

Exxel Pacific

SAFETY AND HEALTH

General contractor liability for safe environment

General contractor was cited for failing to establish, supervise and enforce, in a manner that was effective in practice, a safe and healthful work environment as a result of violations by its subcontractor. Proof of a subcontractor's cited safety violation does not, in and of itself, constitute proof that a general contractor's primary safety obligation was not satisfied. A determination as to whether a general contractor has established, supervised and enforced a safe working environment in a manner that is effective in practice involves an analysis similar to that used in evaluating "effective in practice" for the affirmative defense of unpreventable employee misconduct. ...*In re Exxel Pacific*, BIIA Dec., 96 W182 (1998) [dissent]

Scroll down for order.

1 3/10/97 Tr. at 56, lines 17-29. We remove the testimony at 3/10/97 Tr. at 56, line 39, through
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3 3/10/97 Tr. at 57, line 7, from colloquy. The testimony is relevant. The testimony could tend to
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5 convince a trier of fact that Exxel was not sufficiently vigilant on its jobsite in light of Master
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7 Framing's safety record. Further, our industrial appeals judge did later rely upon this testimony.
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9 The Board has reviewed the other evidentiary rulings in the record of proceedings and finds that no
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11 prejudicial error was committed. We affirm the rulings.

12 **DECISION**

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15 In this appeal we decide whether the Department of Labor and Industries properly cited
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17 Exxel, a general building contractor, for a violation under the Washington Industrial Safety and
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19 Health Act (WISHA). The Department cited general contractor Exxel after a Department safety
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21 inspector observed employees of Exxel's subcontractor, Master Framing, violating specific fall
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23 protection standards. Exxel contends it is entitled to relief from the citation. We agree with Exxel.

24 **Citation Background and Issues**

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27 Exxel was the general contractor at the Stanwood/Camano Village construction project.
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29 Master Framing was one of Exxel's subcontractors on the project. On January 17, 1996, Safety
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31 Inspector Bruce S. Weech, of the Safety and Health Division of the Department of Labor and
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33 Industries, observed four Master Framing employees on a roof on which they were installing
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35 plywood sheeting. The roof varied 16 to 18 feet in height relative to the ground. Two of Master
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37 Framing's employees were on the lower edge of the roof, engaged in loading materials from a
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39 forklift onto the roof. These employees wore full safety harness gear, including safety lanyards,
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41 but the employees did not have the safety lanyards tied-off to the available anchor points. One
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43 employee was working on a truss with a shock-absorbing lanyard that was too long. Safety
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45 Inspector Weech then interviewed Master Framing and Exxel employees, and examined some of
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47 Exxel's documents relating to its safety program.

1 The Department cited Exxel for violation of WAC 296-155-100(1)(a):

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3 (1) It shall be the responsibility of management to establish, supervise,
4 and enforce, in a manner that is *effective in practice*:

5 (a) A safe and healthful working environment.
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7 (Emphasis added.)
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9 In its citation and notice, the Department alleged that Exxel:

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11 as a general contractor, failed to establish, supervise and enforce, in a
12 manner which was *effective in practice* a safe and healthful working
13 environment, in that sub-contractor, Master Framing, Inc., had
14 employees exposed to fall hazards of up to 18 feet without fall
15 protection implemented (WAC # 155-24503(2)(b)(ii)), had a written fall
16 protection work plan posted in the Exxel jobsite office that was not being
17 implemented (WAC 295[sic]-155-24503(4)(a)), and employee had 10
18 feet or more in slack between fall arrest lanyard tie-off on roof and
19 attachment to harness "D" ring while working over a 16 foot fall hazard.
20 (WAC 296-155-24505(4)(q)(ii)).¹
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22 2/14/96 Citation and Notice No. 115221699 (Emphasis added.)
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24 This appeal raises issues concerning a general contractor's obligations, under WISHA, to
25 ensure a safe and healthful work environment on the general contractor's jobsite. These issues
26 include the extent of a general contractor's WISHA obligations and the nature in which a general
27 contractor may fulfill these obligations. In the present appeal, the Department and Exxel agree that
28 our determination should turn specifically upon whether Exxel's safety program was "effective in
29 practice." The Department alleges that Exxel's safety program was not "effective in practice" and
30 Exxel contends its program was "effective in practice," despite the fact that employees of Exxel's
31 subcontractor, Master Framing, violated specific fall protection standards. The Department and
32 Exxel both presented extensive evidence concerning whether Exxel's safety program was "effective
33 in practice." We ultimately agree that our decision in this particular appeal should turn upon
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47 ¹ We note the code references above are consistent with *1995 Washington Administrative Code, Volume 13B 1996 Supplement*, the specific code sections last amended effective October 1, 1995. The provisions were subsequently amended and re-codified effective February 1, 1997.

1 whether Exxel's safety program was "effective in practice" in maintaining a safe and healthful
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3 working environment.

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5 Also, to a large degree, the Department and Exxel appear to agree that WISHA Regional
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7 Directive (WRD) 93-4, promulgated by the Department for general contractor and WISHA
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9 compliance staff use, provides a guide for determining whether Exxel's overall safety program was
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11 adequate so as to be considered "effective in practice." The Department acknowledges that Exxel
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13 complied with many of the recommendations in WRD 93-4. However, the Department maintains
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15 that Exxel's safety program should not be considered "effective in practice."
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17 In this decision, we discuss the most recent developments in the law concerning general
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19 contractor WISHA obligations, and we discuss WRD 93-4 and other sources of the term "effective
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21 in practice." We discuss these in order to adequately explain the reasons for our decision in the
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23 present appeal. We also discuss these in order to clarify the limits of our present decision as it
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25 might apply to future cases where the Department has cited a general contractor after observing a
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27 subcontractor's employees violating specific WISHA standards.
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29 **Developments Concerning General Contractor WISHA Responsibility**

30 **Appellate Court and Board Cases**

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33 The Department may issue a WISHA citation to a general contractor, based on safety
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35 violations occurring on its jobsite, even though the general contractor's employees were not directly
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37 exposed to the hazard and the general contractor's own employees did not directly violate a
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39 specific WISHA regulation. In 1989, this Board held that the general contractor on a multiple
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41 employer construction site is responsible for its subcontractor's WISHA violation when: (1) the
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43 violation exposes not only the subcontractor's employees, but also other workers on the site to a
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45 safety hazard; (2) the general contractor could reasonably have been expected to prevent or abate
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1 the subcontractor's violation by reason of its supervisory capacity over the entire site; and (3) the
2 subcontractor's WISHA violation is obvious. *In re R C Construction*, BIIA Dec., 87 W039 (1989).
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5 In the context of a personal injury lawsuit (as opposed to a safety citation under WISHA),
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7 our State Supreme Court held that general contractors, on multiple employer construction sites,
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9 have an even broader responsibility than we stated in *R C Construction*:

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11 A general contractor's supervisory authority places the general in the
12 best position to ensure compliance with safety regulations. For this
13 reason, **the prime responsibility for safety of all workers should**
14 **rest on the general contractor.**
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16 . . .

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18 Thus, to further the purposes of WISHA to assure safe and
19 healthful working conditions for every person working in Washington,
20 RCW 49.17.010, we hold **the general contractor should bear the**
21 **primary responsibility for compliance with safety regulations**
22 because the general contractor's innate supervisory authority
23 constitutes sufficient control over the workplace.
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25 *Stute v. P.B.M.C.*, 114 Wn.2d 454, 463-464 (1990) (Emphasis added.) See also, *Degroot v.*
26 *Berkley Constr., Inc.* 83 Wn. App. 125 (1996). In *Stute*, a subcontractor's employee sued the
27 general contractor for negligent safety conditions on the jobsite. Mr. Stute fell from a wet, slippery
28 roof while installing gutters in the employ of the subcontractor. The subcontractor had not provided
29 any safety equipment. As evidence of the general contractor's negligence, Mr. Stute sought to
30 present evidence of the general contractor's failure to ensure that its subcontractor complied with
31 WISHA regulations.
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39 Our appellate courts have extended the principle in *Stute* to hold entities other than general
40 contractors potentially liable for WISHA violations. Division One of our Court of Appeals held that
41 the owner of a jobsite may owe a common law duty to the employees of an independent contractor
42 to provide a safe workplace if the landowner "*retained the requisite degree of control over the*
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1 work." *Kennedy v. Sea-Land Service*, 62 Wn. App. 839, 855 (1991), referring to *Kelley v. Howard*
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3 *S. Wright Constr. Co.*, 90 Wn.2d 323 (1978). Division Two, applying both *Kelley* and *Stute*,
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5 imposed liability on a jobsite owner based on: (1) the common law duty to exercise ordinary care
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7 for the safety of an independent contractor's employees (*Kelley*); and (2) the duty to comply with
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9 safety regulations (*Stute*). *Doss v. ITT Rayonier*, 60 Wn. App. 125 (1991). Division One held that
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11 an owner/developer's position was so comparable to that of the general contractor in *Stute* that the
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13 owner/developer has a duty to ensure that employees of its subcontractors comply with applicable
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15 safety regulations. *Weinert v. Bronco National Co.*, 58 Wn. App. 692 (1990).

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17 Thus, our courts have made it clear that the Department may issue a WISHA citation to a
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19 general contractor for failure to meet its "primary responsibility" to comply with WISHA regulations
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21 on its jobsite, whether or not the general contractor's own employees are directly exposed to the
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23 hazard considered.

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25 However, neither this Board nor our courts have previously addressed the **substance** of a
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27 general contractor's primary responsibility for WISHA compliance on its jobsite. The Department
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29 cited one of our previous decisions, *In re Atkinson-Dillingham, J.V.*, Dckt. No. 88 W091 (August 23,
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31 1990). In *Atkinson*, we stated: "[b]ased on the rationale set forth in *Stute*, *Atkinson-Dillingham*, the
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33 general contractor, would be responsible for **any** WISHA violations committed by Bauveg America
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35 [the subcontractor]." *Atkinson*, at 5 (Emphasis added.)² In *Atkinson*, we ultimately determined that
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37 the Department had failed to establish that any safety violation occurred on the jobsite. Therefore,
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43 ² We note that *Atkinson* has not been designated by us as a "significant Decision" under RCW 51.52.160. The Board
44 was directed to publish a guide for those who appear in front of the agency as to how we would respond to various
45 issues and facts. We issue our Significant Decisions to comply with the statutory mandate. The Significant Decisions
46 are also a mechanism to distribute this agency's decisions. Citing a decision by this Board that has not been designated
47 as "significant" does not mean that we will not consider it as authority. We strive for consistency in all our decisions
except where we find it warranted to specifically reverse an earlier position. We caution that we will consider only **final**
decisions of this agency. Proposed Decisions and Orders are not final and are not considered as authority within this
agency.

1 in *Atkinson* we did not fully examine the extent of the general contractor's WISHA obligations and
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3 whether there are defenses available such as the employee misconduct defense. In light of these
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5 facts and our discussion below, we caution that the statement in *Atkinson* should not be read to
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7 mean that general contractors are necessarily responsible for each and every WISHA violation
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9 committed by their subcontractors.

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11 Neither *Stute*, nor other decisions of our appellate courts, provide detailed guidance
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13 regarding the full substance or extent of a general contractor's obligations under WISHA. In *Stute*,
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15 the court, before remanding the case to the trial court for a determination of damages, stated:

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17 A general contractor's supervisory authority is per se control over
18 the workplace, and the duty is placed upon the general contractor as a
19 matter of law. It is the general contractor's responsibility to furnish
20 safety equipment **or to contractually require subcontractors to**
21 **furnish adequate safety equipment relevant to their**
22 **responsibilities.**

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24 *Stute*, at 464 (Emphasis added.)

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26 In referring to this language in *Stute*, the *Degroot* court considered the admissibility of the general
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28 contractor's contract with the subcontractor. The court noted that the boilerplate language in the
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30 contract "appears designed to meet the duty of care outlined in *Stute*." *Degroot*, 83 Wn. App. at
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32 129.

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34 We do not, however, consider the language from *Stute*, cited above, to be an exhaustive
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36 statement of general contractor obligations under WISHA. In *Stute*, neither the general contractor
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38 nor the subcontractor provided safety equipment when the need was obvious. This failure provided
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40 a sufficient factual foundation to find the general contractor liable. We believe the quotation from
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42 *Stute*, cited above, is not a statement on how a general contractor may limit its obligations under
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44 WAC 296-155-100(1)(a).

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46 Our understanding is consistent with the limited legal holding in *Degroot*. Again that court
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held that the general contractor's contract with the subcontractor was admissible together with a

1 limiting jury instruction that explained that the exhibit was received for, "a limited purpose relating to
2 whether (the general contractor) exercised due care in carrying out its duties under WISHA" but
3 "not received in evidence for the purpose of showing that those WISHA duties had been
4 delegated to (the subcontractor)."
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9 While a general contractor cannot absolve itself of responsibility for safety on the jobsite by
10 contractually delegating that responsibility to a subcontractor, neither does proof of a **cited** safety
11 violation constitute sufficient proof the responsibility was not met. This is consistent with the
12 development of tort law in this state. The common law doctrine of negligence, per se, based on a
13 violation of a statute or regulation, has been abolished in this state. Rather, "breach of a duty
14 imposed by statute, ordinance, or administrative rule . . . may be considered by the trier of fact as
15 evidence of negligence." RCW 5.40.050; *Doss*, 60 Wn. App. at 129. Thus, in personal injury
16 actions, our appellate courts have focused in some cases upon the **admissibility of evidence**
17 concerning WISHA violations on a general contractor's jobsite to prove negligence of the general
18 contractor. And in at least one case, *Stute*, the court focused upon the **sufficiency of the**
19 **evidence** to show negligence, where the violation was obvious. But, understanding this legal
20 context, we are persuaded that none of the courts, in the personal injury cases thus far discussed,
21 meant to define the full extent of a general contractor's obligations under WISHA.
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35 **Department Effort to Clarify General Contractor Obligations - WRD 93-4**

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37 The Department promulgated WRD 93-4, Exhibit No. 8, after the "Stute Task Force"
38 (comprised of representatives of the Department of Labor and Industries, the Department of
39 General Administration, various businesses and business associations, and labor associations, and
40 an attorney) considered the implications of *Stute* for the Department's administration of WISHA.
41 WRD 93-4 states that the *Stute* Task Force was formed to develop a WISHA Regional Directive
42 that would set forth a "duty of care" that the Department and the contractor community would
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1 "recognize as an affirmative defense." Exhibit No. 8, at 2. The stated goals were to foster "a
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3 strong commitment to worker safety and viable relationship between the contractor community and
4
5 the Department" and "to develop a WRD that would . . . clarify the Department's expectations in a
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7 manner that recognized the needs of the contractor community and promoted worker safety."
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9 Exhibit No. 8, at 2.

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11 The heart of WRD 93-4, a 9-page document, is its outline of general contractor
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13 responsibilities. Many of the delineated **mandatory** responsibilities of a general contractor are
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15 identical to those that the Department has imposed, by regulation, upon the direct employers of
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17 workers in the construction industry. Among these are: development of an Accident Prevention
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19 Program that includes roles and responsibilities pertaining to safety, training and corrective action;
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21 tailoring this to the safety requirements of the particular jobsites "where appropriate" in the form of
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23 written, site-specific Safety Plans that address and coordinate safety issues of all subcontractors at
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25 the site; developing or requiring subcontractors to identify anticipated hazards in all phases of the
26
27 project; requiring subcontractors to have Accident Prevention Programs and site-specific plans
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29 consistent with WISHA; and the like. Exhibit No. 8, at 4-6. (Emphasis added.)

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31 WRD 93-4 also **suggests** what a general contractor might do in order to establish work
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33 rules designed to enhance safety and prevent violations. A general contractor "*may wish* to
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35 consider": preparing agendas for job safety meetings; mandatory attendance of all workers at such
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37 meetings; safety incentive or recognition programs; and similar. Exhibit No. 8, at 6 (Emphasis
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39 added.) WRD 93-4 then provides that the general contractor "*must* adequately communicate work
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41 rules to its subcontractors" and "*must* show that it has established a process to discover and
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43 control recognized hazards," that is, those hazards "[r]ecognized by the industry or by the
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45 contractor in the past." Exhibit No. 8, at 6 (Emphasis added.) "Disciplinary action related to safety
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47 violations *must* be communicated to the appropriate work force." Exhibit No. 8, at 7 (Emphasis

1 added.) WRD 93-4 requires that the contractor "*must show*" that it has effectively "enforced in
2
3 practice" its Accident Prevention Program and/or Safety Plan when it discovers a violation, and
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5 requires the general contractor to contractually require its subcontractor to do likewise pursuant to
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7 a disciplinary schedule. Exhibit No. 8, at 7-8 (Emphasis added.)
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9 WRD 93-4 concludes by way of indicating the focus on general contractor responsibilities is
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11 intended to provide guidance to WISHA compliance staff to determine whether the general
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13 contractor has provided a safety program that is "**effective in practice.**" "If the general contractor
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15 has met its responsibilities . . . *no citation will be issued to the general contractor. A safety*
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17 program **may** be *effective in practice* even if there are isolated instances of a code violation."
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19 Exhibit No. 8, at 8-9 (Emphasis added.)
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21 We fully acknowledge that WRD 93-4 is laudable, and an immensely valuable document, in
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23 that it reflects a cooperative effort between the Department, business, and labor to promote
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25 general contractor responsibility for WISHA compliance, and thereby worker safety. WRD 93-4
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27 also provides many useful guidelines to help determine whether general contractors, in this case,
28
29 Exxel, have met their "primary responsibility" for WISHA compliance on their jobsites.
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31 For several reasons, however, we cannot adopt WRD 93-4 as a definitive legal statement of
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33 the requirements expected of general contractors. **First**, WRD 93-4 has not been adopted as a
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35 formal regulation, having the force of law, under the Washington Administrative Procedures Act.
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37 **Second**, possibly because WRD is not an adopted regulation, it has not been drafted in precise
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39 terms. WRD 93-4 is a mixture of overlapping mandatory requirements and more permissive
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41 suggestions, both for general contractors and for Department compliance staff. This prevents the
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43 kind of predictable application we would expect of a regulation. **Third**, WRD 93-4 is sweeping in its
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45 scope and detail. It is not necessary that we consider the legal validity of all the pronouncements
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47 in WRD 93-4 in order to resolve the present case, nor should we do so in light of judicial economy.

1 Wholesale agreement that WRD 93-4 contains legally controlling criteria in the present case may
2
3 impede our proper consideration of future cases. In short, we need not, and should not, determine
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5 in this case whether *Stute* requires compliance with all of the mandates or suggestions of WRD 93-
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7 4. Therefore, we do not determine if the legal duty, imposed by *Stute*, requires full adherence to
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9 WRD 93-4. **Fourth**, WRD 93-4 utilizes the terms "effective in practice" and "affirmative defense."
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11 As explained below, our courts have not ruled upon the issue of whether the general contractor,
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13 cited with a so-called *Stute* violation, bears the affirmative obligation of proving it had a safety
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15 program that was "effective in practice." In the present case, both the Department and Exxel
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17 present extensive evidence on the issue of whether Exxel's safety program was "effective in
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19 practice." Neither party briefed the issue of relative burdens of proof. In the present case, we do
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21 not determine whether the Department or a general contractor bears the initial burden in this
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23 regard in an appeal from a *Stute* citation. This is a potentially important legal issue that we do not
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25 decide in this decision, because it is not necessary that we do so.

26 27 **Other Sources of the Term "Effective in Practice"/Risk of Confusing Burdens of Proof**

28 29 **The "Unpreventable Employee Misconduct" Defense**

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31 In the context of an employer defending against WISHA citations for violations of its own
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33 **direct** employees, we held in *In re The Erection Company (II)*, BIIA Dec., 88 W142 (1990):

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35 In order to establish the affirmative defense of unpreventable employee
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37 misconduct, an employer must show that it has established work rules
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39 designed to prevent the violation, has adequately communicated these
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41 rules to its employees, has taken steps to discover violations, and has
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43 **effectively enforced** the rules when violations have been discovered.

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45 *The Erection Company (II)*, at 8-9, citing *Jensen Construction Company*, 7 OSHC 1477, 1479
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47 (1979) (Emphasis added.) See also, *In re Jeld-Wen of Everett*, BIIA Dec., 99 W144 (1990) at 17.

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49 We note, as have Exxel and the Department, the similarities between the four elements of
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51 the "unpreventable employee misconduct" defense and the structure and content of WRD 93-4,

1 particularly the near identity between the "effective in practice" requirement of the WRD and
2 "effectively enforced" language in the fourth element of the unpreventable employee misconduct
3 defense. Indeed, as the Department notes, *Jeld-Wen of Everett* adopts the rationale of a federal
4 Occupational Safety and Health Act (OSHA) case that employed the criteria "effective in practice."
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9 *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1277 (6th Cir. 1987).

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11 In WISHA cases, the Department generally bears the initial burden of going forward with
12 evidence to establish a prima facie case that the violation occurred. WAC 263-12-115(2)(b). We
13 have held this ordinarily entails a showing that: (1) a specific standard applies; (2) there was failure
14 to comply with the standard; and (3) the cited employer's employees had access to the hazard.
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18 *The Erection Company (II)*, at 13-14, citing *Central of Georgia Railroad Co. v. OSHRC*, 576 F.2d
19 620, 624 (5th Cir. 1978). We note, of course, in light of *Stute*, the third element of the
20 Department's initial burden is no longer applicable in this state in general contractor citations of the
21 kind presented in the present case, that is, in *Stute* citations.

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27 Once the Department establishes its prima facie case, in a **non-*Stute* case**, the burden then
28 shifts to the employer to establish all four elements of the affirmative defense of unpreventable
29 employee misconduct. *Jeld-Wen of Everett*, at 14. We must, therefore, recognize that use of the
30 term "effective in practice," as a criteria for deciding ***Stute* cases**, could lead to confusion regarding
31 whether the Department or the general contractor bears the initial burden of showing whether or
32 not the general contractor's safety program should be considered effective in practice. For further
33 reasons stated below, related to this particular case, we do not decide whether the Department or a
34 general contractor should bear the initial burden of proof on the matter of whether the general
35 contractor's safety program was "effective in practice" in ***Stute* cases**.

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45 **The Wording of the Citation in the Present Case**

1 The Department cited Exxel for failure to "establish, supervise, and enforce, in a manner
2 which is **effective in practice** a safe and healthful working environment." 2/14/96 Citation and
3 Notice (Emphasis added), citing to WAC 296-155-100(1)(a), pertaining to "management"
4 responsibility. This wording could arguably raise issues concerning respective burdens of proof
5 between the Department and Exxel.
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11 As we noted earlier, the Department generally bears the initial burden of proof that the
12 violation occurred as alleged in the Department's citation. Therefore, the Department's wording of
13 the citation against Exxel could lead us to conclude that the Department must bear the initial
14 burden of establishing all elements of the citation, including that Exxel did not have a safety
15 program that was "effective in practice." However, in non-*Stute* cases where the Department has
16 initially only proven violation of a specific standard, it is the employer that must then bear the
17 burden of showing it had a safety program that was "effective in practice" in order for the employer
18 to avail itself of the "unpreventable employee misconduct defense."
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27 In *Jeld-Wen of Everett*, we considered that RCW 49.17.180(6), defining "serious" violations,
28 provides in part "a serious violation shall be deemed to exist . . . unless the employer did not, and
29 could not with the exercise of reasonable diligence, know of the presence of the violation." We
30 rejected the idea that this language placed the burden of disproving the unpreventable employee
31 misconduct defense upon the Department. We stated the language does not impose upon the
32 Department "the unreasonable burden of proving a negative. . . . The employer has the necessary
33 knowledge of workplace and work practices and is in the best position to establish the elements of
34 this defense." *Jeld-Wen of Everett*, at 16. The court in *Stute* similarly relied upon the general
35 contractor's "innate supervisory authority [constituting] sufficient control over the workplace" to
36 place "primary responsibility" for jobsite safety upon the general contractor. Using the same
37 rationale, it may be reasonable to assign to the Department only the burden of proving a violation
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1 of a specific standard occurred on the jobsite, and to assign to the general contractor, then, the full
2 affirmative burden of proving it had an adequate safety program that was effective in practice.
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4 Neither the facts in *Stute*, nor the personal injury nature of the case, required the court to fully
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6 explore potential distinctions between a general contractor and a direct employer or subcontractor
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8 in such a manner as to address relative burdens of proof in a WISHA case. Given the wording of
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10 the citation before us, and the conduct of the parties at hearing, we believe the question, of
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12 whether the Department in *Stute* is required only to prove violation of a specific standard, is better
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14 left undecided in the present case.
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17 Thus, overlapping uses of the term "effective in practice" in the citation in this case, in WRD
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19 93-4 and in the criteria for the "unpreventable employee misconduct defense," potentially create
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21 confusion with regard to burdens of proof. Moreover, we again note the language in WRD 93-4
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23 that attempts to establish a "duty of care" that would be recognized as an "affirmative defense."
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25 Exhibit No. 8, at 2. This suggests a Department view that the general contractor in a *Stute* case
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27 should always bear the burden of establishing the contractor had a safety program that was
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29 "effective in practice." This appears in contrast to an arguable interpretation, that a general
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31 contractor might make, based upon the citation language in the present case.³
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33 We cannot predict what citation wording the Department will use, nor can we predict what
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35 evidence will be presented, in future *Stute* type cases that may come before this Board. We
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37 cannot predict whether the Department (in a future case) will only show that a violation occurred on
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39 the general contractor's jobsite (as distinct from the wording of the citation in the present case),
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41 even though the violation was committed by, and affected only, a subcontractor's employees. We
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45 ³ As our industrial appeals judge noted, nothing in WRD 93-4 clearly indicates that it was drafted with the appeals
46 process at this Board in mind. The document is aimed at general contractors and WISHA compliance staff. WRD 93-4
47 states "compliance staff shall be guided by this WRD to assess . . . whether the general contractor should be cited under
WISHA." Exhibit No. 8, page 9. Although Safety Inspector Weech testified that he completed a "*Stute* Questionnaire,"
the testimony concerning the questionnaire was sparse. We cannot tell from this, nor do we otherwise know, how much

1 cannot presume that the Department and a future general contractor will, as here, cast aside
2 distinctions and arguments as to which has the initial burden of showing whether the general
3 contractor's WISHA compliance efforts were sufficient in content and "effective in practice."
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7 We do not find anything in *Stute*, or the other cases we have discussed, that necessarily
8 requires a conclusion that the Department, in a *Stute* citation, bears **only** the burden of establishing
9 that a violation of a specific WISHA standard occurred on the general contractor's jobsite as
10 sufficient proof that a general contractor's safety program was not "effective in practice."
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15 As we stated before, both the Department and Exxel presented extensive evidence on the
16 matter of whether Exxel's safety program was "effective in practice." In order to resolve this
17 appeal, we do not need to decide who had the burden on this issue. The question of which party
18 has the burden of proof may be critical in future appeals from *Stute* citations. For these reasons,
19 we do not decide in this case whether the Department or a general contractor bears the initial
20 burden on the "effective in practice" issue.
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25 With this background, and having stated these limitations, we do conclude that *Stute*, as well
26 as other cases that we have discussed, does impose certain obligations upon a general contractor
27 for furthering WISHA compliance on the general contractor's jobsite. We now turn to these
28 obligations before discussing the details of the present case.
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35 **General Contractor Responsibilities Imposed by *Stute***
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37 At a minimum, the general contractor, on its jobsite, must provide for compliance with the
38 applicable safety rules promulgated by the Department in the Washington Administrative Code.
39 This includes identifying the applicable rules and communication of these rules to its employees
40 and all subcontractors and their employees. As a part of this obligation the general contractor must
41 assure that necessary safety equipment is provided to workers.
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1 We cannot conceive of a general contractor assuming primary responsibility for WISHA
2 adherence on its jobsite without the general contractor establishing a means to monitor its jobsite
3 for compliance. We agree that *Stute* at least requires general contractors to assume "primary
4 responsibility" for WISHA compliance on the jobsite in a manner that is "effective in practice."
5
6 Were we to hold otherwise, we would render meaningless the *Stute* court's assignment of primary
7 responsibility for jobsite safety to the general contractor. Again, wholesale delegation of WISHA
8 responsibility to a subcontractor, by contract, is not sufficient. *Degroot*, 83 Wn. App. We believe
9 these to be the essentials of the *Stute* court's holding.
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16 We also agree that the four elements of the unpreventable employee misconduct defense
17 (identification, communication, discovery, and enforcement or effectiveness) can provide a useful
18 structure or framework for examining whether a general contractor has met its obligations under
19 *Stute*. We are not saying that the unpreventable employee misconduct defense is directly
20 applicable to general contractors with regard to the subcontractors on the jobsite.⁴ Our
21 comparisons to the employee misconduct defense, together with a consideration of WRD 93-4,
22 provide us with useful questions to consider in resolving the larger issue of how a general
23 contractor can fulfill its duty to have a safety program that is effective in practice.
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33 For example, what did the general contractor do to *identify* safety hazards, or to
34 *communicate* safety requirements and regulations? Certainly these kinds of questions are relevant
35 to the question of whether a safety program is "effective in practice."
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39 **Exxel's Safety Program and General Record of Enforcement**

40
41 Exxel generally maintains one of the best safety programs in the contractor industry. This is
42 well documented in the testimony and exhibits in this case. Exhibit No. 20 is Exxel's General
43 Contractor's Safety Manual. The manual organizes 31 topical policies covering Exxel's direct
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general contractor based upon a violation by a subcontractor's employees on the general contractor's jobsite.

1 employees and Exxel's work with subcontractors on safety issues. The manual covers rules,
2 orientation and training, specific safety pre-planning, safety meetings, monitoring and discipline, as
3 well as frequently encountered safety rule and equipment needs such as those concerning ladders,
4 scaffolds, guardrails, trenching/excavating, and the like. Exhibit No. 1 is a document signed by
5 Exxel employees acknowledging receipt and understanding of various safety policies and
6 handbooks, in this instance signed by Robert R. Johnson, Exxel's acting superintendent on the
7 Stanwood/Camano Village project at the time of the alleged violation. Exhibit No. 21 is the contract
8 with Master Framing wherein safety compliance requirements and penalties are well covered.
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17 Exxel is the leading safety performer of the 80 members of its retrospective industrial
18 insurance premium rating group. This "retro-group" itself is comprised of advanced safety
19 performers from the 300 members of Associated General Contractors, according to its Northern
20 District Manager, Arthur Anderson. Mr. Anderson testified that Exxel's program is "definitely"
21 effective. Likewise, Mike Sotelo, a safety and risk management expert who has been a member of
22 a Department sponsored safety task force, expressed his opinion that Exxel strictly implements an
23 effective safety program.
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31 Moreover, Exxel presented evidence to the effect that it has consistently performed in the
32 top range on safety matters. Tim Spink, Exxel's Vice-President and Director of Operations,
33 testified that, since an alleged but unresolved August 1995 fall protection citation, Exxel has
34 engaged in an estimated \$25 to \$27 million of business, supervising 650,000 worker hours without
35 any citation. He further testified that the August 1995 citation was the only citation received by
36 Exxel since he joined Exxel in the winter of 1991. Exhibit Nos. 17, 18, and 19 are reports issued by
37 the Department upon inspections of Exxel. The reports, two issued in 1995 and one in April 1996,
38 show no safety violations and contain commendations of Exxel for its safety efforts. Exhibit
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⁴ Obviously the employee misconduct is available to a general contractor with regard to its own, direct employees.

1 Nos. 22 through 25 are awards and commendations issued by other organizations to Exxel for
2
3 Exxel's safety accomplishments in the industry.
4

5 Finally, Safety Inspector Weech, of the Department, agreed that Exxel's written safety
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7 program and written procedures are excellent. Nevertheless, the Department issued a citation to
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9 general contractor Exxel, as described earlier. The Department contends, as indicated in the
10
11 citation, that more **particular** circumstances of this case warrant a finding that Exxel's safety
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13 program, although excellent on paper and in many other respects, was not "effective in practice."
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15 We turn now to the more particular circumstances of this case. We consider whether we should
16
17 find that general contractor Exxel's safety program was "effective in practice" by providing a safe
18
19 and healthful working environment at the Stanwood/Camano Village project.
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21 Was Exxel's Safety Program "Effective In Practice?"

22 Department's Contentions

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25 At the time of the fall protection violation on January 17,1996, five workers were on the
26
27 jobsite. Four of these worked for Master Framing. The fifth worker on the jobsite was Robert
28
29 Johnson, Assistant Superintendent for Exxel. Mr. Johnson testified he had been acting
30
31 superintendent on the jobsite for a week in the absence of Exxel's usual superintendent, Brett
32
33 Armstrong.
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35 The Department alleges that Exxel's safety program was compromised because Assistant
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37 Superintendent Johnson was acting in a dual capacity as both Exxel's representative and also
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39 performing work tasks, specifically setting up concrete forms. In performing his individual work
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41 Mr. Johnson could not directly view the Master Framing workers. He was 30-40 feet away and his
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43 view was blocked. Indeed, Mr. Johnson's testimony regarding his multiple duties that day reads
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45 almost as a "confession" in that he seems to indicate that he might have prevented the violations
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1 had he not been spread thin. The Department asserts that Exxel should have had more available
2 supervision at the Stanwood/Camano Village construction site.
3

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5 The lack of adequate supervision is arguably demonstrated by Safety Inspector Weech's
6 testimony. He testified that Mr. Johnson had complained that Master Framing workers were
7 causing compliance problems prior to the January 17 safety violation. Specifically, on January 16
8 Mr. Johnson had intervened to advise Master Framing workers to comply with safety standards.
9 3/10/97 Tr. at 47. We note that Mr. Johnson's testimony at hearing does not corroborate
10 Mr. Weech's version of events leading up to January 17.
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14 The Department further contends that Exxel's safety program was not "effective in practice"
15 because Exxel did not document, in the form of a sanction against Master Framing, the incidents of
16 January 16 and the citation on January 17, as required in Exxel's own policies (Exhibit No. 20).
17 Although the Department admits the January 17 incident was written up, Exxel did not actually
18 issue a disciplinary "warning notice" to Master Framing.
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27 In light of additional facts, however, we are persuaded the better view is that Exxel's safety
28 program was effective in practice so as to discharge Exxel's "primary responsibility" for jobsite
29 safety as the general contractor under *Stute*.
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1 **Exxel's Contentions**
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3 Exxel documented, through Exhibit Nos. 9 through 15, its safety pre-planning meetings and
4 agreements, including those specific to safety standard adherence, on the Stanwood/Camano
5 Village project. Exxel demonstrated a consistent pattern of weekly safety meetings with all
6 subcontractors. At these safety meetings, Exxel identified potential hazards and site-specific safety
7 work plans. Exxel conducted inspections of the site and intervened as discussed further below.
8 We also note that Exxel or Master Framing provided necessary safety equipment. Master Framing
9 employees were actually wearing the harnesses and dragging their safety lanyards, at the time
10 they committed fall protection violations.
11
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13 Exxel followed through upon the weekly safety meetings. At least daily, and frequently more
14 often, Exxel reminded its subcontractor's employees, including those of Master Framing, regarding
15 safety compliance. And we note, minutes of the January 15, 1996 safety meeting, just two days
16 before the alleged violation, reflect that Exxel directed that "full body harness will be worn &
17 secured at all times when working on roof." Exhibit No. 9. The minutes reflect that Master
18 Framing's employees were in attendance at the meetings.
19
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21 With regard to daily reminders, Acting Superintendent Johnson testified: "every day I told
22 them I said before they would go up on the roof, I would say be sure to tie off. It's a normal
23 procedure." 3/10/97 Tr. at 11. "Yes, at least once a day. Sometimes you have to remind them.
24 For instance, every time they get up on the roof after lunch. . ." 3/10/97 Tr. at 18. Exxel
25 Superintendent Brett Armstrong confirmed the practice of regular reminders.
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28 Moreover, Master Framing owner/operator Wade Brown described his experience that:
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it's pretty much a daily - - daily thing. When you get on a project with
Exxel is they tell you daily, you know, what are you going to do in this
situation. How are you going to handle the safety measures.

And if they see you doing something wrong then they - - they,
you know, they correct it right then, you know. And don't let you really

1 proceed with your work until you take steps to insure that what you're
2 doing is up to the safety standards, you know.
3

4 3/10/97 Tr. at 112.
5

6 Master Framing employee Chris Hansen, one of the employees in violation of the standard on
7
8 January 17, testified:
9

10 I've worked for Exxel a number of different occasions. . . . every time
11 you walk on a job you get - - you go through the safety procedures.
12 They tell you where the first aid kit is. They tell you where the MSDS's
13 are. They tell you where, you know, fall protection is. They tell you
14 you've got to have a hard hat. Do you have a hard hat, and they will
15 loan you one for a day. They just let you know. You know, no matter
16 how many times you work for them the first day you walk onto a
17 different job you get the same speech.
18

19 Yes, Bob is always sticking his head up checking things out, or Brett
20 would come up and do an inspection, make sure the nails were in sync,
21 or whatever, and make sure we were tied off.
22

23 3/10/97 Tr. at 34.
24

25 We are persuaded by this testimony that Exxel established a pattern of at least daily
26 reminders, directing Master Framing employees to comply with safety standards, and specifically
27 those concerning fall protection and tie off requirements. The Department did not present any
28
29 evidence to the contrary on this point.
30
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33 We recognize that Master Framing had been cited for fall protection violations four to six
34 times in the ten months preceding the violation at issue here. It appears that only one of these
35 violations may have occurred on an Exxel jobsite. Master Framing owner/operator Wade Brown
36 testified that Master Framing had worked on five to six prior projects for Exxel. The record shows
37 that the Department had issued a similar citation to Exxel in August 1995. However, that citation is
38
39 not final and is still on further review at the Department and is, therefore, of limited probative value
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41 here.
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1 In any event, we do not agree with the view expressed by the Department or the dissent to
2 this decision, that Exxel's actions did not adequately take into account Master Framing's history of
3 prior safety standard violations. Exhibit No. 16 is a written warning from an August 1995 incident,
4 wherein Exxel warned Master Framing of potential further discipline during a prior contract. Master
5 Framing acknowledged receipt of the written warning as indicated by Master Framing
6 owner/operator Wade Brown's signature. The warning contains a written expectation that Master
7 Framing would take immediate corrective action and that failure to do so would result in the
8 involved employee being removed from the project. Having in mind this one exception, Exxel
9 Superintendent Brett Armstrong testified that, in his experience, Master Framing adhered to Exxel's
10 rules when working on Exxel jobsites. Mr. Armstrong testified that he never had any other
11 indication that they would not continue do so in the future. The evidence supports the conclusion
12 that Exxel routinely practiced effective enforcement of its safety program. This is demonstrated by
13 the fact that Master Framing had been cited several times while working for other general
14 contractors. Exxel was obviously more effective in obtaining Master Framing's compliance with its
15 safety plan and safety regulations.

16 We do not agree with the position that Acting Superintendent Johnson failed to properly
17 sanction a similar "violation" that occurred on January 16, the day before the citation was issued.
18 Mr. Johnson's testimony differs from Safety Inspector Weech's account. When questioned about
19 the incident on January 16, Acting Superintendent Johnson explained:

20 It was anytime you're up off the ground where you should be tied off
21 within six feet of the edge of the roof you should be tied off with a
22 proper, approved harness and a lanyard.

23 I didn't - - I didn't observe - - you have to understand that there are
24 times when obviously when you first get up on the roof, before you are a
25 tied off, you're not tied off. When you unhook your lanyard to go down
26 the ladder you're not tied off. So you're not tied you have 100 percent
27 of the time. I did not observe them going about their normal work
28 without being tied off or I would have said something to them.

1
2 3/10/97 Tr. at 10.
3

4 In its case-in-chief, the Department's assistant attorney general directly questioned Master
5
6 Framing employee Chris Hansen about the January 16 circumstance and interaction:
7

8 Q. Do you remember a conversation - - well, did you talk to Bob
9 Johnson?

10 A. Yep. Yes.

11 Q. And do you recall Mr. Johnson having a conversation with you about
12 not being tied off?

13 A. Yes, he came up the ladder when I was moving it. Because as you
14 progressively get work done you need to progressively move your
15 system further towards the work. And he popped his head up when we
16 were moving it. So he was always going - - sure, we're moving it, so
17 we're not tied off because we're picking it up and moving it.

18 Q. Do you remember indicating to him that that's what you were doing
19 at the time?

20 A. Yes.

21 Q. Did he have any response to that?

22 A. He told me to get tie off. His response was to get tied off.

23 Q. And did you do that?

24 A. Oh, yeah, bam, bam, bam.
25

26 3/10/97 Tr. at 29-30.
27

28 Further testimony on the subject does suggest there may have been some discussion as to
29 whether Mr. Johnson would write-up the incident. Nevertheless, the whole of the testimony
30 suggests it is questionable whether an actual violation occurred. Other than Safety Inspector
31 Weech's conclusory characterization of the incident as a "violation," we have no other explanation
32 as to why we should view Mr. Johnson's intervention as anything other than an appropriate
33 intervention and reinforcement of safety rules in a questionable situation. Although elicited by the
34 Department as evidence that Exxel's safety program was not, "effective in practice," the testimony
35 just as readily demonstrates Exxel's commitment to active enforcement of the safety standards.
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44 Exxel's *Safety and Health Policy No. 3, Assistant Superintendent Safety Orientation*, under
45 *Enforcement, Item 3*, states:
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1 If a subcontractor is involved in a safety violation, the assistant
2 superintendent or superintendent will inform the worker of the infraction.
3 If the worker does not take corrective action, the superintendent will
4 inform the office for further action.
5

6 Exhibit No. 20.
7

8 The prior write-up of the August 1995 incident, as well as Acting Superintendent Johnson's
9 actions on January 16, 1996, comply with this policy and indicate an active enforcement of the
10 policy.
11
12

13 Exxel's *Safety and Health Policy No. 5, Disciplinary Action for Subcontractors*, also
14 contained in Exhibit No. 20, lists a more severe requirement that the involved subcontractor
15 employee leave the site and not return if the infraction is serious (can result in disabling injury or
16 fatality.) The Policy also anticipates replacing the subcontractor, after a warning letter, if the
17 subcontractor does not take corrective action and continually disregards safety requirements.
18 Exxel utilized, with Master Framing, the *1995 Edition of Subcontract Form of The Associated*
19 *General Contractors of Washington*, Exhibit No. 21. In some contrast to Policy No. 5, the
20 Subcontract General Conditions, Section N. states: "Contractor's supervisor **may direct**
21 Subcontractor's superintendent to remove employees not in compliance with the requirements of
22 this Agreement." Exhibit No. 21, at 8 (Emphasis added.) Reading these documents together,
23 Exxel's write-up of the August 1995 incident substantially complied with Exxel's written enforcement
24 procedures, as did Acting Superintendent Johnson's handling of the incident on January 16, 1996.
25 We do not believe the Department presented sufficient evidence to discredit, as ineffective, Exxel's
26 written policies or Exxel's proven active, on site, enforcement.
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42 In his dissent, our fellow Board member indicates that Exxel's failure to show that it
43 disciplined Master Framing for the violation on January 17, 1996, at issue here, demonstrates
44 ineffective enforcement. Acting Superintendent Johnson did call the incident into the office, and
45 he provided a written report on January 18. We do not consider Exxel's further action or lack
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1 thereof concerning the violation immediately at hand should be a fair and reliable indicator of
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3 Exxel's safety program enforcement. Our inquiry as to effective enforcement should focus upon
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5 actions taken by a contractor historically and as of the date and time of the violation in question, so
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7 as to determine whether or not the contractor had a reasonable belief that the violation in question
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9 should not have occurred. Certainly, severe discipline after a cited violation that is on appeal to
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11 this Board would not tend to convince us of what expectations a general contractor reasonably held
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13 just before the violation occurred. Likewise, when an appeal is pending before us, we are reluctant
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15 to assume that the general contractor has taken final action on the matter or that the matter is
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17 closed as between the general contractor and the subcontractor.

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19 Moreover, the Department cited, and we assume, penalized, Master Framing directly for the
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21 January 17 violation. Separate citation of subcontractors will likely exist in *Stute* type cases.
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23 Ordinarily in this situation, we should more appropriately direct our inquiry to the general
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25 contractor's history of independent efforts to discover and correct violations on its jobsites, rather
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27 than direct our inquiry to what the general contractor did or did not do to add to the penalty already
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29 imposed upon the subcontractor by the Department. By this focus upon independent action by the
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31 general contractor, we best support the rationale of the court's holding in *Stute* as well as the
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33 purposes of WRD 93-4. This focus is consistent, in *Stute* type cases, with the application of
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35 principles derived from the unpreventable employee misconduct defense. The unpreventable
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37 employee misconduct defense focuses upon the employer's history of disciplining its own
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39 employees. In such cases the employer has the sole responsibility for disciplining employees. The
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41 Department does not cite individuals. In other words, the employer is the primary enforcement
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43 authority in non-*Stute* cases, while the Department and the general contractor share an
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45 enforcement role in *Stute* situations.
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1 Here, we are concerned with Exxel's discipline policy and history of discipline and other
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3 dealings with its subcontractor, Master Framing, who the Department has already penalized for the
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5 instant violation. While it may be useful, neither WRD 93-4 nor Exxel's own policies speak directly
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7 to this situation. Suffice it to say, given Exxel's proof of its independent efforts, including action
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9 taken after the August 1995 citation and just preceding the instant violation, we decline to give
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11 significant weight to whether or not Exxel sanctioned Master Framing upon the Department's
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13 discovery of the violation in this case. However, should we be presented with different
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15 circumstances in the future, we may well assign considerable weight to the fact that a general
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17 contractor has **historically** failed to adequately sanction subcontractors following WISHA citations.

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19 In the circumstances of this appeal, we hold that Exxel's site-specific safety plan was
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21 "effective in practice" in promoting a safe and healthful working environment. A general
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23 contractor's safety program can be "effective in practice" even in those circumstances where a
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25 cited safety violation of a subcontractor has occurred. The existence of a cited safety violation
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27 does not, automatically, establish that a safety program is ineffective. To hold otherwise would be
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29 to impose a hopelessly strict standard and would give no meaning to the words, "effective in
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31 practice." However, a cited safety violation is an important factor to be considered. Clearly the
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33 Department, in this case, determined the citation to Master Framing was evidence, not only a
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35 violation of a specific safety standard, but also symptomatic of flaws in Exxel's safety program. We
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37 agree with the Department to the extent that the question of whether a general contractor's safety
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39 program is "effective in practice" depends on a consideration of other factors. We find that in this
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41 case the safety violation by Master Framing was not indicative of the ineffectiveness of Exxel's
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43 program.

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45 Finally, we turn to our industrial appeals judge's determination that Exxel Acting
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47 Superintendent Johnson "should have provided primary priority to strict supervision" of Master

1 Framing's employees, that "enforcement was not absolute and continuous," and that Mr. Johnson
2 failed to "maintain a constant vigilance that resulted in a lapse in the implementation of the safety
3 program and, thereby, undermined its effectiveness." 11/25/97 Proposed Decision and Order, at
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5 11-12. Our industrial appeals judge acknowledged some "hindsight" here, but also supported the
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7 determination by way of pointing to "sufficient indicators to create the suspicion that a problem
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9 could reoccur if enforcement was not absolute and continuous." Among these "indicators" were
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11 Master Framing's history of violations and the January 16 incident. Also, Safety Inspector Weech
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13 testified that Exxel Acting Superintendent Johnson told Mr. Weech there had been "considerable
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15 problems in the past few days with getting Master Framing to comply with the fall protection work
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17 plan and company regulations." 3/10/97 Tr. at 47.
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21 We have already stated our view that Exxel's safety program and enforcement was
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23 adequate, considering Master Framing's past history with other general contractors and the
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25 August 1995 violation, as well as the specific incident on January 16, wherein Exxel appropriately
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27 intervened. We have also described testimony that established the fact of Mr. Johnson's daily, and
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29 often more frequent, reminders to Master Framing to adhere to safety standards, including during
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31 the immediate time frame in question. Neither Safety Inspector Weech, nor our industrial appeals
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33 judge, identified any specific instances of violations in which Mr. Johnson failed to intervene. We
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35 are truly presented, then, with the question of whether, in the circumstances of this case, Exxel was
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37 required to meet its obligations under *Stute* by providing direct and continuous supervision of its
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39 subcontractor Master Framing's employees.
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41 The violations in question occurred in the relatively early morning of January 17. Master
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43 Framing owner/operator Wade Brown testified that, on January 17, he had just been on the site
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45 with two of his employees present and two more expected. Mr. Brown testified that he left just
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47 moments before the violation occurred. We have nothing in the record before us to indicate

1 whether Mr. Brown informed Mr. Johnson that he was leaving the jobsite, nor whether he had
2
3 requested that Mr. Johnson provide direct, immediate supervision of Master Framing's employees.
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5 The violations may not have occurred had Mr. Brown been present and directly supervising his
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7 employees at the time. We believe the violations certainly would not have occurred had
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9 Mr. Johnson been providing direct, constant supervision of Master Framing's employees.

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11 We do not believe that Mr. Johnson's apparent recognition of the need for frequent
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13 interventions, nor Safety Inspector Weech's general characterization of "considerable problems,"
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15 justifies the conclusion that Mr. Johnson should have provided more "strict supervision," by which
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17 our industrial appeals judge appears to mean "absolute and continuous" supervision. In the
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19 context of the relationship between a general contractor and its subcontractor, we view as extreme
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21 the expectation that the general contractor provide direct, constant supervision of the
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23 subcontractor's own employees. Nothing we know of requires such a result, not the contract in this
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25 case (as we assume in most others), not WRD 93-4, not even the holding in *Stute*, contemplates
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27 such a complete collapsing of role distinctions between the general contractor and its
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29 subcontractor.

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31 We agree that hindsight does lead to the conclusion that the violation on January 17 likely
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33 would not have occurred had Exxel's Acting Superintendent, Mr. Johnson, provided direct,
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35 continuous supervision of the subcontractor's employees at that specific time. However, in light of
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37 Exxel's excellent safety program and enforcement measures, including Mr. Johnson's other active
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39 efforts to monitor and enforce safety compliance during the period in question and earlier on
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41 January 17, we decline to hold that Exxel's safety program was not effective in practice because
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43 Exxel did not provide direct, continuous supervision of Master Framing's employees.

44
45 **Conclusion**
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1 We find that Exxel met its primary responsibility for compliance with safety regulations on
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3 the Stanwood/Camano Village jobsite as of January 17, 1996, in that it established, supervised and
4
5 enforced, in a manner that was effective in practice, a safe and healthful working environment, in a
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7 manner consistent with its role as general contractor. We, therefore, vacate the citation of Exxel.
8

9 After consideration of the Proposed Decision and Order and the Petition for Review filed
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11 thereto, and a careful review of the entire record before us, we make the following:
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13 **FINDINGS OF FACT**
14

- 15 1. On January 17, 1996, Bruce S. Weech, safety inspector for the
16 Department of Labor and Industries (Department), conducted an
17 inspection pursuant to the Washington Industrial Safety and Health Act
18 on the work site of Exxel Pacific, Inc., at the construction site of 72nd
19 N.W. and 265th Street N.W., Stanwood, Washington. On January 17,
20 1996, the Department inspector held a closing conference with a
21 representative of Exxel Pacific, Inc.
22

23 On February 14, 1996, the Department issued a citation and notice that
24 cited Exxel Pacific, Inc., (Exxel), for an alleged repeat serious violation
25 of WAC 296-155-100(1)(a) with a total penalty assessed of \$1,600. The
26 violation was corrected at the time of inspection and the abatement date
27 was January 17, 1996. The alleged repeat serious violation was cited
28 as a repeat of that violation cited in Citation and Notice No.115402752
29 issued on August 31, 1995.
30

31 On February 22, 1996, Exxel filed an appeal of the February 14, 1996
32 citation and notice with the Safety Division of the Department of Labor
33 and Industries. On March 5, 1996, the Department issued a Notice of
34 Reassumption of Jurisdiction.
35

36 On April 3, 1996, the Department issued Corrective Notice of
37 Redetermination No. 115221699 that changed the repeat serious
38 violation to a serious violation, changed the abatement date of
39 January 17, 1996, to complied, and reduced the total penalty assessed
40 from \$1600 to \$800. Exxel received the Corrective Notice of
41 Redetermination on April 4, 1996.
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43 On April 16, 1996, Exxel filed a Notice of Appeal of the April 3, 1996
44 Corrective Notice of Redetermination with the Board of Industrial
45 Appeals. On April 16, 1996, the Board issued a Notice of Filing of
46 Appeal, assigning the appeal Docket No. 96 W182. The Department
47 transmitted its records supporting the citation to the Board on May 16,
1996.

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2. On January 17, 1996, Exxel was the general contractor on the Stanwood/Camano Village construction project, the site identified in the Department's citation and notice herein. Exxel had contracted with Master Framing, Inc. (Master Framing), an independent subcontractor, to provide construction-framing services on the site. The contract required that Master Framing "shall provide all supervision, materials, labor, supplies, and equipment" for the framing work identified. The contract required Master Framing and its lower-tier, if any, subcontractors to take all reasonably necessary safety precautions pertaining to its work performance, including but not limited to compliance with all Washington Industrial Safety and Health Act (WISHA) regulations, including but not limited to provision of all required safety equipment, maintenance of a written accident prevention plan and a jobsite-specific safety plan in compliance with WISHA. The contract included enforcement provisions, stating that Exxel "may" direct removal of employees not in compliance, and "may" order the subcontractor to stop work until a violation is corrected.
 3. Exxel's General Contractor's Safety Manual contains 31 topical policies covering Exxel's direct employees and its work with subcontractors on safety issues, including rules, orientation and training, specific safety pre-planning, safety meetings, monitoring of safety compliance and discipline, and specific safety issues. Exxel provides safety training to its employees, including its superintendents and assistant superintendents. Exxel provided videos pertaining to safety rules, required self-inspection reports, and had a bonus program that was predicated upon compliance with its safety program.
 4. Exxel is the leading safety performer of the 80 members of its retrospective industrial insurance premium rating group, which is comprised of the top safety performers of the approximate 300 members of the Associated General Contractors of Washington. From 1991 to January 17, 1996, Exxel was cited two times by the Department of Labor and Industries, once in August 1995, and on January 17, 1996. The August 1995 citation is not final and is pending at the Department. Since August 1995, Exxel has engaged in supervising approximately 650,000 worker hours performed by its employees and subcontractors. Exxel jobsites were inspected by the Department with no notations of safety violations two times in 1995 and once in 1996. The reports issued by the Department contain commendations for Exxel's safety efforts. Exxel has received awards and commendations from other organizations for its safety accomplishments.
 5. On the Stanwood/Camano Village project, Exxel developed site-specific safety plans covering, but not limited to, fall protection requirements and measures. These were reviewed and made constantly available to Master Framing and its employees. On the Stanwood/Camano Village

1 project, Exxel conducted weekly safety meetings that were attended by
2 Master Framing employees. A weekly safety meeting held on
3 January 15, 1996, directed that a full body harness will be worn and
4 secured at all times when working on the roof.
5

6 6. On the Stanwood/Camano Village project, as with its other projects,
7 Exxel's superintendent or assistant superintendent provided daily
8 reminders to its subcontractors and its subcontractor's employees,
9 including those of Master Framing, to comply with all safety regulations,
10 including those related to fall protection. These reminders occurred
11 every day first thing in the morning and frequently several times
12 throughout the day. On January 16, 1996, Exxel's Assistant
13 Superintendent, Robert Johnson, intervened when he perceived a
14 possible lapse in fall protection and ordered a Master Framing
15 employee to tie off. The Master Framing employee immediately
16 complied.
17

18 7. Master Framing owner/operator Wade Brown was aware of Exxel's
19 safety program and expectations, as were his employees. Wade Brown
20 considered Exxel's program excellent and considered Exxel to be a
21 strict enforcer of safety rules. Exxel previously disciplined Master
22 Framing on another project in August 1995 by way of a written warning
23 with a requirement that it discipline its involved employee(s). Master
24 Framing employees believed they would be disciplined by Exxel if Exxel
25 discovered them in violation of safety rules. As of January 17, 1996,
26 Exxel believed that Master Framing would adhere to WISHA regulations
27 on the Stanwood/Camano Village jobsite.
28

29 8. On January 17, 1996, on the Stanwood/Camano Village project, Exxel
30 Assistant Superintendent Robert Johnson, before workers went on the
31 roof, reminded the Master Framing employees to comply with fall
32 protection regulations. After this, still in the morning, and after Master
33 Framing owner/operator Wade Brown left the jobsite, a Department
34 Safety Inspector noticed four Master Framing employees, on a roof with
35 potential hazard of fall up to 18 feet, in violation of fall protection
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1 regulations. Some of the employees were not tied off pursuant to then
2 existing WAC 296-155-24503(4)(a) and one worker had too much slack
3 in his shock absorbing lanyard attached to a "D" ring in violation of then
4 existing WAC 296-155-24505(4)(q)(ii). All of the workers had, and
5 wore, the safety equipment, including harnesses and lanyards, that was
6 necessary for compliance with the regulations and as necessary for
7 compliance with the written fall protection work plan posted in the Exxel
8 jobsite office.

- 9
- 10 9. As of January 17, 1996, Exxel, commensurate with its role as general
11 contractor on the Stanwood/Camano Village jobsite, did establish,
12 supervise, and enforce, in a manner that was effective in practice, a
13 safe and healthful working environment. The safety violations
14 discovered by the Department on the jobsite January 17, 1996, were
15 due solely to the neglect of Master Framing and its employees in
16 contravention of the expectations, training, contract, planning, safety
17 meetings, monitoring, discipline program, and reminders actively
18 provided by Exxel. The violations were not due to any failure of Exxel to
19 fulfill its role as a general contractor to provide a safe work place.

20

21 **CONCLUSIONS OF LAW**

22

- 23 1. The Board of Industrial Insurance Appeals has jurisdiction over the
24 parties and the subject matter of this appeal.
- 25
- 26 2. On January 17, 1996, Exxel Pacific, Inc., did not violate the provisions
27 of then existing WAC 296-155-100(1)(a). On January 17, 1996, Exxel
28 Pacific, Inc., fulfilled its primary responsibility as a general contractor for
29 compliance with safety regulations on its jobsite within the meaning of
30 *Stute v. P.B.M.C.*, 114 Wn.2d 454 (1990).
- 31
- 32 3. Corrective Notice of Redetermination No. 115221699, issued by the
33 Department of Labor and Industries Safety Division to Exxel Pacific,
34 Inc., on April 3, 1996, that modified the citation and notice issued on
35 February 14, 1996, from repeat serious to a serious violation of
36 WAC 296-155-100(1)(a), changed the abatement date of January 17,
37 1996, to complied, and changed the total penalty assessed from \$1600
38 to \$800, is incorrect, and is reversed. This matter is remanded to the
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1 Department of Labor and Industries with directions to vacate the
2 citation.

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4 It is so **ORDERED**.

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6 Dated this 6th day of July, 1998.

7
8 BOARD OF INDUSTRIAL INSURANCE APPEALS

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11 /s/ _____
12 S. FREDERICK FELLER Chairperson

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15 /s/ _____
16 JUDITH E. SCHURKE Member

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19 **DISSENT**

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21 I would adopt in its entirety the Proposed Decision and Order that affirmed the Corrective
22 Notice of Redetermination finding a violation by Exxel Pacific, Inc. The Proposed Decision and
23 Order, issued by the industrial appeals judge who personally heard all of the testimony in this case,
24 very thoroughly sets forth the evidence and reaches the correct conclusion. Exxel's safety program
25 was not effective in practice on January 17, 1996, when the fall protection violations occurred. The
26 fall protection violations occurred as a direct result of this failure. Exxel did not meet its primary
27 responsibility as a general contractor for a safe and healthful jobsite.
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35 Exxel's failure was exactly as determined in the Proposed Decision and Order. Exxel did not
36 provide adequate supervision and they did not provide adequate discipline to account for the lack
37 of supervision on the jobsite. Master Framing was known to have a history of poor safety
38 performance with repeated violations in the 10 months preceding January 17, 1996, at least one of
39 which was on an Exxel jobsite. Exxel, as demonstrated by its own safety program, understands
40 what is necessary to obtain adherence to safety regulations. Exxel had the prior **past experience**
41 with Master Framing **and** Exxel admittedly had the **recent experience** of problems getting Master
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1 Framing's employees to comply with fall protection regulations. When considered together, Exxel
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3 had two options short of direct, constant supervision--discipline Master Framing with sufficient
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5 severity to obtain compliance, or, terminate the contract pursuant to terms allowing for this. Exxel
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7 did not exercise either of these options. In fact, even after the January 17, 1996 violation, Exxel
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9 could not point to any severe discipline of Master Framing or its employees. Thus, lack of
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11 enforcement is absolutely clear. The overly embellished testimony of Master Framing employees
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13 to the contrary, in support of Exxel, is only as one would expect it to be, given the ongoing business
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15 relationship with Exxel. This testimony should not have been afforded any weight.

16
17 Failing to take adequate disciplinary measures, Exxel had the yet additional option of
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19 providing for, or ensuring, constant supervision of Master Framing's employees, who Exxel knew to
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21 be lax in adherence to safety regulations. Instead of ensuring direct supervision, the assistant
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23 superintendent busied himself with other tasks, with employees on the jobsite out of his view. In
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25 these circumstances, the eventual violation was a foregone conclusion. This is only one step
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27 removed from seeing a violation and doing nothing about it. As in *Stute*, the general contractor
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29 here, Exxel did not exercise its duty to assume primary responsibility for jobsite safety in a manner
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31 that was effective in practice.

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33 Finally, the majority is too "cautious" with regard to placing the full, affirmative burden on a
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35 general contractor to show that an admitted violation on its jobsite was truly "unpreventable." The
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37 present case belies this point. By assigning "primary responsibility" to the general contractor, our
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39 Supreme Court, in *Stute*, squarely placed the burden on the general contractor precisely because
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41 the general contractor is innately in control. Exxel simply failed to exercise its control, and the
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violation occurred. It is not only **proper** that Exxel be penalized for the violation; it is **necessary** that Exxel be penalized for the violation if *Stute* is to have the meaning intended by the court.

Dated this 6th day of July, 1998.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
FRANK E. FENNERTY, JR. Member