent the violation;
- (ii) [a]dequate communication of these rules to employees;
- (iii) [s]teps to

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. WASH. REV. CODE §§ 49.17.120(2), (4), (5) (2016).

56. *Id.* § 49.17.120(4).

57. *Id.* § 49.17.120(2).

58. *Id.* § 49.17.120(5).

59. *Id.*

60. *Potelco, Inc. v. Dep’t of Labor & Indus.*, 194 Wash. App. 428, 435, 377 P.3d 251, 255 (2016).

discover and correct violations of its safety rules; and (iv) [e]ffective enforcement of its safety program as written in practice and not just in theory.⁶¹

The employer bears the burden to prove each element of the defense.⁶² “[F]urthermore, ‘the evidence must support the employer’s assertion that the employees’ misconduct was an isolated occurrence and was not foreseeable.’”⁶³ Only if the employer can prove all the elements of the defense will the reviewing body overturn the citation.⁶⁴

When the Department issues a citation and a cited employer disagrees with the decision, the party may appeal the citation.⁶⁵ To appeal a citation, the party must first notify the director of the Department of its intention to appeal.⁶⁶ After this notification, the director may reassume jurisdiction of the matter and issue a corrective notice of redetermination or allow the appeal to proceed directly to the Board of Industrial Insurance Appeals (Board).⁶⁷ The Board hears all appeals from citations issued for WISHA violations.⁶⁸ Decisions issued by the Board may be appealed to superior court.⁶⁹ The superior court reviews Board findings of fact under a substantial evidence standard and the Board’s conclusions of law *de novo*.⁷⁰ Although review of the Board’s conclusions of law is *de novo*, the courts give “substantial weight to [the Department’s] interpretation of statutes and regulations within its area of expertise.”⁷¹ A Board finding that the Department has established the existence of a violation is reviewed on appeal under a substantial evidence standard.⁷²

61. *Id.* (citing WASH. REV. CODE § 49.17.120(5)(a)).

62. *Id.* (citing *Wash. Cedar & Supply Co. v. Dep’t of Labor & Indus. (Wash. Cedar I)*, 119 Wash. App. 906, 911, 83 P.3d 1012, 1014 (2004)).

63. *Id.* (citing *BD Roofing, Inc. v. Dep’t of Labor & Indus.*, 139 Wash. App. 98, 111, 161 P.3d 387, 394 (2007)).

64. *Id.*

65. WASH. REV. CODE § 49.17.140 (2016).

66. *Id.* § 49.17.140(3).

67. *Id.*

68. *Id.*

69. *Id.* § 49.17.150.

70. *Id.* (“The findings of the board or hearing examiner where the board has denied a petition or petitions for review with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive.”); *Erection Co. v. Dep’t of Labor & Indus.*, 160 Wash. App. 194, 201, 248 P.3 1085, 1089 (2011).

71. *Wash. Cedar I*, 119 Wash. App. 906, 913, 83 P.3d 1012, 1015 (2004).

72. *J.E. Dunn Nw., Inc. v. Dep’t of Labor & Indus.*, 139 Wash. App. 35, 45, 156 P.3d 250, 255 (2007).

When a citation is appealed, the Department bears the burden of proving the underlying violation.⁷³ Washington courts have divided safety regulations into two categories: general duty and specific duty.⁷⁴ A general duty regulation is a regulation that creates a “non-specific duty that an employer take all reasonable steps to protect the safety of its employees.”⁷⁵ This general duty governs all employer safety obligations unless a more specific standard applies.⁷⁶ To prove a general duty violation, the Department must show “the employer failed to render the workplace free of (1) a *hazard*, which (2) was *recognized*, and (3) caused or was *likely to cause* death or serious injury.”⁷⁷ Further, the Department must specify what steps the employer needed to take and prove that those steps were “feasible.”⁷⁸ In contrast, when the Department alleges a violation of a specific standard it must establish only four elements: (1) [T]he cited standard applies; (2) the requirements of the standard were not met; (3) employees were exposed to, or had access to, the violative condition; [and] (4) the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition.⁷⁹

When citing under a specific standard, “it is not necessary to *even* prove that a hazard exists, just that the specific standard was violated.”⁸⁰ And unlike a citation under the general duty standard, the specific standard is presumed feasible and the employer bears the burden of proving infeasibility.⁸¹ A violation of a specific standard may be cited as “serious” with an additional showing that “‘there is a substantial probability that death or serious physical harm could result’ from the violative condition.”⁸² The Washington State Supreme Court has noted that the “clear evidentiary differences” between actions brought under specific and general duty standards create “increased difficulty” for the

73. WASH. ADMIN. CODE § 263-12-115(2)(b) (2017); *SuperValu, Inc. v. Dep’t of Labor & Indus.*, 158 Wash. 2d 422, 433, 144 P.3d 1160, 1165 (2006).

74. *Dep’t of Labor & Indus. v. Kaiser Aluminum & Chem. Corp.*, 111 Wash. App. 771, 779–80, 48 P.3d 324, 329–30 (2002).

75. *Wash. Cedar & Supply Co., Inc. v. Dep’t of Labor & Indus. (Wash. Cedar II)*, 137 Wash. App. 592, 602, 154 P.3d 287, 292 (2007).

76. *Id.* at 602–03, 154 P.3d at 293.

77. *SuperValu, Inc.*, 158 Wash. 2d at 433, 144 P.3d at 1165 (citing *Kaiser Aluminum*, 111 Wash. App. at 780, 48 P.3d at 330).

78. *Wash. Cedar II*, 137 Wash. App. at 602, 154 P.3d at 292–93.

79. *SuperValu, Inc.*, 158 Wash. 2d at 433, 144 P.3d at 1165.

80. *Id.* at 434, 144 P.3d at 1165.

81. *Id.*

82. *J.E. Dunn Nw., Inc. v. Dep’t of Labor & Indus.*, 139 Wash. App. 35, 44–45, 156 P.3d 250, 254 (2007) (quoting *Wash. Cedar I*, 119 Wash. App. 906, 914, 83 P.3d 1012, 1016 (2003)).

Department in proving general duty violations.⁸³ This increased difficulty heightens the emphasis on the Department's citation policy in ensuring employers are properly policed for workplace safety violations. The standards of proof required, as well as the availability of certain affirmative defenses, depends on the status of the employer, the regulations referenced, and the wording used in the citation.

II. A HIGHER STANDARD: THE EVOLUTION OF GENERAL CONTRACTOR LIABILITY

Part II examines the evolving jurisprudence of general contractor liability from the pre-WISHA common law approach explained in *Kelley v. Howard S. Wright Construction, Co.*⁸⁴ through the most recent interpretations of the requirements of WISHA.⁸⁵ This Part pays particular attention to the ramifications of the *Stute* decision, in which the Washington State Supreme Court held that general contractors are per se liable for the WISHA violations of their subcontractors.⁸⁶

A. *The Washington State Supreme Court's Pre-WISHA General Contractor Jurisprudence*

Prior to the enactment of WISHA, the common law governed workplace safety liability. In 1978, five years after the enactment of WISHA, the Washington State Supreme Court significantly expanded general contractor liability in *Kelley*. Although the Washington State Supreme Court announced its decision five years after the enactment of WISHA, the alleged injuries occurred prior to the enactment of the statute and thus provide a glimpse into the state of general contractor liability in Washington prior to WISHA.⁸⁷ In *Kelley*, the employee of a subcontractor sued the general contractor for negligence after falling twenty-nine feet onto a concrete floor.⁸⁸ The employee's claim against the general contractor was predicated on the general contractor's failure to provide a

83. *SuperValu, Inc.*, 158 Wash. 2d at 434, 144 P.3d at 1165–66.

84. 90 Wash. 2d 323, 582 P.2d 500 (1978).

85. See, e.g., *Afoa v. Port of Seattle (Afoa I)*, 176 Wash. 2d 460, 296 P.3d 800 (2013) (exploring the evolution of general contractor liability in Washington).

86. *Stute v. P.B.M.C., Inc.*, 114 Wash. 2d 454, 464, 788 P.2d 545, 550–51 (1990).

87. See Bulzomi & Messina, *supra* note 30, at 318–19; Gregory J. Duff, Comment, *Job Site Safety in Washington: Requiring Actual Control when Imposing Statutory Duties on Job Site Owners*, 17 U. PUGET SOUND L. REV. 355, 360–67 (1994).

88. *Kelley*, 90 Wash. 2d at 327, 582 P.2d at 503.

safety net in violation of an OSHA safety regulation.⁸⁹ Under the common law in Washington at the time, “one who engages an independent contractor is not liable for injuries resulting from the contractor’s work.”⁹⁰ However, an employer of an independent contractor could be liable if the employer “retains control over some part of the work.”⁹¹ The employer did not need to actually control the work of the contractor, but rather needed only to have the right to exercise control.⁹²

In finding for the employee, the *Kelley* Court expanded the common law control doctrine, holding that a general contractor had per se control over the worksite.⁹³ In explaining its decision to expand the liability of general contractors, the Court reasoned that such a rule would increase overall safety:

Placing ultimate responsibility on the general contractor for job safety in common work areas will . . . render it more likely that the various subcontractors being supervised by the general contractor will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment⁹⁴

However, *Kelley* relied in part on statutes that had been repealed and replaced in the interim with WISHA. Therefore, shortly after *Kelley*, all three divisions of the Washington Court of Appeals ruled that WISHA severely restricted the potential liability of jobsite employers.⁹⁵ All three divisions “construed WISHA as limiting the tort rights” of workers injured as a result of a violation by “an employer other than their own.”⁹⁶

B. Stute v. P.B.M.C., Inc.: The Washington State Supreme Court Rebuffs Attempts to Limit Liability Under WISHA

The confusion over the scope of general contractor liability remained until 1990 when the Washington State Supreme Court reaffirmed its ruling in *Kelley* and expanded general contractor liability further in *Stute*

89. *Id.*

90. Bulzomi & Messina, *supra* note 30, at 317.

91. *Id.* at 318.

92. *Id.*

93. *Kelley*, 90 Wash. 2d at 331, 582 P.2d at 505; Bulzomi & Messina, *supra* note 30, at 319.

94. *Kelley*, 90 Wash. 2d at 331, 582 P.2d at 505.

95. *Straw v. Esteem Constr. Co.*, 45 Wash. App. 869, 728 P.2d 1052 (1986) (Division Three); *Bozung v. Condominium Builders, Inc.*, 42 Wash. App. 442, 711 P.2d 1090 (1985) (Division Two); *Ward v. Ceco Corp.*, 40 Wash. App. 619, 699 P.2d 814 (1985) (Division One); Bulmozi & Messina, *supra* note 30, at 324.

96. Bulmozi & Messina, *supra* note 30, at 324.

v. *P.B.M.C., Inc.*⁹⁷ In *Stute*, the plaintiff, a roofing subcontractor, fell off a rain-slick roof while working without fall-protection gear or the benefit of scaffolding to break his fall.⁹⁸ At the time of the fall, the general contractor knew that “employees of the subcontractor were working on the roof without safety devices.”⁹⁹ After the accident, the plaintiff brought suit against the general contractor alleging it owed him a “duty to provide necessary safety devices at the job site.”¹⁰⁰ The *Stute* Court first examined the decisions reached by the three divisions of the Washington Court of Appeals and rejected those decisions as conflicting with binding precedent.¹⁰¹

After holding that a subcontractor employee is of the “class of persons” protected by WISHA, the Court turned to P.B.M.C.’s argument that it was not liable because it did not “control the work of the subcontractor.”¹⁰² The Court dismissed the argument holding that general contractors bear primary responsibility for jobsite safety:

Inasmuch as both the general contractor and subcontractor come within the statutory definition of employer, the primary employer, the general contractor, has, as a matter of policy, the duty to comply with or ensure compliance with WISHA and its regulations. A general contractor’s supervisory authority places the general in the best position to ensure compliance with safety regulations. For this reason, the prime responsibility for safety of all workers should rest on the general contractor.¹⁰³

The *Stute* Court emphatically clarified the point later in the opinion, “[a] general contractor’s supervisory authority is *per se control* over the workplace, and the duty [to comply with WISHA] is placed upon the general contractor as a matter of law.”¹⁰⁴ The *Stute* Court reaffirmed its pre-WISHA holding in *Kelley* stating that the policy reasons behind extending general contractor liability had not changed.¹⁰⁵ The Court

97. *Stute v. P.B.M.C., Inc.*, 114 Wash. 2d 454, 788 P.2d 545 (1990).

98. *Id.* at 456, 788 P.2d at 546.

99. *Id.*

100. *Id.*

101. *Id.* at 458–61, 788 P.2d at 547–49 (stating that the Court of Appeals decisions “conflict with this court’s holdings that the WISHA regulations apply to employees of independent contractors as well as direct employees of an employer. Employers must comply with the WISHA regulations to protect not only their direct employees but all employees on the job site”).

102. *Id.* at 460, 788 P.2d at 548.

103. *Id.* at 463, 788 P.2d at 550.

104. *Id.* at 464, 788 P.2d at 550–51 (emphasis added).

105. *Id.*

further clarified the importance of its decision, tying its reasoning to the underlying statutory decree of WISHA.¹⁰⁶ The Court stated that “to further the purpose of WISHA to assure safe and healthful working conditions for every person working in Washington, RCW 49.17.010, we hold the general contractor should bear the primary responsibility for compliance with safety regulations because the general contractor’s innate supervisory authority constitutes sufficient control over the workplace.”¹⁰⁷

In *Stute*, the Washington State Supreme Court diverged from the reasoning in *Kelley* by viewing a general contractor’s liability, not as based in the common law doctrine of control, but as a liability imposed by a statutory duty.¹⁰⁸ RCW 49.17.060(2) supplies the statutory authority for this duty.¹⁰⁹ While RCW 49.17.060(1) “imposes a general duty on employers to protect only the employer’s own employees from recognized hazards not covered by specific safety regulations[,]” RCW 49.17.060(2) “imposes a specific duty to comply with WISHA regulations.”¹¹⁰ The Washington State Supreme Court reaffirmed prior case law¹¹¹ that held that when an employer fails to follow a specific WISHA regulation, “all employees working on the premises are members of the protected class.”¹¹² Through its decision in *Stute*, the Washington State Supreme Court increased the protection of workers in Washington by imposing a statutory duty on both subcontractors and general contractors to comply with safety regulations.¹¹³ This increased protection conforms with the legislative intent behind WISHA.¹¹⁴ The Legislature’s two main concerns in enacting WISHA were to promote worker safety and to promote

106. *Id.* at 464, 788 P.2d at 550.

107. *Id.*

108. *See* Bulzomi & Messina, *supra* note 30, at 327 (“Whereas the *Kelley* court saw a general contractor’s innate supervisory authority as per se control sufficient to satisfy the control test and impose the common law duty as a matter of law, *Stute* viewed this innate supervisory authority as a policy justification to impose the statutory duty as a matter of law.”).

109. *See Stute*, 114 Wash. 2d at 458, 788 P.2d at 547 (“Thus, the specific duty clause of RCW 49.17.060(2), requiring employers to comply with applicable WISHA regulations, applies to employees of subcontractors.”).

110. *Id.* at 457, 788 P.2d at 547.

111. *See* *Adkins v. Aluminum Co. of Am.*, 110 Wash. 2d 128, 153, 750 P.2d 1257, 1271 (1988).

112. *Stute*, 114 Wash. 2d at 457, 788 P.2d at 547 (citing *Adkins*, 110 Wash. 2d at 153, 750 P.2d at 1271).

113. *See* Bulzomi & Messina, *supra* note 30, at 327–28 (“WISHA was not to be viewed as a step backwards in the protection of workers, but as a step forward.”).

114. *See id.* at 335.

efficiency in the administration of worker safety law.¹¹⁵ *Stute* is in direct concert with these aims as it promotes “certainty under the innate supervisory authority approach” and ensures compliance with WISHA by imposing civil liability on both general and subcontractors.¹¹⁶

In their 1994 article discussing the impact and potential reach of *Stute*, Stephen Bulzomi and John Messina argue that *Stute* liability should be extended to jobsite owners and developers to further promote the purpose of WISHA.¹¹⁷ They contend that “[u]nder the *Stute* approach, general contractors and owners know they are responsible for WISHA compliance, and subcontractors know they are responsible in their work area. The parties can figure their potential liability and prepare for it. This will save employers from unexpected liabilities.”¹¹⁸ Further, the scholars posit that restricting *Stute* to only general contractors would allow jobsite owners and developers to shrug off responsibility over areas they control by “intentionally abdicating control over safety.”¹¹⁹

C. *After Stute, Continued Expansion of Jobsite Liability Offered More Potential Liable Parties but Less Clear Liability*

During the three decades since *Stute*, Washington courts have continued to expand the potential scope of liability at the center of the decision. Contrary to the position advocated by Bulzomi and Messina, the Washington State Supreme Court refused to extend *per se* liability to jobsite owners.¹²⁰ However, courts have forged a middle ground incorporating the common law “control” doctrine to find liability for jobsite owners¹²¹ and upper-tier subcontractors.¹²²

115. *See id.*

116. *See id.*

117. *See id.* at 340–41.

118. *Id.* at 340.

119. *Id.* at 341 (“Such apathy is not what the legislature sought when it enacted WISHA. Owners should be encouraged to become more, not less, involved in the safety of the jobs they initiate.”).

120. *Kamla v. Space Needle Corp.*, 147 Wash. 2d 114, 127, 52 P.3d 472, 478 (2002) (“[A]s a jobsite owner, Space Needle is not similar enough to a general contractor to justify imposing the same nondelegable duty of care to ensure WISHA compliant work conditions.”).

121. *See, e.g., Afoa I*, 176 Wash. 2d 460, 472, 296 P.3d 800, 807 (2013) (“[I]t is settled law that jobsite owners have a specific duty to comply with WISHA regulations if they retain control over the manner and instrumentalities of work being done on the jobsite. Further, this duty extends to all workers on the jobsite that may be harmed by WISHA violations.”); *Kinney v. Space Needle Corp.*, 121 Wash. App. 242, 248, 85 P.3d 918, 921 (Wash. Ct. App. 2004) (“While jobsite owners are not *per se* liable under the statutory requirements of RCW 49.17 they may retain a similar degree of authority to control jobsite work conditions and subject themselves to WISHA regulations.”).

122. *See, e.g., Husfloen v. MTA Constr., Inc.*, 58 Wash. App. 686, 689–90, 794 P.2d 859, 861 (Wash. Ct. App. 1990) (“MTA maintains that *Stute* is distinguishable because it involved two rather

Washington courts have often looked to OSHA case law to aid in interpreting Washington worker safety laws.¹²³ In 2005, the Washington Court of Appeals adopted the “multi-employer worksite” doctrine, established in federal OSHA case law.¹²⁴ Under the doctrine, an employer at a multi-employer worksite is liable for a violation if the employer was a “creating, exposing, correcting, or controlling employer” of the violative hazard.¹²⁵ In *Martinez Melgoza & Associates Inc. v. Department of Labor & Industries*,¹²⁶ the Department issued a citation to an asbestos abatement consulting firm for violating seven WISHA regulations relating to unsafe asbestos work practices.¹²⁷ At the court of appeals, the firm contended that, as a consultant, it could not be “subject to penalties for WISHA violations.”¹²⁸ The firm argued that it was not sufficiently similar to a general contractor because it “did not design the project, hire or fire contractors, or negotiate change orders.”¹²⁹ The court discussed the “multi-employer worksite” doctrine applied in federal OSHA cases, and adopted the doctrine to hold that the firm, as the “controlling employer,” was liable for the WISHA violations.¹³⁰

1. The Federal Multi-Employer Worksite Doctrine Has Evolved Along Similar but Distinct Lines from Washington State Jobsite Liability Jurisprudence

The Federal “Multi-Employer Worksite” doctrine arises from a U.S. Department of Labor (DOL) OSHA directive outlining the DOL’s citation policy at multi-employer worksites.¹³¹ The directive is an agency policy

than three levels of employers as is the case here. This factual distinction is without consequence MTA did not avoid owing a duty to Husfloen merely because it was a subcontractor, not the general contractor of the project.”).

123. *See, e.g.,* *Adkins v. Aluminum Co. of Am.*, 110 Wash. 2d 128, 147, 750 P.2d 1257, 1268 (1988) (“In deciding what constitutes the exposure to a hazard which will trigger application of the regulations, we will consider decisions construing the federal counterpart to WISHA, OSHA, and federal decisions involving machine guarding regulations.”).

124. *Martinez Melgoza & Associates, Inc. v. Dep’t of Labor & Indus.*, 125 Wash. App. 843, 853, 106 P.3d 776, 781–82 (Wash. Ct. App. 2005).

125. *Id.* at 850, 106 P.3d at 780.

126. 125 Wash. App. 843, 106 P.3d 776 (Wash. Ct. App. 2005).

127. *Id.* at 846, 106 P.3d at 778.

128. *Id.* at 844–45, 106 P.3d at 777.

129. *Id.* at 853, 106 P.3d at 781.

130. *Id.* at 851–53, 106 P.3d at 780–82 (“We conclude that substantial evidence demonstrates that MMA, in actual practice, exercised sufficient control over the worksite so as to be liable for the WISHA citations under the multi-employer worksite doctrine.”).

131. OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP’T OF LABOR, OSHA INSTRUCTION: MULTI-EMPLOYER CITATION POLICY, CPL 02-00-124 (Dec. 10, 1999) [hereinafter OCCUPATIONAL

statement and did not go through notice and comment rulemaking procedures.¹³² However, it has been accepted by the Occupational Safety and Health Review Commission, the administrative body that hears OSHA disputes, as well as several U.S. Courts of Appeals.¹³³ The directive states OSHA policy for citing employers at multi-employer worksites and explains the four categories of employers at such sites that will be liable for violations.¹³⁴ Under the directive, an employer may be cited for a violation if the employer was the “creating, exposing, correcting, or controlling employer” of the hazard that led to the violation.¹³⁵ A “creating” employer is defined as “[t]he employer that caused a hazardous condition that violates an OSHA standard.”¹³⁶ An “exposing” employer is one “whose own employees are exposed to the hazard.”¹³⁷ A “correcting” employer is “[a]n employer who is engaged in a common undertaking, on the same worksite, as the exposing employer and is responsible for correcting a hazard.”¹³⁸ And finally, a “controlling” employer is “[a]n employer who has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them.”¹³⁹

Applying the OSHA directive, the Eighth Circuit found in *Marshall v. Knutson Construction Co.*¹⁴⁰ that a general contractor may be a controlling employer. The Eighth Circuit held that because general contractors “normally have the responsibility and the means to assure that other contractors fulfill their obligations with respect to employee safety where those obligations affect the construction worksite,” a general contractor could be a controlling employer.¹⁴¹ This duty is not “limited to the protection of its own employees . . . but extends to the protection of all

SAFETY & HEALTH ADMIN.],
https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_id=2024&p_table=DIRECTIVES
[<https://perma.cc/5425-6DYK>].

132. See Jon M. Philipson, *Owner Beware: OSHA's Impact on Tort Litigation by Independent Contractors' Injured Employees Against Business Premises Owners*, 66 U. MIAMI L. REV. 987, 994 (2012).

133. *Id.*

134. OCCUPATIONAL SAFETY & HEALTH ADMIN., *supra* note 131.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. 566 F.2d 596 (8th Cir. 1977).

141. *Id.* at 599.

employees engaged at the worksite.”¹⁴² However, the Eighth Circuit further stated that the standard set by the Occupational Safety and Health Review Commission in determining general contractor OSHA liability was whether “[the general contractor] could reasonably have been expected to prevent or abate by reason of its supervisory capacity.”¹⁴³ This lesser duty of a controlling employer is supported by the OSHA directive itself, which states that “the extent of the measures that a controlling employer must take to satisfy its duty to exercise reasonable care to prevent and detect violations is less than what is required of an employer with respect to protecting its own employees.”¹⁴⁴

2. *The Washington State Supreme Court Has Expressly Adopted the Multi-Employer Worksite Doctrine as a Distinct Form of Liability*

In 2013, the Washington State Supreme Court approved the adoption of the federal multi-employer worksite doctrine.¹⁴⁵ However, in approving the use of the doctrine to hold jobsite owners and other employers liable for WISHA violations, the Court distinguished “multi-employer worksite” liability from general contractor *Stute* liability.¹⁴⁶ The Court affirmed its previous ruling in *Kamla v. Space Needle Corp.*,¹⁴⁷ stating, “we held that although general contractors and similar employers *always* have a duty to comply with WISHA regulations, the person or entity that owns the jobsite is not per se liable for WISHA violations.”¹⁴⁸ The Court then went on to affirm that while jobsite owners do not have the same per se liability as general contractors, jobsite owners “have a duty to comply with WISHA only if they retain control over the manner in which contractors complete their work.”¹⁴⁹ In reaffirming the per se liability of general contractors and the potential liability for WISHA violations of other employers, the Court once again based its holding on the policy underlying the enactment of WISHA: the protection of Washington’s workers.¹⁵⁰

142. *Id.*

143. *Id.*

144. OCCUPATIONAL SAFETY & HEALTH ADMIN., *supra* note 131.

145. *Afoa I*, 176 Wash. 2d 460, 472, 296 P.3d 800, 807 (2013).

146. *Id.* at 471–72, 296 P.3d at 806–07.

147. 147 Wash. 2d 114, 52 P.3d 472 (2002).

148. *Afoa I*, 176 Wash. 2d at 472, 296 P.3d at 807.

149. *Id.*

150. *Id.* at 473, 296 P.3d at 808 (“We reaffirm *Goucher* and *Stute* and hold that WISHA’s specific duty does not require a direct employment relationship. To read the statute in any other way would contravene both federal law and WISHA’s clearly articulated policy of protecting workplace safety.”).

3. *Washington State Supreme Court Further Muddies the Waters Between Multi-Employer Worksite Doctrine and Stute Liability*

Recently, in July 2018, the Washington State Supreme Court issued a new opinion in *Afoa v. Port of Seattle*.¹⁵¹ Although the issue before the Court was the imposition of joint and several liability against the defendant,¹⁵² the opinion contains language that may further muddy the distinction between tort and WISHA liability. In the case, the jury had “apportioned fault” between the plaintiff, the Port of Seattle, and several airlines, and the plaintiff argued that the Port was vicariously liable for the airlines portion of the damages award.¹⁵³

In discussing whether the Port was jointly and severally liable for the actions of the airlines, the majority stated that “[u]nder some circumstances, jobsite owners may have a duty of care analogous to that of an employer or general contractor. A jobsite owner or general contractor will have this duty only if it maintains a sufficient degree of control over the work.”¹⁵⁴

It is possible that this statement, that both jobsite owners’ and general contractors’ duties are tied to the amount of control retained, could impact the general contractor WISHA liability described in *Stute*.¹⁵⁵ But this statement comes in a discussion of vicarious tort liability potentially imposed on a jobsite owner, rather than in a discussion of general contractor or jobsite owner liability for WISHA violations (the majority notably never references *Stute*).¹⁵⁶ While the effects of this decision on general contractor tort liability are beyond the scope of this Comment, it is unlikely that the decision displaced the rule announced in *Stute* that general contractors are per se liable for the WISHA violations of their subcontractors.¹⁵⁷

151. *Afoa v. Port of Seattle (Afoa II)*, No. 94525-0 (Wash. July 19, 2018).

152. *Id.*, slip op. at 1.

153. *Id.*

154. *Id.*, slip op. at 9 (internal citations omitted).

155. *Id.*, slip op. at -2- (Stephens, J., dissenting) (noting that the Court’s vicarious liability ruling will “dramatically change the law and to eviscerate the protections for workers at multiemployer work sites recognized under the Washington Industrial Safety and Health Act”).

156. *Id.*, slip op. at 9–13 (majority opinion) (discussing the nondelegable duty to provide a safe workplace in relation to Washington’s tort liability statutory scheme).

157. *See id.*, slip op. at -12- (Stephens, J., dissenting) (“[A] violation of WISHA by a subcontractor is not only chargeable to the subcontractor but also chargeable to a general contractor—‘the primary employer,’ whose supervisory authority puts it ‘in the best position to ensure compliance with safety regulations.’” (citing *Stute v. P.B.M.C., Inc.*, 114 Wash. 2d 454, 463, 788 P.2d 545, 550 (1990); *Millican v. N.A. Degerstrom, Inc.*, 177 Wash. App. 881, 893, 313 P.3d 1215, 1221 (Wash. Ct. App. 2013))).

III. WISHA REGIONAL DIRECTIVE 27.00: THE DEPARTMENT'S POST-*STUTE* CITATION POLICY AND ITS DETRIMENTAL EFFECT ON CITATION APPEALS

Part III focuses on the actual enforcement of WISHA. It discusses the Department's guidance document regarding general contractor liability, which is provided to both DOSH compliance officers charged with issuing citations and employers who may face liability. This Part discusses the legal and policy bases for the Department's guidance. Next, this Part explores the effect of that guidance on the Board and how decisions made by DOSH compliance officers at the site of an accident can severely impact the enforceability of a given citation against a liable employer.

A. *The Regional Directive Provides a Clear View of the Law but Fails to Create a Policy to Match*

As discussed above, the Department conducts workplace inspections to determine WISHA compliance and issues citations for WISHA violations.¹⁵⁸ To ensure that the public understands laws and regulations that may affect them, the Legislature has encouraged agencies, such as the Department, to issue policy statements outlining the agency's interpretation of those laws and its enforcement policies.¹⁵⁹ These policy statements are non-binding and "advisory only."¹⁶⁰ In accordance with this statutory encouragement, the Department has issued a number of policy statements, which it titles WISHA Regional Directives (WRD).¹⁶¹ These WRDs represent the Department's current policy on a given subject and serve to inform Department staff, and those private citizens who may be affected, of that policy.¹⁶² A WRD is not an agency rule and thus does not have the effect of law.¹⁶³ In response to *Stute*, the Department

158. Paja, *supra* note 19.

159. WASH. REV. CODE § 34.05.230 (2016).

160. *Id.*

161. *Rule Interpretations & Enforcement Policies*, WASH. DEP'T OF LABOR & INDUS., <https://www.lni.wa.gov/Safety/Rules/Policies/ByName/default.asp?T=WRD&SB=> [<https://perma.cc/245S-55AD>].

162. *See, e.g.*, WASH. DEP'T OF LABOR & INDUS., DOSH DIRECTIVE 6.55: CONE-SETTING REQUIREMENTS (July 20, 2012), <https://www.lni.wa.gov/Safety/Rules/Policies/PDFs/WRD655.pdf> [<https://perma.cc/3VYR-5RW4>] (explaining the Department's stance on the correct way to set safety cones).

163. *J.E. Dunn Nw., Inc. v. Dep't of Labor & Indus.*, 139 Wash. App. 35, 52–53, 156 P.3d 250, 258 (Wash. Ct. App. 2007) (stating that WRDs are policy statements that are advisory only and do not have the effect of law).

published WRD 27.00 outlining its policies towards citing general contractors for WISHA violations of subcontractors.¹⁶⁴

Most recently, the Department updated the WRD on November 30, 2016, to incorporate the effects of the Washington State Supreme Court's decisions in *Afoa* and *Martinez Melgoza*.¹⁶⁵ The "Directive establishes guidelines for DOSH compliance and consultation staff when assessing an upper-tier contractor's compliance with [WISHA] as it applies to lower-tier contractor or its employees."¹⁶⁶ The Directive states that it represents "compliance policy" and provides the Department's "interpretation of appropriate application" of WISHA in situations involving potential general contractor liability for subcontractor WISHA violations.¹⁶⁷ Further, the Department states that "the intent of this Directive is to reflect the current state of the law as accurately as possible."¹⁶⁸

In laying out the foundation for the Department's enforcement policy, WRD 27.00 accurately explains the current state of the law.¹⁶⁹ However, WRD 27.00 then states that "[t]he Department interprets these statements from the Washington Supreme Court to mean that if there is a serious violation by a lower-tier contractor, a parallel violation to an upper-tier contractor may be appropriate."¹⁷⁰ Further, WRD 27.00 directs compliance officers to cite a general contractor under a different regulation than the regulation violated by the underlying behavior or hazard.¹⁷¹ It directs compliance officers to cite general contractors for a

164. DIV. OF OCCUPATIONAL SAFETY & HEALTH, WASH. DEP'T OF LABOR AND INDUS., DOSH DIRECTIVE 27.00: GENERAL OR UPPER-TIER CONTRACTOR (STUTE) RESPONSIBILITY (Nov. 30, 2016) [hereinafter WISHA REGIONAL DIRECTIVE 27.00], <http://www.lni.wa.gov/Safety/Rules/Policies/PDFs/WRD2700.pdf> [<https://perma.cc/N7VK-GSML>].

165. *Id.* at ¶ I.

166. *Id.*

167. *Id.* at ¶ II.

168. *Id.* at ¶ III.

169. *Id.* at ¶ IV(B). ("The Washington Supreme Court has said that the liability of a general contractor to employees on the worksite is 'per se' liability. Washington courts have explained that general contractors have a non-delegable, specific duty to ensure compliance with all applicable WISHA regulations for 'every employee on the jobsite,' not just its own employees. Thus, a general contractor's duty to protect workers on the jobsite extends to 'any employee who may be harmed by the employer's violation of the safety rules.' As our Supreme Court explained, '[t]he *Stute* court imposed the per se liability as a matter of policy: "to further the purposes of WISHA to assure safe and healthful working conditions for every person working in Washington."') (citations omitted).

170. *Id.*

171. *Id.* at ¶ VI(B). ("The department has determined as a matter of enforcement discretion that parallel violations will not necessarily be issued to general or upper-tier subcontractors for every violation cited against one or more subcontractors. In order to distinguish upper-tier contractor violations from violations involving the contractor's own employees, compliance staff should

violation of WAC 296-155-100(1)(a)¹⁷² which states, “[i]t is the responsibility of management to establish, supervise, and enforce, in a manner which is effective in practice: (a) A safe and healthful working environment.”¹⁷³ Finally, it directs DOSH compliance officers to refrain from issuing a citation to the general or upper-tier contractor if it “appears that the lower-tier contractor will be able to successfully assert an affirmative defense such as unpreventable employee misconduct.”¹⁷⁴

B. The Negative Effect of WRD 27.00 on Upholding Citations on Appeal

WRD 27.00 has caused significant issues for both the Board and appellate courts in determining whether to uphold WISHA violation citations. The mechanics of a WISHA appeal and the standards of review employed by appellate courts make citations based on inaccurate understandings of the law difficult to both parse and ultimately enforce.

Appeals of WISHA citations are heard before the Board of Industrial Insurance Appeals.¹⁷⁵ A statute mandates that the Board publish opinions that it defines as “Significant Decisions.”¹⁷⁶ Significant decisions are those that the Board “considers to have an analysis or decision of substantial importance to the board in carrying out its duties.”¹⁷⁷ The Board has published two “Significant Decisions” on *Stute* liability that also address the Department’s *Stute* guidance documents.¹⁷⁸ In 1998, the Board designated its decision in *In re Exxel Pacific, Inc.*¹⁷⁹ as significant.¹⁸⁰ At issue in that case was a department citation under WAC 296-155-100(1)(a).¹⁸¹ A compliance officer observed two subcontractor employees of Exxel Pacific loading materials onto a sixteen-foot roof without tying off their safety lanyards to available

normally use WAC 296-155-100(1)(a).”).

172. *Id.*

173. WASH. ADMIN. CODE § 296-155-100(1)(a) (2016).

174. WISHA REGIONAL DIRECTIVE 27.00, *supra* note 164, at ¶ VI(A).

175. WASH. ADMIN. CODE § 263-12-010(3) (2017) (“The jurisdiction of the board extends to . . . [a]ppeals arising under the Washington Industrial Safety and Health Act.”).

176. *Id.* § 263-12-195(1).

177. *Id.*

178. *In re Mediterranean Pac. Corp.*, BIIA Dec., No. 06 W0162 (June 28, 2007); *In re Exxel Pac., Inc.*, BIIA Dec., No. 96 W182 (July 6, 1998).

179. *Exxel Pac.*, BIIA Dec., No. 96 W182.

180. *Significant Decisions Case Name Index*, BD. INDUS. INS. APP., <http://www.biia.wa.gov/SDNameIndex.html#e> [<https://perma.cc/ZXA3-RRFR>].

181. *Exxel Pac.*, BIIA Dec., No. 96 W182, at *3.

anchor points as required by applicable WISHA regulations.¹⁸² Rather than citing the general contractor for a violation under the applicable regulation for failing to tie-off, Exxel Pacific was cited, per department policy, for failing to provide a “safe and healthful working environment.”¹⁸³

In overturning the citation and concluding that Exxel Pacific had not violated the provisions of WAC 296-155-100(1)(a), the Board clarified its position on what the Department must show to successfully prove a violation of that WAC.¹⁸⁴ First, the Board stated that proof of a subcontractor’s violation does not “constitute sufficient proof” that the general contractor’s responsibility was not met under the WAC.¹⁸⁵ Next, the Board acknowledged that the WAC’s use of the language “effective in practice” may cause confusion regarding whether the burden of proof lies with the Department or with the employer in establishing the effectiveness of the employer’s safety program.¹⁸⁶ The Board expressly declined to decide who should bear that burden in *Stute* cases, only noting that “the Department generally bears the initial burden of proof that the violation occurred” and that the employer bears the burden of proving the elements of the statutory defense of “unpreventable employee misconduct.”¹⁸⁷ Ultimately, the Board decided that the evidence of the underlying violation was insufficient to prove that Exxel Pacific’s safety program was ineffective and thus overturned the Department’s citation.¹⁸⁸ The Board found that “Exxel met its primary responsibility for compliance with safety regulations . . . in that it established, supervised and enforced, in a manner that was effective in practice, a safe and healthful working environment, in a manner consistent with its role as general contractor.”¹⁸⁹

In 2007, the Court of Appeals addressed the confusion surrounding the apparently shifting burdens of proof by eliminating the unpreventable

182. *Id.* at *2.

183. *See id.* at *3.

184. *Id.* at *6–11.

185. *Id.* at *8.

186. *Id.* at *12. (“Once the Department establishes its prima facie case, in a **non-*Stute* case**, the burden then shifts to the employer to establish all four elements of the affirmative defense of unpreventable employee misconduct. We must, therefore, recognize that use of the term ‘effective in practice,’ as a criteria for deciding ***Stute* cases**, could lead to confusion regarding whether the Department or the general contractor bears the initial burden of showing whether or not the general contractor’s safety program should be considered effective in practice.” (citation omitted)).

187. *Id.* at *13.

188. *Id.* at *29.

189. *Id.*

employee misconduct defense in *Stute* citation cases.¹⁹⁰ In *J.E. Dunn Northwest, Inc. v. Department of Labor and Industries*,¹⁹¹ the Court of Appeals foreclosed the availability of the unpreventable employee misconduct affirmative defense in cases of WAC 296-155-100(1) violations under *Stute*.¹⁹² The court founded its decision in the two-fold, general versus specific, duty created by WISHA.¹⁹³ *Stute* liability only exists under the specific duty clause of RCW 49.17.060, and the unpreventable employee misconduct statute “is a general provision of WISHA, not a regulation promulgated pursuant thereto.”¹⁹⁴ Because of this distinction, the court determined that the statute could not be interpreted to “give rise to duties of general contractors in regard to oversight of employees of subcontractors.”¹⁹⁵ Therefore, when the Department cites a general contractor under WAC 296-155-100(1), the Department bears the burden of proving that “the requirements of the regulation were not met.”¹⁹⁶

Then, immediately following the decision in *J.E. Dunn*, the Board issued a significant decision explaining its understanding of the changes established by the Court of Appeals’s decision in *In re Mediterranean Pacific Corp.*¹⁹⁷ In this case, the Board confronted the issue of how to define whether an employer “was actually engaged as a general contractor.”¹⁹⁸ During the construction of a home, the employee of a subcontractor was exposed to a “fall hazard of 35 feet 6 inches” without the use of any fall protection.¹⁹⁹ The Board acknowledged that the burden of proof lay with the Department to establish a violation of WAC 296-155-100(1)(a).²⁰⁰ The Board held that the Department could, and in the present case did, establish its burden by presenting “evidence of violations

190. *J.E. Dunn Nw., Inc. v. Dep’t of Labor & Indus.*, 139 Wash. App. 35, 156 P.3d 250 (2007).

191. 139 Wash. App. 35, 156 P.3d 250 (2007).

192. *Id.* at 50, 156 P.3d at 257.

193. *Id.* at 48, 156 P.3d at 256.

194. *Id.*

195. *Id.*

196. *Id.* at 50, 156 P.3d at 257 (“The establishment, supervision and enforcement of . . . an accident prevention program, are requirements of WAC 296-155-100(1). Accordingly, a showing that such requirements are not met is an element of violations alleged . . . the burden of proving which must be borne by the Department.”).

197. *In re Mediterranean Pac. Corp.*, BIIA Dec., No. 06 W0162, at *2 (June 28, 2007) (“We have granted review to clearly set forth our finding that the Department has met the requirements set forth in *J.E. Dunn Northwest* . . .”).

198. *Id.*

199. *Id.* at *3.

200. *Id.* at *2.

of specific safety standards at the worksite.”²⁰¹ The Board found that “[t]he number, seriousness, and the general nature of the hazards that [the Compliance Officer] observed at the work site clearly demonstrate that Mediterranean Pacific Corp. did not take workplace safety seriously.”²⁰² However, this may have been sufficient simply because “Mediterranean Pacific Corp.[] offered no evidence to show that it had established, supervised, and enforced a safe and healthful working environment which was effective in practice.”²⁰³ In fact, the employer did not respond to the Department’s discovery request when challenging the citation.²⁰⁴ Notably, the Board labeled its decision a finding of fact, rather than a conclusion of law, when it determined that Mediterranean Pacific Corp. acted as a general contractor.²⁰⁵

The unreported opinion in *Department of Labor & Industries v. Howard S. Wright Constructors LP*²⁰⁶ provides a troubling example of the current effect of WRD 27.00 because the Court of Appeals required the Department to prove extra elements beyond the underlying citation violation. The court confronted a challenge to a department citation stating, “[a]s the controlling contractor, the employer did not establish, supervise, and enforce, in a manner which was effective in practice a safe and healthful working environment by allowing 2 employees of its subcontractor . . . to be subjected to hazards in violation of the Washington Administrative Code”²⁰⁷ The Department contended that Howard S. Wright Constructors, the general contractor, violated WAC 296-155-100(1)(a) or “in the alternative” was responsible for the subcontractor’s employees’ violations of the underlying specific safety standards.²⁰⁸ On appeal, the employer argued that it did not “owe a duty to provide a safe and healthful working environment for the subcontractor’s employees.”²⁰⁹ The court held that general contractors owe a “nondelegable specific duty to ensure WISHA compliance for the protection of *all* employees on the jobsite.”²¹⁰ The court determined that the Department had established a *prima facie* case of a serious violation

201. *Id.* at *0.

202. *Id.* at *3.

203. *Id.*

204. *Id.* at *2.

205. *Id.* at *4.

206. 195 Wash. App. 1005, No. 73843-3-I, 2016 WL 3919704 (Wash. Ct. App. July 18, 2016).

207. *Id.* at *1.

208. *Id.*

209. *Id.* at *7.

210. *Id.*

of WAC 296-155-100(1)(a) “because the Department demonstrated that Wright failed to provide fall protection to the subcontractor’s employees on the surface here at issue, the Department met its burden of demonstrating Wright’s failure to provide a safe and healthful working environment.”²¹¹ Thus, even though the court upheld the Department’s citation, it still required the Department to both prove the violation of WAC 296-155-100(1)(a) as well as the underlying subcontractor violations.

IV. THE DEPARTMENT SHOULD CHANGE ITS POLICY TO REFLECT CASE LAW AND PROTECT WORKER SAFETY

A. *The Current Department Policy Is Inconsistent with the Washington State Supreme Court’s Case Law*

This section argues that the Department’s policy of citing general contractors under WAC 296-155-100(1)(a) is inconsistent with the Washington State Supreme Court’s ruling in *Stute* and its progeny. The Washington State Supreme Court has consistently held that general contractor liability is per se liability.²¹² In determining the nature of general contractor liability, the Court distinguished between the specific and general requirements of WISHA. The Court held that general contractors are not liable for violations of the general requirements of WISHA but rather only for specific violations of regulations promulgated under WISHA.²¹³ By citing general contractors under WAC 296-155-100(1)(a), the Department has circumvented this distinction by alleging violations based on failure to provide a “safe and healthful working environment”²¹⁴ rather than the underlying violation observed by the compliance officer. As suggested by Bulzomi and Messina,²¹⁵ the Court’s imposition of a statutory duty to comply with relevant safety regulations on both general and subcontractors conformed with the legislative intent behind WISHA.

211. *Id.*

212. *See, e.g., Afoa I*, 176 Wash. 2d 460, 471–72, 296 P.3d 800, 806–07 (2013) (reaffirming the standard set by *Stute* and its progeny by noting that “general contractors and similar employers *always* have a duty to comply with WISHA regulations . . .”). *But see Afoa II*, No. 94525-0, slip op. at 9 (Wash. July 19, 2018) (“Under some circumstances, jobsite owners may have a duty of care analogous to that of an employer or general contractor. A jobsite owner or general contractor will have this duty only if it maintains a sufficient degree of control over the work.” (citations omitted)).

213. *Stute v. P.B.M.C., Inc.*, 114 Wash. 2d 454, 457, 788 P.2d 545, 547 (1990).

214. WASH. ADMIN. CODE. § 295-155-100 (2016).

215. *See Bulzomi & Messina, supra* note 30, at 334.

However, the Department's citing decision has created a double-layer burden on the Department to prove violations against general contractors. To prove a citation, the Department must first prove that the underlying violation (e.g., inadequate fall protection, un-shored excavation, or inadequate protective equipment) occurred and that a subcontractor employee was exposed to the violation, and second, that this violation amounted to a failure on the part of the general contractor to provide a "safe and healthful working environment."²¹⁶ As the Washington State Supreme Court noted in *SuperValu, Inc.*,²¹⁷ the Department bears a much higher evidentiary burden when citing a general duty violation, which leads to "increased difficulty" in successfully upholding citations.²¹⁸

The Department's double layer burden of proof is contrary to the Court's *Stute* ruling that general contractors "bear the primary responsibility for compliance with safety regulations because the general contractor's innate supervisory authority constitutes sufficient control over the workplace."²¹⁹ If the Department must prove the underlying violation and that the violation met a secondary standard, that burden does not place "primary responsibility" on general contractors, but rather ancillary or secondary responsibility.

This problem is further compounded by the unavailability of the statutory unpreventable employee misconduct defense in cases involving *Stute* liability. In a typical WISHA suit, an employer may assert, and bears the burden of proving, the defense.²²⁰ However, after the Court of Appeals decision in *J.E. Dunn*, an employer cannot raise the defense for WISHA violations based on *Stute* liability.²²¹ Rather than allowing a general contractor to carry the burden to prove this affirmative defense as a general contractor in relation to its subcontractor's employees, the Court of Appeals has foreclosed access to the defense in these situations. As an apparent result of this foreclosure, the Department has preserved the defense within its enforcement discretion by directing its compliance officers to refrain from issuing citations in situations where it appears to the officer that the subcontractor would likely be able to successfully

216. WASH. ADMIN. CODE § 296-155-100(1)(a).

217. 158 Wash. 2d 422, 144 P.3d 1160 (2006).

218. *SuperValu, Inc. v. Dep't of Labor & Indus.*, 158 Wash. 2d 422, 434, 144 P.3d 1160, 1166 (2006).

219. *Stute*, 114 Wash. 2d at 464, 144 P.3d at 550.

220. *See Potelco, Inc. v. Dep't of Labor & Indus.*, 194 Wash. App. 428, 435, 377 P.3d 251, 255 (2016).

221. *See J.E. Dunn Nw., Inc. v. Dep't of Labor & Indus.*, 139 Wash. App. 35, 156 P.3d 250 (2007).

assert the defense against its own employee.²²² This enforcement decision, coupled with the Department's decision to cite general contractors for violations of WAC 296-155-100(a), has shifted the burden of proof squarely from the employers onto the Department for establishing the existence, or lack thereof, of unpreventable employee misconduct.

The Legislature enacted unpreventable employee misconduct as an affirmative defense, requiring the employer to prove five distinct elements to assert it.²²³ The Department's WRD 27.00, rather than requiring the employer to supply relevant evidence, directs DOSH compliance officers to assess the likelihood of the availability of the defense before issuing a citation. Further, the Department directs the officers to cite violations in such a way as to require the Department to establish the lack of the elements as part of its own case. Both these decisions are in contravention of the Legislature's decision regarding which party should have the burden of proof.

B. The Enforcement Policy Causes Confusion at the Board Level and in the Superior Courts

The conflation of statutes, regulations, case law, and regional directives with competing commands causes confused decisions at the Board level that can then be exacerbated on review in Superior Court. After the Court of Appeals decisions in *J.E. Dunn* and *Martinez Megloza*, the potential for confusion at the Board is increased. Although general contractors are supposed to be per se liable for a violation, an employer may attempt to make an argument under the multi-employer worksite doctrine that the general contractor was not, in fact, the "controlling" employer at the worksite. The case law allowing for the inclusion of OSHA case law into Washington state jurisprudence has also created potential for confusion.

The extension of *Stute*-like liability to job site owners and developers without clear delineation by the courts and Department on the parameters of each category's responsibilities exacerbates this potential confusion. This lack of clear delineation may lead to difficult questions upon review in superior court. If, as a conclusion of law, the Board decides that an employer is the "controlling" employer, or a general contractor, or only a jobsite owner, then the superior court will review those decisions de novo. However, if those same issues are decided as findings of fact, the court will review the record under a substantial evidence standard. These differing standards of review may lead to different results depending on the artful arguing of an employer's attorney. Because the Department's

222. WISHA REGIONAL DIRECTIVE 27.00, *supra* note 164, at ¶ VI.

223. WASH. REV. CODE § 49.17.120(5) (2016).

stance on jobsite responsibility is unclear, an employer has an incentive to further muddy the waters in an attempt to keep open as many avenues of non-liability as possible.

C. The Department Should Change its Enforcement Policy

The Department should change its current citation policy to cite general contractors for the underlying WISHA violation rather than WAC 296-155-100(a). If, after an investigation, a compliance officer finds that a subcontractor's employee was exposed to a hazard on the jobsite, Washington case law is clear that both the subcontractor and the general contractor are liable for that hazard. The subcontractor is liable as the employee's employer and the general contractor is liable because of its "innate supervisory authority" over the jobsite.²²⁴ Although the theories of liability are different, the underlying conduct is the same. If the underlying violation is failure to require a worker to wear fall protection while working at a height of greater than four feet, both employers should be cited under the same WAC. Both the subcontractor and the general contractor violated the WAC by failing to require the employee to wear the fall protection; the general contractor simply by virtue of its position did not commit a distinct violation from the subcontractor of failing to provide a safe workplace. Both employers failed to provide a safe workplace, but they failed to do so by violating a specific WAC. While it may be true that the general contractor violated both the specific WAC and WAC 296-155-100(a) because of its managerial capacities, it is not an either-or situation.

As *J.E. Dunn* has shifted the burden to the Department to essentially prove the elements of unpreventable employee misconduct to uphold a citation under WAC 296-155-100(a), the Department should not solely cite this general regulation where the underlying regulation exists to directly highlight the violative behavior.

D. The Legislature Should Enact an Unpreventable Employee Misconduct Statute for Stute Cases

Without considering the policy reasons for the Department's current citation decisions, the case law itself has created a conundrum that should be addressed by the Legislature. Because the Court of Appeals foreclosed the statutory defense of unpreventable employee misconduct in cases of *Stute* liability, a general contractor cannot raise the defense against a Department citation. Thus, if the Department cited a general contractor

224. *Stute v. P.B.M.C., Inc.*, 114 Wash. 2d 454, 464, 788 P.2d 545, 550 (1990).

for violating a fall protection regulation and the general contractor has sufficient evidence to fulfill the requirements of the affirmative defense, the general contractor is legally unable to raise the defense. This is taking per se liability too far.

The ruling in *J.E. Dunn* has likely influenced the Department's decision to continue to cite general contractors under the general regulation, allowing employee misconduct to factor into the correctness of a citation. However, as discussed above, this burden shifting is contrary to the law and does not promote the safety of Washington's workers. Instead, the Legislature should expand the availability of the unpreventable employee misconduct defense to allow general contractors to raise it as an affirmative defense before the Board of Industrial Insurance Appeals. This statutory fix will preserve the correct burdens on the parties and will not require compliance officers to make on-site charging decisions based on the likelihood of a potentially meritorious defense. Instead, the compliance officer can simply cite the violation and allow the employer to bring forward the evidence necessary to prove the defense to the Board.

CONCLUSION

Since deciding *Stute v. P.B.M.C., Inc.* in 1990, the Washington State Supreme Court has taken an expansive view of liability for workplace accidents. This view is supported both by the enactment of WISHA and Washington's constitutional worker safety mandate. The Department's policy decision to cite general contractors under the general duty regulation—rather than under the actual regulation their subcontractors violated—is in contravention of both the Washington State Supreme Court's rulings and the purposes of WISHA. While common sense reform is needed to create a worker safety scheme that both protects workers and promotes business, the Legislature—not the Department—must lead the charge in clarifying and changing the law. Until the Legislature changes the relevant statutes, or the Court limits the scope of general contractor liability, the Department should follow a citation policy that comports with the law as it currently exists.