

RC Construction

SAFETY AND HEALTH

General contractor liability - multiple employer worksite

The general contractor on a multiple employer construction site is responsible for its subcontractor's WISHA violation when (1) the violation exposes not only the subcontractor's employees, but also other workers on the site to a safety hazard, (2) the general contractor could reasonably have been expected to prevent or abate the subcontractor's violation by reason of its supervisory capacity over the entire site, and (3) the subcontractor's WISHA violation is obvious. ...*In re RC Construction*, BIIA Dec., **87 W039 (1989)** [Editor's Note: See also *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454 (1990).]

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: R C CONSTRUCTION**) **DOCKET NO. 87 W039**
2)
3 **CITATION & NOTICE NO. 380916**) **DECISION AND ORDER**
4

5 **APPEARANCES:**

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7 Firm, R C Construction, by
8 Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, per
9 Nate D. Mannakee

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11 Department of Labor and Industries, by
12 Office of the Attorney General, per
13 Ronald Lavigne, Law Clerk, Gary McGuire, Paralegal, and Elliott S. Furst, Assistant
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15 This is an appeal filed by R C Construction on June 17, 1987 with the Department of Labor and
16 Industries Safety Division, and certified to the Board on June 22, 1987 from Corrective Notice of
17 Redetermination No. 380916 of the Department of Labor and Industries dated June 5, 1987, which
18 affirmed Citation and Notice No. 380916 dated March 12, 1987 and which cited R C Construction for
19 one serious repeat violation of WAC 296-155-225(1)(b), but reduced the penalty assessment from
20 \$2800 to \$720. **AFFIRMED.**

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24 **PROCEDURAL AND EVIDENTIARY MATTERS**

25 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
26 and decision on a timely Petition for Review filed by the Department of Labor and Industries to a
27 Proposed Decision and Order issued on March 27, 1989 in which the Corrective Notice of
28 Redetermination dated June 5, 1987 was reversed.

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30 The Industrial Appeals Judge incorrectly published the discovery deposition of Steve Nilsen
31 taken on January 22, 1988. Since no basis for publishing that deposition in its entirety has been
32 established under ER 613, 801, or 804, the Industrial Appeals Judge's ruling is reversed.

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34 The Board has reviewed all other evidentiary rulings in the record of proceedings and finds that
35 no further prejudicial error was committed and said rulings are hereby affirmed.

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39 **DECISION**

40 As he was driving by R C Construction's jobsite at 84th and Pine in Tacoma, Washington, on
41 February 23, 1987, Department safety inspector Gary Cochran observed William Robbins and Cecil
42 Warner walking on a standard pitched plywood roof deck, 26 feet above ground level without fall
43 protection. R C Construction was cited for violation of WAC 296-155-225(1)(b), which provides that
44 "safety belts shall be used when workers are exposed to the hazard of falling from buildings, . . . or
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1 construction members . . . at elevations exceeding 10 feet above ground" At hearing there was
2 no challenge to the Department's position that a violation had in fact occurred. Rather, R C
3 Construction contended that neither William Robbins nor Cecil Warner was an employee of R C
4 Construction. Our Industrial Appeals Judge reversed the Corrective Notice of Redetermination. She
5 found that Mr. Robbins and Mr. Warner were not employees of R C Construction and therefore
6 concluded that their failure to properly use safety belts was not a violation by R C Construction.
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10 By way of its Petition for Review, the Department requests we affirm the Corrective Notice of
11 Redetermination and raises two issues which we state as follows:
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- 13 1. Were William Robbins and Cecil Warner employees of R C Construction?
14 and,
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- 16 2. Even if William Robbins and Cecil Warner were not employees of R C
17 Construction, may R C Construction still be held responsible for the
18 violation?
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20 With regard to the first issue, we agree with the finding of our Industrial Appeals Judge that Mr.
21 Robbins and Mr. Warner were not employees of R C Construction. However, on the second issue, we
22 hold that R C Construction was properly cited for the violation as the general contractor involved in a
23 common undertaking and in control of a multi-employer construction jobsite.
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25 Holly Homes, the prime contractor, contracted with R C Construction, the general contractor, to
26 frame the structures of apartment buildings at 84th and Pine Street in Tacoma, Washington. R C
27 Construction then subcontracted a portion of the framing work to Steve Nilsen Construction, in which
28 Mr. Robbins was a partner. Partner Steve Nilsen did not particularly like the roof portion of framing
29 work, primarily because of the chance of receiving a WISHA citation for failure to comply with fall
30 protection regulations. Whether Mr. Robbins and Mr. Warner were employees of R C Construction
31 turns upon the question of whether Mr. Robbins undertook the roof framing work as R C
32 Construction's own employee or as part of the Nilsen partnership performing the general framing work.
33 Upon our review of the entire record, we find that William Robbins was acting as a partner in Steve
34 Nilsen Construction and employed Cecil Warner in furtherance of the partnership; neither Mr. Robbins
35 nor Mr. Warner was an employee of R C Construction.
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38 The testimony related to this first issue is adequately discussed in the Proposed Decision and
39 Order. Even though Steve Nilsen stated his preference not to have any part of the roofing project, he
40 indicated William Robbins took the job on behalf of Steve Nilsen Construction, that he billed R C
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1 Construction for both the wall framing and roof framing work, and that he paid Mr. Robbins, who in turn
2 paid Mr. Warner. Steve Nilsen also stated his understanding that he, along with R C Construction
3 superintendent, Steven Mason, was responsible for supervising the job from a quality control
4 perspective. In addition, Mr. Robbins and Mr. Warner used equipment belonging to Steve Nilsen
5 Construction to frame the roof.
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9 Likewise, R C Construction superintendent Steven Mason stated he arranged for Steve Nilsen
10 Construction to perform both the wall and roof framing. Randall Chopp, the owner/operator of R C
11 Construction, stated he had subcontracted with Steve Nilsen Construction for both wall and roof
12 framing. Contrary to assertions by Mr. Robbins, both Mr. Mason and Mr. Chopp denied ever having
13 told Mr. Robbins that he would be placed on R C Construction's records as an employee. Mr. Chopp
14 stated he paid Steve Nilsen Construction for the work performed.
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18 Mr. Robbins and Mr. Warner were, then, providing their personal labor and skill in furtherance
19 of the subcontract held by Steve Nilsen Construction. Our Industrial Appeals Judge was correct in
20 concluding that Mr. Robbins and Mr. Warner were neither employees of R C Construction nor working
21 directly for R C Construction as independent contractors in their own right providing their personal
22 labor to R C Construction. RCW 49.17.020(3) & (4); WAC 296-155-012(12) and (28).
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25 The second issue is more problematical. That WAC 296-155- 225(1)(b) was violated is
26 undisputed. Mr. Cochran and Mr. Mason both observed the violation, which was captured by the
27 former in the photograph admitted as Exhibit No. 2. Mr. Robbins further testified that he and Cecil
28 Warner, the worker shown in Exhibit No. 2, worked for five days framing the roof of Building G without
29 any safety protection. The critical question before us is whether the general contractor, R C
30 Construction, is responsible under WISHA for an obvious safety violation by one of its subcontractors.
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34 Unfortunately, the Department did not try this case on a multi- employer worksite theory.
35 Instead the Department focused solely on trying to prove that Mr. Warner and Mr. Robbins were
36 employees of R C Construction rather than of Nilsen Construction. Having failed in that proof the
37 Department now, for the first time, argues that R C Construction, as the general contractor, is
38 responsible for its subcontractor's safety violation. The law in this area is not quite so clear as the
39 Department's Petition for Review seems to contend.
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43 RCW 49.17.060 provides as follows:

44 Each employer:

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

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

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10 (Emphasis supplied).

11 Cases interpreting RCW 49.17.060(1) and (2) have typically arisen in the context of personal
12 injury lawsuits. Our Supreme Court has twice ruled upon the scope of the duty imposed upon an
13 employer under RCW 49.17.060 in personal injury cases in which plaintiffs contended an employer
14 was negligent as a matter of law due to alleged violation of this statute and WISHA regulations.
15 Adkins v. Aluminum Company, 110 Wn.2d 128, 750 P.2d 1257 (1988) and Goucher v. J.R. Simplot
16 Co., 104 Wn.2d 662, 709 P.2d 774 (1985).
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19 An employer's duty is twofold under RCW 49.17.060. Under the first subsection, a general duty
20 is imposed upon an employer to protect its employees from hazards that are "causing or likely to
21 cause serious injury or death" Under the second subsection, a specific duty is imposed upon
22 employers to comply with WISHA regulations. In Goucher, the court noted that the federal counterpart
23 to Washington's twofold duty statute, 29 U.S.C. § 654(a), has been subject to varying interpretations
24 by federal courts. Some have held that OSHA regulations protect not only an employer's own
25 employees, but all employees who may be harmed by the employer's violation of the regulations.
26 Others have held that the regulations protect only an employer's own employees. Our Supreme Court
27 was persuaded that " ... WISHA regulations should be construed to protect not only an employer's own
28 employees, but all employees who may be harmed by the employer's violation of the regulations."
29 Goucher, at 672. See also Adkins, at 152-154.
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33 The court in Adkins restated the difference between the two duties owed by an employer as
34 follows:
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38 The specific duty clause in RCW 49.17.060(2), in contrast to RCW
39 49.17.060(1), applies when a party asserts that the employer failed to
40 comply with a particular WISHA standard or regulations. In such a case,
41 all employees who work on the premises of another employer are
42 members of the protected class.
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46 (Emphasis supplied) Adkins, at 153.
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1 At a minimum we conclude from the Washington Supreme Court's holdings in Adkins and
2 Goucher that the absence of an employer- employee relationship between the workers exposed and
3 the employer alleged to have violated a WISHA regulation on a multi-employer jobsite will not, in and
4 of itself, insulate that employer from citation for violation of a regulation. At least this much was an
5 integral part of the court's reasoning in each case and a rule of law necessary to the court's
6 consideration of whether the doctrine of negligence per se would apply. Thus, the finding that neither
7 William Robbins nor Cecil Warner was an employee of R C Construction, nor an independent
8 contractor whose personal service was the essence of a contract with R C Construction, is not
9 necessarily determinative on the matter of whether R C Construction may be cited for the violation of
10 WAC 296-155-225(1)(b).

11 The Department contends that R C Construction was properly cited if "R C Construction was in
12 control of, and responsible for the maintenance of the construction site at 84th and Pine in Tacoma,
13 Washington; ... a fall protection hazard existed; ... the hazard was accessible to the employees of R C
14 Construction or those of Nilsen Construction; and ... R C Construction and Nilsen Construction were
15 engaged in a common undertaking." PFR at 10-11. For authority, the Department cites Brennan v.
16 OSH Rev. Comm'n. & Underhill, 513 F.2d 1032 (2d Cir.1975). In that case, the United States Court
17 of Appeals for the Second Circuit construed subparagraph (2) of 29 U.S.C. § 654(a), the federal
18 counterpart to our specific duty section, RCW 49.17.060(2). The court stated:

19 In a situation where, as here, an employer is in control of an area, and
20 responsible for its maintenance, we hold that to prove a violation of OSHA
21 the Secretary of Labor need only show that a hazard has been committed
22 and that the area of the hazard was accessible to the employees of the
23 cited employer or those of other employers engaged in a common
24 undertaking.

25 Underhill, at 1038.

26 Underhill is one of a number of federal cases which our Supreme Court cited in Adkins in
27 construing our WISHA statute. Specifically, our Supreme Court stated:

28 In deciding what constitutes the exposure to a hazard which will trigger
29 application of the regulations, we will consider decisions construing the
30 federal counterpart to WISHA, OSHA, and federal decisions regarding
31 machine guarding regulations. [citation omitted] Decisions by the
32 Occupational Safety and Health Review Commission (the Commission)
33 demonstrate that to establish a violation of a machine guarding regulation
34 there must be sufficient evidence showing that employees had access to
35 the violative conditions. To establish employee access, the Secretary of

1 Labor must demonstrate reasonable predictability that, in the course of
2 their duties, employees will be, are, or have been in the zone of danger.
3 [citations omitted] Where the danger is created by an unguarded
4 machine, the Secretary of Labor can satisfy this burden of proof by
5 demonstrating that the unguarded machine was located where employees
6 could gain access to it and use it in the course of their normal duties.
7 [Citations omitted].
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9 Adkins, at 147.

10 However, the appeal before us involves a somewhat different issue from that presented in
11 Goucher and Adkins. That is, this appeal does not involve the question of whether an employer which
12 violates a WISHA regulation may be cited when the only exposed employees are employees of
13 another employer. Clearly, the answer to that question under Adkins and Goucher is affirmative.
14 What we have before us is the question of whether a general contractor on a multi- employer
15 construction site can be cited for a subcontractor's violation of a WISHA regulation. That specific
16 question has never been answered by the Washington courts. There is, however, some guidance to
17 be gleaned from Washington cases in the personal injury arena.
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19 Kelley v. Howard S. Wright Const., 90 Wn.2d 323, 582 P.2d 500 (1978), a pre-WISHA case,
20 addressed the question of whether a general contractor on a multi-employer jobsite had the duty to
21 take safety precautions, i.e., provide fall protection, for a subcontractor's employee who fell from an
22 unprotected height of 29 feet. The Washington Supreme Court determined that the general
23 contractor, "as the employer in control of safety in the work area, was responsible for complying with
24 the OSHA [safety net] regulation". Kelley, at 335.
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26 When work by its very nature creates some peculiar risk of injury, and the
27 general contractor has reason to know of the inherent hazards of the work,
28 the general contractor has a duty to take reasonable precautions against
29 those hazards. [Citations omitted] Work in which employees are required
30 to walk over bare beams more than 25 feet above the ground, and
31 sometimes even higher, is inherently dangerous. Wright [the general
32 contractor] was certainly aware of the hazards involved in such work, and
33 therefore had a duty to take precautions against those hazards.
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35 Kelley, at 332.

36 The court derived this duty of care from several sources in the common law, from the contract
37 between the parties, and from RCW 49.16.030, which has been replaced by WISHA and is not
38 applicable to the case before us. As the Supreme Court noted in Goucher, Kelley is of limited value
39 because it relied upon RCW 49.16.030, which has been repealed.
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1 However, the Supreme Court's discussion of the duty OSHA places on a general contractor
2 provides some suggestions as to how the court would view that question under WISHA. The court
3 framed the issue in Kelley as follows:
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5 The question of duty to comply with the OSHA regulation at issue here is
6 thus the question of the duty of a general contractor to comply with
7 applicable safety regulations for the benefit of the employee of a
8 subcontractor under our own state law. The first issue is whether the
9 regulation is applicable to appellant Wright.
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12 Kelley, at 335.

13 The Supreme Court began by noting that the OSH Review Commission (OSHRC) had "taken
14 the position that a general contractor does not bear joint responsibility with a subcontractor for
15 compliance with OSHA regulations, and at least one federal court has acquiesced in that decision.
16 Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255 (4th Cir.1974)." Kelley, at 335.
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18 However, in 1975 the OSHRC apparently modified its position, stating:
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20 We have, however, reconsidered our prior decisions in light of the court
21 decisions in Brennan v. OSHRC (Underhill Construction Corp.) and
22 Anning- Johnson. We continue to believe that the Act can be most
23 effectively enforced if each employer is held responsible for the safety of
24 its own employees. We agree with the courts, however, that this rule
25 should be modified with respect to the construction industry. This is
26 required by the unique nature of the multi-employer worksite common to
27 the construction industry.
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30 Grossman Steel & Aluminum Corp., 4 OSHC 1185, 1188 (1975). The Commission went on, in
31 acknowledged dicta, to state:
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33 Additionally, the general contractor normally has responsibility to assure
34 that the other contractors fulfill their obligations with respect to employee
35 safety which affect the entire site. The general contractor is well situated
36 to obtain abatement of hazards, either through its own resources or
37 through its supervisory role with respect to other contractors. It is
38 therefore reasonable to expect the general contractor to assure
39 compliance with the standards insofar as all employees on the site are
40 affected. Thus, we will hold the general contractor responsible for
41 violations it could reasonably have been expected to prevent or abate by
42 reason of its supervisory capacity.
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44 Grossman Steel, at 1188.

45 Our Supreme Court in Kelley also noted that other federal courts have taken a different view
46 from that enunciated in Gilles & Cotting, Inc. In particular the court cited the Underhill Construction
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1 Corp. case which is relied on by the Department in its Petition for Review, which we have quoted from
2 supra, and which was relied on by the OSHRC in Grossman. Indeed, the OSHRC in Grossman, after
3 noting the modification of its prior position, stated: "We will therefore follow the holding of the Second
4 Circuit to this effect in Brennan v. OSHRC (Underhill Construction Corp.) [513 F.2d 1032 (2d Cir.1975)
5]". Grossman, at 1188.
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9 As our Supreme Court stated in Kelley, "Under [the Underhill Construction Corp. approach]
10 Wright [the general contractor], as the employer in control of safety in the work area, was responsible
11 for complying with the OSHA regulation." Kelley, at 335. Thus, Kelley clearly suggests that, if
12 squarely presented with the question of whether a general contractor is responsible for a WISHA
13 violation committed by a subcontractor, the Washington Supreme Court will likely adopt a test similar
14 to that set forth in Grossman. This question is currently before the Washington Supreme Court in
15 Andre Stute v. P.B.M.C., Inc., No. 56267-9, involving a personal injury lawsuit. A decision in that case
16 has not been issued as yet.
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20 For additional guidance on this question, we have reviewed three other personal injury
21 decisions emanating from the three divisions of our Court of Appeals as well as a 1977 Eighth Circuit
22 Court of Appeals decision, which involved facts similar to the present appeal and applied the test
23 enunciated in Grossman in the context of an OSHA violation, rather than a personal injury lawsuit.
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26 In Straw v. Esteem Const., 45 Wn.App 869, 728 P.2d 1052 (1986), Division III was faced with
27 the following fact situation: Donahue contracted with Esteem Construction Company to build his
28 home. Esteem subcontracted with A & M to do the drywalling. Unbeknownst to Esteem, A & M
29 subcontracted the drywalling to Apollo. Straw, an employee of Apollo, was injured when he fell down
30 an unprotected stairwell. Only Apollo's employees were on the worksite at the time. Esteem's duties
31 as the general contractor involved timing and coordination of jobs, including regular progress checks.
32 Esteem had provided plywood to cover the stairwell where Mr. Straw's injury occurred. Division III
33 concluded that Esteem was not liable for Mr. Straw's injury.
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36 In reaching this conclusion, Division III acknowledged the contrary interpretation of WAC
37 296-155-040(2) by Division I in Ward v. Ceco Corp., 40 Wn.App 619, 699 P.2d 814 review denied 104
38 Wn.2d 1004 (1985). However, Division III did not acknowledge the contrary interpretation of RCW
39 49.17.060(2) enunciated by the Washington Supreme Court nine months previous in Goucher. It
40 seems clear to us, that Goucher and the subsequent consistent decision by the Supreme Court in
41 Adkins undermines the rationale of Division III's decision in Straw. Thus we find little guidance in
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1 Division III's approach for resolving the question of R C Construction's liability for Nilsen's violation of
2 WAC 296-155-225(1)(b).
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4 While Division I in Ward accurately presaged the Supreme Court's holding in Goucher, the fact
5 situation in Ward is too dissimilar to assist us in resolving the issue which is before us. In Ward,
6 Division I held Ceco, a subcontractor, liable for injuries sustained by the general contractor's
7 employee, when he fell from an unprotected height in a portion of a multi-employer project which was
8 clearly under Ceco's control.
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10 The Court of Appeals decision which deals with a fact situation most analogous to our own is
11 that cited by the Proposed Decision and Order -- Division II's decision in Bozung v. Condominium
12 Builders, 42 Wn.App 442, 711 P.2d 1090 (1985), decided a little over a month after the Supreme
13 Court's decision in Goucher. Mr. Bozung was injured when his Caterpillar scraper rolled over. He was
14 an employee of Tucci, a subcontractor of Builders. Neither Builders, the general contractor, nor any
15 other subcontractor was doing any work at the site when Mr. Bozung was injured. Builders' site
16 superintendent was the only Builders' employee on site. His duties were to assure that the work was
17 timely performed, per specifications, and to keep trespassers off the premises.
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19 Mr. Bozung contended that Tucci had violated WAC 296-155-950 which requires rollover
20 protection equipment on scrapers and that Builders should be held responsible for this violation.
21 Division II rejected this argument under the particular facts of the case. The court recited the
22 Grossman rule adopted by the Eighth Circuit in Marshall v. Knutson Const. Co., 566 F.2d 596, 601
23 (8th Cir.1977) to the effect that:
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25 [A]n employer's responsibility for safety violations under the specific duty
26 clause is limited to those violations which the employer reasonably could
27 have been expected to prevent or abate by reason of its supervisory
28 authority.
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30 Bozung, at 451-452.
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32 Having stated the general rule, however, Division II went on to conclude that, under the facts
33 before it the general contractor would not be responsible for the subcontractor's violation of safety
34 regulations. Bozung, at 452.
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36 What is most helpful to us in Bozung is Division II's reliance on the Eighth Circuit's decision in
37 Knutson. It is that decision which provides the most workable framework for analyzing the extent to
38 which a general contractor can be held accountable for its subcontractor's safety violation. As with the
39 other court decisions we have reviewed, Knutson can only be understood within its own factual
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1 context. Thus, a review of the facts of Knutson is essential. First, and most critically, Knutson, unlike
2 Goucher, Adkins, Straw, Ward, and Bozung, is not a personal injury case. Rather, it involves the
3 precise question which is before us with one difference -- Knutson, of course, arose under OSHA, not
4 WISHA.
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7 Knutson was the general contractor at a large construction site. Knutson subcontracted with
8 Flower City Architectural Metals to install a curtain wall. Flower City contracted with Allstate to perform
9 the requisite steel erection. Allstate in turn rented a scaffold, which failed to comply with OSHA
10 standards. Only Allstate's employees worked on the scaffold but the OSHRC found that Knutson's
11 employees had access to the zone of danger underneath the scaffold. The scaffold collapsed, injuring
12 four Allstate employees.
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15 Prior to the collapse, Knutson's safety administrator had inspected the site and noticed the
16 absence of guardrails and toe boards, but had not communicated his observations either to Allstate or
17 the project superintendent. The Secretary of Labor cited Knutson for a non-serious violation with
18 respect to the absence of guardrails and toe boards. In addition, Knutson was cited for a serious
19 violation for failure to meet maximum load requirements. This violation related to a preexisting one
20 inch long crack which contributed to the collapse of the scaffold by rendering it unable to support the
21 weight of the four injured employees.
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24 An Administrative Law Judge reversed both citations. The OSHRC held that Knutson did have
25 a duty with respect to Allstate's safety standard violations and held Knutson responsible for the
26 non-serious violation because "it could reasonably have known that the scaffold lacked a standard
27 guardrail and toe boards." Knutson, at 1078. However, the Commission held that Knutson had not
28 violated its duty with respect to maximum load requirements because "under the circumstances,
29 Knutson could not reasonably have known that the scaffold was incapable of meeting the minimum
30 weight requirement." Knutson, at 1078. That citation was therefore vacated. The Commission
31 emphasized that Knutson could not have detected the one inch crack which caused the scaffold to
32 collapse. On an appeal by the Secretary of Labor, the Eighth Circuit Court of Appeals declined to
33 reverse the Commission on either determination.
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36 Knutson is particularly enlightening with regard to its statement of the legal standard for
37 whether a general contractor should be held responsible for a subcontractor's safety violation on a
38 multi-employer construction site.
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1 Employers who have no control, or only limited control, over the
2 operations of other employers at the worksite, e.g., subcontractors, have a
3 duty to exert reasonable efforts to protect their own employees from the
4 safety standard violations of others. (Citations omitted) General
5 contractors normally have the responsibility and the means to assure that
6 other contractors fulfill their obligations with respect to employee safety
7 where those obligations affect the construction worksite. Accordingly, the
8 Commission has stated that it will hold a general contractor responsible
9 under § 654(a)(2) for safety standard violations which 'it could reasonably
10 have been expected to prevent or abate by reason of its supervisory
11 capacity'. [Citing Grossman] Furthermore, the duty of a general
12 contractor is not limited to the protection of its own employees from safety
13 hazards but extends to the protection of all the employees engaged at the
14 worksite. [Citations omitted]

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16 Knutson, at 1079 (Emphasis supplied). Thus the court gave its seal of approval to the Commission's
17 interpretation of § 654(a)(2) as enunciated in Grossman.

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19 Some of the factors set forth in Knutson for deciding whether a general contractor has violated
20 its duty under § 654(a)(2) (and therefore arguably under the Washington analogue, RCW
21 49.17.060(2)) with respect to the safety standard violations of its subcontractors on a multi-employer
22 construction site are: "(1) degree of supervisory capacity, (2) nature of the safety standard violation,
23 and (3) nature and extent of precautionary measures taken." Knutson, at 1080.

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25 Because it deals directly with the specific issue before us, Knutson provides us with the most
26 complete legal framework for analyzing the facts in the instant appeal. The Washington personal
27 injury cases, while helpful, do not specifically decide the issue of which employer/employers the
28 Department can cite for a WISHA violation on a multi-employer construction site.

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30 Unfortunately, the evidentiary record here is not as complete as it might have been. As noted
31 above, the Department waited until the time it filed a Petition for Review to fully develop the theory of
32 its case. Thus, the record is sparse with respect to critical factors such as the nature and extent of the
33 contract between Nilsen and R C Construction, the nature and extent of R C Construction's day-to-day
34 supervision of the project, and the extent to which workers other than Mr. Robbins and Mr. Warner
35 were exposed to the hazard. Even in its Petition for Review, the Department has failed to fully explore
36 and provide sufficient specific transcript references on the critical issues. It has, instead, left to us the
37 task of sifting through the record to discover the requisite evidence.

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39 R C Construction had contracted with the prime contractor, Holly Homes, to frame the
40 apartment buildings located at 84th and Pine Street in Tacoma, Washington, and had subcontracted
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1 framing work in Building G to Steve Nilsen Construction. There does not appear to have been a
2 written contract between the two or any specific discussion with respect to safety standard
3 compliance. The worksite superintendent for R C Construction, Steven Mason, was responsible for
4 crew coordination for specific jobs throughout the worksite and for inspection to insure that jobs were
5 performed satisfactorily by the various subcontractors. In addition to lining up crews for specific jobs,
6 he ran an hourly crew. According to Mr. Mason, Steve Nilsen provided the day-to-day supervision on
7 his particular job. According to William Robbins, Steven Mason or Randall Chopp, the owner of R C
8 Construction, supervised the roof job in Building G. According to Mr. Chopp, neither he nor any of his
9 employees provided day-to-day supervision of Nilsen or the other subcontractors who were also on
10 site. He described the relationship as follows:

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17 A. Well, the crews take it upon themselves. We have kind of an overall job
18 outline description of each duty that they are doing out there. They take it
19 upon themselves to run their helpers and get the job completed. At that
20 moment we go in and take a look and make sure that it's a hundred
21 percent and we pay for that.

22
23 2/21/89 Tr. at 117

24 He essentially agreed with Mr. Mason's description of his supervisory role.

25 According to Steve Nilsen, he and Steven Mason both supervised the job in Building G from a
26 quality control perspective. As he put it, "Steve Mason supervised all the work" on the worksite.
27 2/21/89 Tr. at 75. He essentially agreed with Mr. Mason's and Mr. Chopp's description of the role of
28 the superintendent (Mr. Mason) in inspecting work once it was done, providing the subcontractor with
29 a "pickup" list of corrections that needed to be made, and then reinspecting the work once the
30 changes had been made.

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34 On February 23, 1987, when the WISHA inspector observed the violation at Building G, Steven
35 Mason was two buildings away. He acknowledged that no permanent fall protection was in place and
36 that William Robbins and Cecil Warner were not wearing safety belts. Mr. Mason testified that, had he
37 seen something wrong, in his role as superintendent he would have gone to "Steve Nilsen
38 Construction and let them know about it, but it was just so that he could let his help know." 2/21/89 Tr.
39 at 97-98. No evidence was presented to the effect that R C Construction had discussed the provision
40 of fall protection with Steve Nilsen Construction even though it was readily apparent that no safety
41 measures were in place. According to Mr. Robbins' testimony, he and Cecil Warner worked for five
42 days on the roof without any safety protection whatsoever.
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1 That the violation of WAC 296-155-225(1)(b) was obvious from some distance cannot be
2 disputed. Indeed, the violation was observed by Mr. Cochran, the safety and health inspector, as he
3 was driving past the worksite on February 23, 1987. From that distance, he noted that neither safety
4 lines nor other fall protection was being utilized. He photographed the scene as he pulled his vehicle
5 onto the property. Exhibit No. 2 graphically illustrates just how obvious the safety violation was.
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8 The question before us, then, is whether these facts fall within the Grossman guidelines
9 adopted in Knutson, when viewed against the backdrop of the Washington personal injury line of
10 cases. The degree of supervisory capacity in this case does not seem much different from that
11 present in Knutson. For example, Mr. Mason apparently perceived his role with respect to a
12 subcontractor's safety violations in much the same manner as the safety administrator in Knutson, i.e.,
13 an advisory one. We also find Mr. Mason's supervision of quality control quite similar to the level of
14 supervision in Knutson. However, we can think of no better example of the actual control exercised by
15 a general contractor on a multi-employer construction site than the fact that, once R C Construction
16 had been cited for Nilsen's safety violation, Mr. Chopp fired Nilsen Construction and hired another
17 subcontractor. Would that R C Construction had exercised such vigilance with respect to the obvious
18 absence of fall protection for five days at Building G without the necessity of a WISHA citation.
19 Nonetheless, it is eminently clear that the citation served the purpose intended by the legislature when
20 it enacted WISHA (RCW 49.17.010) and that, when it chose to, R C Construction exercised
21 considerable control over all safety violations on its worksite.
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24 Another factor which appears to have been significant to Division II in Bozung, when
25 considering the liability of a general contractor for a subcontractor's safety violation, was that, in that
26 case, only the subcontractor's employees were exposed to the danger zone of the hazard created by
27 the subcontractor. No other workers were on the site at the time. In the case before us, it is clear that
28 workers other than Nilsen's employees were on the worksite. Under Underhill and Adkins the question
29 is whether those other workers were also exposed to the hazard or were within the zone of danger.
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32 While there was no direct testimony that employees of other subcontractors or of R C
33 Construction came within the zone of danger, it seems obvious to us, that on a multi-employer
34 construction site, workers on the ground are exposed to the hazard of workers above them falling.
35 Thus it was not only Mr. Robbins and Mr. Warner who were exposed to the danger created by Nilsen's
36 violation of WAC 296-155- 255(1) (b) but also any workers passing beneath them during the five days
37 they were so employed. That is, it was "reasonably predictable" that workers other than Nilsen's
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1 employees would be, were or had been in the zone of danger created by Nilsen's violation during that
2 five day period. See Adkins, at 147. Thus the facts in the instant appeal are clearly distinguishable
3 from the facts in Bozung.
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6 With respect to the nature of the violation, we, like the OSHRC in Knutson, consider the fact
7 that the ongoing five day violation of WAC 296-155-225(1)(b) was obvious to casual passers-by
8 significant. We need only look at Exhibit No. 2 and recall the manner in which Mr. Cochran witnessed
9 the violation as he drove by in his car to conclude that the violation must have been obvious to anyone
10 on the worksite with even a passing interest. Mr. Mason, as the superintendent for the general
11 contractor, should have had more than a passing interest, since Nilsen's violation of WAC
12 296-155-225(1)(b) exposed not only Nilsen's own workers to a hazard but also any other workers
13 passing below.
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18 For the foregoing reasons, we adopt the rationale set forth in Knutson for multiple employer
19 construction sites. As a general principle, the general contractor on a multiple employer construction
20 site is responsible for its subcontractor's WISHA violation when that violation exposes not only the
21 subcontractor's employees, but also other workers on the site to a safety hazard. This level of
22 responsibility is imposed upon the general contractor when, as here, that employer could reasonably
23 have been expected to prevent or abate the subcontractor's violation by reason of its supervisory
24 capacity over the entire site as the general contractor. The level of control which R C Construction
25 exercised over the worksite, coupled with the obvious nature of Nilsen's WISHA violation, is sufficient
26 to permit the Department to cite R C Construction for Nilsen's violation. On the specific facts of this
27 case, we therefore conclude that Corrective Notice of Redetermination No. 380916 is correct and must
28 be affirmed.
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34 Proposed Finding of Fact No. 1 and proposed Conclusion of Law No. 1 are adopted as the
35 Board's final findings and conclusions. In addition, the following findings and conclusions are entered:
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37 **FINDINGS OF FACT**

- 38
39 2. In February, 1987, R C Construction was the general contractor at a
40 multi-employer construction worksite located at 84th and Pine Street in
41 Tacoma, Washington. R C Construction had contracted with Holly
42 Homes, the prime contractor, to frame apartment buildings at that location
43 and had subcontracted framing work in Building G, including the roof, to
44 Steve Nilsen Construction.
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46 3. On February 23, 1987 and for four days previous William Robbins and
47 Cecil Warner were working framing the roof on Building G. During that
period they worked at a height of approximately 26 feet above the ground

1 without any fall protection. In particular, they did not use safety belts.
2 During that period they were exposed to the hazard of falling, as were the
3 employees of other employers passing below.
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- 5 4. In February, 1987, William Robbins and Cecil Warner were not employees
6 of R C Construction nor were they independent contractors the essence of
7 whose contract was personal labor for R C Construction. William Robbins
8 and Cecil Warner were employees of Steve Nilsen Construction.
- 9 5. As the general contractor R C Construction had a worksite superintendent,
10 Steven Mason, on site. He was responsible for crew coordination for
11 specific jobs throughout the jobsite and for inspection to insure that jobs
12 were performed satisfactorily by the various subcontractors. He had
13 general supervisory authority over the entire worksite.
- 14 6. Randall Chopp, the owner of R C Construction, fired Steve Nilsen
15 Construction after the Department cited R C Construction for a WISHA
16 violation because of William Robbins' and Cecil Warner's failure to use
17 safety belts during the roof framing at Building G.
- 18 7. In addition to William Robbins and Cecil Warner, the employees of other
19 employers working at the jobsite were exposed to the hazard created by
20 Steve Nilsen Construction's failure to require its workers, William Robbins
21 and Cecil Warner, to use fall protection.
- 22 8. While framing the roof on Building G, William Robbins' and Cecil Warner's
23 failure to use fall protection, in particular, safety belts, for a five day period
24 ending on February 23, 1987, could be and was observed from the ground
25 and at some distance.
- 26 9. By reason of its supervisory capacity over the entire worksite, R C
27 Construction as the general contractor could reasonably have been
28 expected to prevent or abate the subcontractor Steve Nilsen
29 Construction's failure to use safety belts while framing the roof on Building
30 G.
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33 **CONCLUSIONS OF LAW**

- 34 2. On February 23, 1987, Steve Nilsen Construction, a subcontractor on a
35 multi-employer construction jobsite, violated WAC 296-155-225(1)(b).
- 36 3. William Robbins and Cecil Warner were employees of Steve Nilsen
37 Construction during February, 1987. They were not employees of R C
38 Construction nor were they independent contractors the essence of whose
39 contract with R C Construction was their personal labor. RCW
40 49.17.020(3) & (4) and WAC 296-155-012(12) and (28).
- 41 4. Because its subcontractor's violation of WAC 296- 155-225(1)(b) was
42 readily apparent; because the violation exposed not only Steve Nilsen
43 Construction's employees but also other workers on the multi-employer
44 construction worksite to a safety hazard; and because R C Construction
45 could reasonably have been expected to prevent or abate its
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1 subcontractor's violation by reason of its supervisory capacity over the
2 entire worksite, R C Construction was properly cited for Steve Nilsen
3 Construction's violation of WAC 296-155-225(1)(b) under the specific duty
4 imposed by RCW 49.17.060(2).
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- 6 5. The Corrective Notice of Redetermination of the Department of Labor and
7 Industries dated June 5, 1987, which affirmed the finding of a violation of
8 WAC 296-155-225(1)(b) contained in Citation and Notice No. 380916
9 dated March 12, 1987, but which reduced the penalty assessment from
10 \$2800 to \$750 is correct and is affirmed.

11 It is so ORDERED.

12 Dated this 7th day of November, 1989.

13 BOARD OF INDUSTRIAL INSURANCE APPEALS

14
15
16 /s/
17 SARA T. HARMON Chairperson

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19 /s/
20 FRANK E. FENNERTY, JR. Member

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22 /s/
23 PHILLIP T. BORK Member
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