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.
IN RE: EXXEL PACIFIC, INC. ) DOCKET NO. 96 W182
CITATION & NOTICE NO. 115221699 ) DECISION AND ORDER

APPEARANCES:

Employer, Exxel Pacific, Inc., by
Schiffrin, Olson & Schlemlein, P.L.L.C., per
Garth A. Schlemlein

Employees of Exxel Pacific, Inc., by
None

Department of Labor and Industries, by
Office of the Attorney General, per
Martha A. French, Assistant

The employer, Exxel Pacific, Inc., filed an appeal with the Board of Industrial Insurance Appeals on April 16, 1996, from a Corrective Notice of Redetermination issued by the Department of Labor and Industries on April 3, 1996. The Corrective Notice of Redetermination affirmed a citation and notice issued February 14, 1996, and reduced the penalty for a serious violation of WAC 296-155-100(1)(a) from $1600 to $800. REVERSED AND REMANDED.

PROCEDURAL AND EVIDENTIARY MATTERS

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the general contractor, Exxel Pacific, Inc., (Exxel). Exxel petitions for review of the Proposed Decision and Order issued on November 25, 1997, in which the Corrective Notice of Redetermination issued by the Department on April 3, 1996, was affirmed.

The Department sought testimony from Safety Inspector Bruce Weech concerning subcontractor Master Framing, Inc.'s (Master Framing) citation history. The industrial appeals judge sustained general contractor Exxel's objection to the testimony. We reverse the ruling at
3/10/97 Tr. at 56, lines 17-29. We remove the testimony at 3/10/97 Tr. at 56, line 39, through 3/10/97 Tr. at 57, line 7, from colloquy. The testimony is relevant. The testimony could tend to convince a trier of fact that Exxel was not sufficiently vigilant on its jobsite in light of Master Framing's safety record. Further, our industrial appeals judge did later rely upon this testimony.

The Board has reviewed the other evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. We affirm the rulings.

DECISION

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

Citation Background and Issues

Exxel was the general contractor at the Stanwood/Camano Village construction project. Master Framing was one of Exxel's subcontractors on the project. On January 17, 1996, Safety Inspector Bruce S. Weech, of the Safety and Health Division of the Department of Labor and Industries, observed four Master Framing employees on a roof on which they were installing plywood sheeting. The roof varied 16 to 18 feet in height relative to the ground. Two of Master Framing's employees were on the lower edge of the roof, engaged in loading materials from a forklift onto the roof. These employees wore full safety harness gear, including safety lanyards, but the employees did not have the safety lanyards tied-off to the available anchor points. One employee was working on a truss with a shock-absorbing lanyard that was too long. Safety Inspector Weech then interviewed Master Framing and Exxel employees, and examined some of Exxel's documents relating to its safety program.
The Department cited Exxel for violation of WAC 296-155-100(1)(a):

(1) It shall be the responsibility of management to establish, supervise, and enforce, in a manner that is effective in practice:
   (a) A safe and healthful working environment.

(Emphasis added.)

In its citation and notice, the Department alleged that Exxel:

as a general contractor, failed to establish, supervise and enforce, in a manner which was effective in practice a safe and healthful working environment, in that sub-contractor, Master Framing, Inc., had employees exposed to fall hazards of up to 18 feet without fall protection implemented (WAC # 155-24503(2)(b)(ii)), had a written fall protection work plan posted in the Exxel jobsite office that was not being implemented (WAC 295[sic]-155-24503(4)(a)), and employee had 10 feet or more in slack between fall arrest lanyard tie-off on roof and attachment to harness "D" ring while working over a 16 foot fall hazard. (WAC 296-155-24505(4)(q)(ii).)

2/14/96 Citation and Notice No. 115221699 (Emphasis added.)

This appeal raises issues concerning a general contractor's obligations, under WISHA, to ensure a safe and healthful work environment on the general contractor's jobsite. These issues include the extent of a general contractor's WISHA obligations and the nature in which a general contractor may fulfill these obligations. In the present appeal, the Department and Exxel agree that our determination should turn specifically upon whether Exxel's safety program was "effective in practice." The Department alleges that Exxel's safety program was not "effective in practice" and Exxel contends its program was "effective in practice," despite the fact that employees of Exxel's subcontractor, Master Framing, violated specific fall protection standards. The Department and Exxel both presented extensive evidence concerning whether Exxel's safety program was "effective in practice." We ultimately agree that our decision in this particular appeal should turn upon

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

Also, to a large degree, the Department and Exxel appear to agree that WISHA Regional Directive (WRD) 93-4, promulgated by the Department for general contractor and WISHA compliance staff use, provides a guide for determining whether Exxel's overall safety program was adequate so as to be considered "effective in practice." The Department acknowledges that Exxel complied with many of the recommendations in WRD 93-4. However, the Department maintains that Exxel's safety program should not be considered "effective in practice."

In this decision, we discuss the most recent developments in the law concerning general contractor WISHA obligations, and we discuss WRD 93-4 and other sources of the term "effective in practice." We discuss these in order to adequately explain the reasons for our decision in the present appeal. We also discuss these in order to clarify the limits of our present decision as it might apply to future cases where the Department has cited a general contractor after observing a subcontractor's employees violating specific WISHA standards.

**Developments Concerning General Contractor WISHA Responsibility**

**Appellate Court and Board Cases**

The Department may issue a WISHA citation to a general contractor, based on safety violations occurring on its jobsite, even though the general contractor's employees were not directly exposed to the hazard and the general contractor's own employees did not directly violate a specific WISHA regulation. In 1989, this Board held that the general contractor on a multiple employer construction site is responsible for its subcontractor's WISHA violation when: (1) the violation exposes not only the subcontractor's employees, but also other workers on the site to a safety hazard; (2) the general contractor could reasonably have been expected to prevent or abate
the subcontractor’s violation by reason of its supervisory capacity over the entire site; and (3) the subcontractor’s WISHA violation is obvious. *In re R C Construction*, BIIA Dec., 87 W039 (1989).

In the context of a personal injury lawsuit (as opposed to a safety citation under WISHA), our State Supreme Court held that general contractors, on multiple employer construction sites, have an even broader responsibility than we stated in *R C Construction*:

A general contractor’s supervisory authority places the general in the best position to ensure compliance with safety regulations. For this reason, the prime responsibility for safety of all workers should rest on the general contractor.

... 

Thus, to further the purposes of WISHA to assure safe and healthful working conditions for every person working in Washington, RCW 49.17.010, we hold the general contractor should bear the primary responsibility for compliance with safety regulations because the general contractor’s innate supervisory authority constitutes sufficient control over the workplace.

*Stute v. P.B.M.C.*, 114 Wn.2d 454, 463-464 (1990) (Emphasis added.) See also, *Degroot v. Berkley Constr., Inc.* 83 Wn. App. 125 (1996). In *Stute*, a subcontractor’s employee sued the general contractor for negligent safety conditions on the jobsite. Mr. Stute fell from a wet, slippery roof while installing gutters in the employ of the subcontractor. The subcontractor had not provided any safety equipment. As evidence of the general contractor’s negligence, Mr. Stute sought to present evidence of the general contractor’s failure to ensure that its subcontractor complied with WISHA regulations.

Our appellate courts have extended the principle in *Stute* to hold entities other than general contractors potentially liable for WISHA violations. Division One of our Court of Appeals held that the owner of a jobsite may owe a common law duty to the employees of an independent contractor to provide a safe workplace if the landowner "retained the requisite degree of control over the
Kennedy v. Sea-Land Service, 62 Wn. App. 839, 855 (1991), referring to Kelley v. Howard S. Wright Constr. Co., 90 Wn.2d 323 (1978). Division Two, applying both Kelley and Stute, imposed liability on a jobsite owner based on: (1) the common law duty to exercise ordinary care for the safety of an independent contractor’s employees (Kelley); and (2) the duty to comply with safety regulations (Stute). Doss v. ITT Rayonier, 60 Wn. App 125 (1991). Division One held that an owner/developer’s position was so comparable to that of the general contractor in Stute that the owner/developer has a duty to ensure that employees of its subcontractors comply with applicable safety regulations. Weinert v. Bronco National Co., 58 Wn. App. 692 (1990).

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

However, neither this Board nor our courts have previously addressed the substance of a general contractor’s primary responsibility for WISHA compliance on its jobsite. The Department cited one of our previous decisions, In re Atkinson-Dillingham, J.V., Dckt. No. 88 W091 (August 23, 1990). In Atkinson, we stated: "[b]ased on the rationale set forth in Stute, Atkinson-Dillingham, the general contractor, would be responsible for any WISHA violations committed by Bauveg America [the subcontractor]." Atkinson, at 5 (Emphasis added.) In Atkinson, we ultimately determined that the Department had failed to establish that any safety violation occurred on the jobsite. Therefore,

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2 We note that Atkinson has not been designated by us as a "significant Decision" under RCW 51.52.160. The Board was directed to publish a guide for those who appear in front of the agency as to how we would respond to various issues and facts. We issue our Significant Decisions to comply with the statutory mandate. The Significant Decisions are also a mechanism to distribute this agency’s decisions. Citing a decision by this Board that has not been designated 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.
in *Atkinson* we did not fully examine the extent of the general contractor's WISHA obligations and whether there are defenses available such as the employee misconduct defense. In light of these facts and our discussion below, we caution that the statement in *Atkinson* should not be read to mean that general contractors are necessarily responsible for each and every WISHA violation committed by their subcontractors.

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

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

*Stute*, at 464 (Emphasis added.)

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

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

Our understanding is consistent with the limited legal holding in *Degroot*. Again that court held that the general contractor's contract with the subcontractor was admissible together with a
limiting jury instruction that explained that the exhibit was received for, "a limited purpose relating to
whether (the general contractor) exercised due care in carrying out its duties under WISHA" but
"not received in evidence for the purpose of showing that those WISHA duties had been
delegated to (the subcontractor)."

While a general contractor cannot absolve itself of responsibility for safety on the jobsite by
contractually delegating that responsibility to a subcontractor, neither does proof of a cited safety
violation constitute sufficient proof the responsibility was not met. This is consistent with the
development of tort law in this state. The common law doctrine of negligence, per se, based on a
violation of a statute or regulation, has been abolished in this state. Rather, "breach of a duty
imposed by statute, ordinance, or administrative rule . . . may be considered by the trier of fact as
evidence of negligence." RCW 5.40.050; Doss, 60 Wn. App. at 129. Thus, in personal injury
actions, our appellate courts have focused in some cases upon the admissibility of evidence
concerning WISHA violations on a general contractor's jobsite to prove negligence of the general
contractor. And in at least one case, Stute, the court focused upon the sufficiency of the
evidence to show negligence, where the violation was obvious. But, understanding this legal
context, we are persuaded that none of the courts, in the personal injury cases thus far discussed,
meant to define the full extent of a general contractor's obligations under WISHA.

**Department Effort to Clarify General Contractor Obligations - WRD 93-4**

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

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

WRD 93-4 also suggests what a general contractor might do in order to establish work rules designed to enhance safety and prevent violations. A general contractor "may wish to consider": preparing agendas for job safety meetings; mandatory attendance of all workers at such meetings; safety incentive or recognition programs; and similar. Exhibit No. 8, at 6 (Emphasis added.) WRD 93-4 then provides that the general contractor "must adequately communicate work rules to its subcontractors" and "must show that it has established a process to discover and control recognized hazards," that is, those hazards "[r]ecognized by the industry or by the contractor in the past." Exhibit No. 8, at 6 (Emphasis added.) "Disciplinary action related to safety violations must be communicated to the appropriate work force." Exhibit No. 8, at 7 (Emphasis
added.) WRD 93-4 requires that the contractor "must show" that it has effectively "enforced in practice" its Accident Prevention Program and/or Safety Plan when it discovers a violation, and requires the general contractor to contractually require its subcontractor to do likewise pursuant to a disciplinary schedule. Exhibit No. 8, at 7-8 (Emphasis added.)

WRD 93-4 concludes by way of indicating the focus on general contractor responsibilities is intended to provide guidance to WISHA compliance staff to determine whether the general contractor has provided a safety program that is "effective in practice." "If the general contractor has met its responsibilities . . . no citation will be issued to the general contractor. A safety program may be effective in practice even if there are isolated instances of a code violation." Exhibit No. 8, at 8-9 (Emphasis added.)

We fully acknowledge that WRD 93-4 is laudable, and an immensely valuable document, in that it reflects a cooperative effort between the Department, business, and labor to promote general contractor responsibility for WISHA compliance, and thereby worker safety. WRD 93-4 also provides many useful guidelines to help determine whether general contractors, in this case, Exxel, have met their "primary responsibility" for WISHA compliance on their jobsites.

For several reasons, however, we cannot adopt WRD 93-4 as a definitive legal statement of the requirements expected of general contractors. First, WRD 93-4 has not been adopted as a formal regulation, having the force of law, under the Washington Administrative Procedures Act. Second, possibly because WRD is not an adopted regulation, it has not been drafted in precise terms. WRD 93-4 is a mixture of overlapping mandatory requirements and more permissive suggestions, both for general contractors and for Department compliance staff. This prevents the kind of predictable application we would expect of a regulation. Third, WRD 93-4 is sweeping in its scope and detail. It is not necessary that we consider the legal validity of all the pronouncements in WRD 93-4 in order to resolve the present case, nor should we do so in light of judicial economy.
Wholesale agreement that WRD 93-4 contains legally controlling criteria in the present case may impede our proper consideration of future cases. In short, we need not, and should not, determine in this case whether Stute requires compliance with all of the mandates or suggestions of WRD 93-4. Therefore, we do not determine if the legal duty, imposed by Stute, requires full adherence to WRD 93-4. Fourth, WRD 93-4 utilizes the terms "effective in practice" and "affirmative defense."

As explained below, our courts have not ruled upon the issue of whether the general contractor, cited with a so-called Stute violation, bears the affirmative obligation of proving it had a safety program that was "effective in practice." In the present case, both the Department and Exxel present extensive evidence on the issue of whether Exxel's safety program was "effective in practice." Neither party briefed the issue of relative burdens of proof. In the present case, we do not determine whether the Department or a general contractor bears the initial burden in this regard in an appeal from a Stute citation. This is a potentially important legal issue that we do not decide in this decision, because it is not necessary that we do so.

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

**The "Unpreventable Employee Misconduct" Defense**

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

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


We note, as have Exxel and the Department, the similarities between the four elements of the "unpreventable employee misconduct" defense and the structure and content of WRD 93-4,
particularly the near identity between the "effective in practice" requirement of the WRD and "effectively enforced" language in the fourth element of the unpreventable employee misconduct defense. Indeed, as the Department notes, *Jeld-Wen of Everett* adopts the rationale of a federal Occupational Safety and Health Act (OSHA) case that employed the criteria "effective in practice." *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1277 (6th Cir. 1987).

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

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

**The Wording of the Citation in the Present Case**
The Department cited Exxel for failure to "establish, supervise, and enforce, in a manner which is effective in practice a safe and healthful working environment." 2/14/96 Citation and Notice (Emphasis added), citing to WAC 296-155-100(1)(a), pertaining to "management" responsibility. This wording could arguably raise issues concerning respective burdens of proof between the Department and Exxel.

As we noted earlier, the Department generally bears the initial burden of proof that the violation occurred as alleged in the Department's citation. Therefore, the Department's wording of the citation against Exxel could lead us to conclude that the Department must bear the initial burden of establishing all elements of the citation, including that Exxel did not have a safety program that was "effective in practice." However, in non-\textit{Stute} cases where the Department has initially only proven violation of a specific standard, it is the employer that must then bear the burden of showing it had a safety program that was "effective in practice" in order for the employer to avail itself of the "unpreventable employee misconduct defense."

In \textit{Jeld-Wen of Everett}, we considered that RCW 49.17.180(6), defining "serious" violations, provides in part "a serious violation shall be deemed to exist . . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." We rejected the idea that this language placed the burden of disproving the unpreventable employee misconduct defense upon the Department. We stated the language does not impose upon the Department "the unreasonable burden of proving a negative. . . . The employer has the necessary knowledge of workplace and work practices and is in the best position to establish the elements of this defense." \textit{Jeld-Wen of Everett}, at 16. The court in \textit{Stute} similarly relied upon the general contractor's "innate supervisory authority [constituting] sufficient control over the workplace" to place "primary responsibility" for jobsite safety upon the general contractor. Using the same rationale, it may be reasonable to assign to the Department only the burden of proving a violation
of a specific standard occurred on the jobsite, and to assign to the general contractor, then, the full affirmative burden of proving it had an adequate safety program that was effective in practice.

Neither the facts in *Stute*, nor the personal injury nature of the case, required the court to fully explore potential distinctions between a general contractor and a direct employer or subcontractor in such a manner as to address relative burdens of proof in a WISHA case. Given the wording of the citation before us, and the conduct of the parties at hearing, we believe the question, of whether the Department in *Stute* is required only to prove violation of a specific standard, is better left undecided in the present case.

Thus, overlapping uses of the term "effective in practice" in the citation in this case, in WRD 93-4 and in the criteria for the "unpreventable employee misconduct defense," potentially create confusion with regard to burdens of proof. Moreover, we again note the language in WRD 93-4 that attempts to establish a "duty of care" that would be recognized as an "affirmative defense."

Exhibit No. 8, at 2. This suggests a Department view that the general contractor in a *Stute* case should always bear the burden of establishing the contractor had a safety program that was "effective in practice." This appears in contrast to an arguable interpretation, that a general contractor might make, based upon the citation language in the present case.³

We cannot predict what citation wording the Department will use, nor can we predict what evidence will be presented, in future *Stute* type cases that may come before this Board. We cannot predict whether the Department (in a future case) will only show that a violation occurred on the general contractor's jobsite (as distinct from the wording of the citation in the present case), even though the violation was committed by, and affected only, a subcontractor's employees. We

³ As our industrial appeals judge noted, nothing in WRD 93-4 clearly indicates that it was drafted with the appeals process at this Board in mind. The document is aimed at general contractors and WISHA compliance staff. WRD 93-4 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
cannot presume that the Department and a future general contractor will, as here, cast aside
distinctions and arguments as to which has the initial burden of showing whether the general
contractor's WISHA compliance efforts were sufficient in content and "effective in practice."

We do not find anything in Stute, or the other cases we have discussed, that necessarily
requires a conclusion that the Department, in a Stute citation, bears only the burden of establishing
that a violation of a specific WISHA standard occurred on the general contractor's jobsite as
sufficient proof that a general contractor's safety program was not "effective in practice."

As we stated before, both the Department and Exxel presented extensive evidence on the
matter of whether Exxel's safety program was "effective in practice." In order to resolve this
appeal, we do not need to decide who had the burden on this issue. The question of which party
has the burden of proof may be critical in future appeals from Stute citations. For these reasons,
we do not decide in this case whether the Department or a general contractor bears the initial
burden on the "effective in practice" issue.

With this background, and having stated these limitations, we do conclude that Stute, as well
as other cases that we have discussed, does impose certain obligations upon a general contractor
for furthering WISHA compliance on the general contractor's jobsite. We now turn to these
obligations before discussing the details of the present case.

**General Contractor Responsibilities Imposed by Stute**

At a minimum, the general contractor, on its jobsite, must provide for compliance with the
applicable safety rules promulgated by the Department in the Washington Administrative Code.
This includes identifying the applicable rules and communication of these rules to its employees
and all subcontractors and their employees. As a part of this obligation the general contractor must
assure that necessary safety equipment is provided to workers.
We cannot conceive of a general contractor assuming primary responsibility for WISHA adherence on its jobsite without the general contractor establishing a means to monitor its jobsite for compliance. We agree that *Stute* at least requires general contractors to assume "primary responsibility" for WISHA compliance on the jobsite in a manner that is "effective in practice." Were we to hold otherwise, we would render meaningless the *Stute* court's assignment of primary responsibility for jobsite safety to the general contractor. Again, wholesale delegation of WISHA responsibility to a subcontractor, by contract, is not sufficient. *Degroot*, 83 Wn. App. We believe these to be the essentials of the *Stute* court's holding.

We also agree that the four elements of the unpreventable employee misconduct defense (identification, communication, discovery, and enforcement or effectiveness) can provide a useful structure or framework for examining whether a general contractor has met its obligations under *Stute*. We are not saying that the unpreventable employee misconduct defense is directly applicable to general contractors with regard to the subcontractors on the jobsite. Our comparisons to the employee misconduct defense, together with a consideration of WRD 93-4, provide us with useful questions to consider in resolving the larger issue of how a general contractor can fulfill its duty to have a safety program that is effective in practice.

For example, what did the general contractor do to identify safety hazards, or to communicate safety requirements and regulations? Certainly these kinds of questions are relevant to the question of whether a safety program is "effective in practice."

**Exxel's Safety Program and General Record of Enforcement**

Exxel generally maintains one of the best safety programs in the contractor industry. This is well documented in the testimony and exhibits in this case. Exhibit No. 20 is Exxel's General Contractor's Safety Manual. The manual organizes 31 topical policies covering Exxel's direct general contractor based upon a violation by a subcontractor's employees on the general contractor's jobsite.
employees and Exxel’s work with subcontractors on safety issues. The manual covers rules, orientation and training, specific safety pre-planning, safety meetings, monitoring and discipline, as well as frequently encountered safety rule and equipment needs such as those concerning ladders, scaffolds, guardrails, trenching/excavating, and the like. Exhibit No. 1 is a document signed by Exxel employees acknowledging receipt and understanding of various safety policies and handbooks, in this instance signed by Robert R. Johnson, Exxel’s acting superintendent on the Stanwood/Camano Village project at the time of the alleged violation. Exhibit No. 2 is the contract with Master Framing wherein safety compliance requirements and penalties are well covered.

Exxel is the leading safety performer of the 80 members of its retrospective industrial insurance premium rating group. This "retro-group" itself is comprised of advanced safety performers from the 300 members of Associated General Contractors, according to its Northern District Manager, Arthur Anderson. Mr. Anderson testified that Exxel's program is "definitely" effective. Likewise, Mike Sotelo, a safety and risk management expert who has been a member of a Department sponsored safety task force, expressed his opinion that Exxel strictly implements an effective safety program.

Moreover, Exxel presented evidence to the effect that it has consistently performed in the top range on safety matters. Tim Spink, Exxel's Vice-President and Director of Operations, testified that, since an alleged but unresolved August 1995 fall protection citation, Exxel has engaged in an estimated $25 to $27 million of business, supervising 650,000 worker hours without any citation. He further testified that the August 1995 citation was the only citation received by Exxel since he joined Exxel in the winter of 1991. Exhibit Nos. 17, 18, and 19 are reports issued by the Department upon inspections of Exxel. The reports, two issued in 1995 and one in April 1996, show no safety violations and contain commendations of Exxel for its safety efforts. Exhibit

4 Obviously the employee misconduct is available to a general contractor with regard to its own, direct employees.
Nos. 22 through 25 are awards and commendations issued by other organizations to Exxel for Exxel's safety accomplishments in the industry.

Finally, Safety Inspector Weech, of the Department, agreed that Exxel's written safety program and written procedures are excellent. Nevertheless, the Department issued a citation to general contractor Exxel, as described earlier. The Department contends, as indicated in the citation, that more particular circumstances of this case warrant a finding that Exxel's safety program, although excellent on paper and in many other respects, was not "effective in practice."

We turn now to the more particular circumstances of this case. We consider whether we should find that general contractor Exxel's safety program was "effective in practice" by providing a safe and healthful working environment at the Stanwood/Camano Village project.

**Was Exxel's Safety Program "Effective In Practice?"**

**Department's Contentions**

At the time of the fall protection violation on January 17, 1996, five workers were on the jobsite. Four of these worked for Master Framing. The fifth worker on the jobsite was Robert Johnson, Assistant Superintendent for Exxel. Mr. Johnson testified he had been acting superintendent on the jobsite for a week in the absence of Exxel's usual superintendent, Brett Armstrong.

The Department alleges that Exxel's safety program was compromised because Assistant Superintendent Johnson was acting in a dual capacity as both Exxel's representative and also performing work tasks, specifically setting up concrete forms. In performing his individual work Mr. Johnson could not directly view the Master Framing workers. He was 30-40 feet away and his view was blocked. Indeed, Mr. Johnson's testimony regarding his multiple duties that day reads almost as a "confession" in that he seems to indicate that he might have prevented the violations
had he not been spread thin. The Department asserts that Exxel should have had more available
supervision at the Stanwood/Camano Village construction site.

The lack of adequate supervision is arguably demonstrated by Safety Inspector Weech’s
testimony. He testified that Mr. Johnson had complained that Master Framing workers were
causing compliance problems prior to the January 17 safety violation. Specifically, on January 16
Mr. Johnson had intervened to advise Master Framing workers to comply with safety standards.
3/10/97 Tr. at 47. We note that Mr. Johnson's testimony at hearing does not corroborate
Mr. Weech's version of events leading up to January 17.

The Department further contends that Exxel's safety program was not "effective in practice"
because Exxel did not document, in the form of a sanction against Master Framing, the incidents of
January 16 and the citation on January 17, as required in Exxel's own policies (Exhibit No. 20).
Although the Department admits the January 17 incident was written up, Exxel did not actually
issue a disciplinary "warning notice" to Master Framing.

In light of additional facts, however, we are persuaded the better view is that Exxel's safety
program was effective in practice so as to discharge Exxel's "primary responsibility" for jobsite
safety as the general contractor under Stute.
Exxel’s Contentions

Exxel documented, through Exhibit Nos. 9 through 15, its safety pre-planning meetings and agreements, including those specific to safety standard adherence, on the Stanwood/Camano Village project. Exxel demonstrated a consistent pattern of weekly safety meetings with all subcontractors. At these safety meetings, Exxel identified potential hazards and site-specific safety work plans. Exxel conducted inspections of the site and intervened as discussed further below.

We also note that Exxel or Master Framing provided necessary safety equipment. Master Framing employees were actually wearing the harnesses and dragging their safety lanyards, at the time they committed fall protection violations.

Exxel followed through upon the weekly safety meetings. At least daily, and frequently more often, Exxel reminded its subcontractor’s employees, including those of Master Framing, regarding safety compliance. And we note, minutes of the January 15, 1996 safety meeting, just two days before the alleged violation, reflect that Exxel directed that "full body harness will be worn & secured at all times when working on roof." Exhibit No. 9. The minutes reflect that Master Framing’s employees were in attendance at the meetings.

With regard to daily reminders, Acting Superintendent Johnson testified: "every day I told them I said before they would go up on the roof, I would say be sure to tie off. It's a normal procedure." 3/10/97 Tr. at 11. "Yes, at least once a day. Sometimes you have to remind them. For instance, every time they get up on the roof after lunch. . ." 3/10/97 Tr. at 18. Exxel Superintendent Brett Armstrong confirmed the practice of regular reminders.

Moreover, Master Framing owner/operator Wade Brown described his experience that:

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

3/10/97 Tr. at 112.

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

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

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

3/10/97 Tr. at 34.

We are persuaded by this testimony that Exxel established a pattern of at least daily
reminders, directing Master Framing employees to comply with safety standards, and specifically
those concerning fall protection and tie off requirements. The Department did not present any
evidence to the contrary on this point.

We recognize that Master Framing had been cited for fall protection violations four to six
times in the ten months preceding the violation at issue here. It appears that only one of these
violations may have occurred on an Exxel jobsite. Master Framing owner/operator Wade Brown
tested that Master Framing had worked on five to six prior projects for Exxel. The record shows
that the Department had issued a similar citation to Exxel in August 1995. However, that citation is
not final and is still on further review at the Department and is, therefore, of limited probative value
here.
In any event, we do not agree with the view expressed by the Department or the dissent to this decision, that Exxel's actions did not adequately take into account Master Framing's history of prior safety standard violations. Exhibit No. 16 is a written warning from an August 1995 incident, wherein Exxel warned Master Framing of potential further discipline during a prior contract. Master Framing acknowledged receipt of the written warning as indicated by Master Framing owner/operator Wade Brown's signature. The warning contains a written expectation that Master Framing would take immediate corrective action and that failure to do so would result in the involved employee being removed from the project. Having in mind this one exception, Exxel Superintendent Brett Armstrong testified that, in his experience, Master Framing adhered to Exxel's rules when working on Exxel jobsites. Mr. Armstrong testified that he never had any other indication that they would not continue do so in the future. The evidence supports the conclusion that Exxel routinely practiced effective enforcement of its safety program. This is demonstrated by the fact that Master Framing had been cited several times while working for other general contractors. Exxel was obviously more effective in obtaining Master Framing's compliance with its safety plan and safety regulations.

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

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

I didn't - - I didn't observe - - you have to understand that there are times when obviously when you first get up on the roof, before you are a tied off, you're not tied off. When you unhook your lanyard to go down the ladder you're not tied off. So you're not tied you have 100 percent of the time. I did not observe them going about their normal work without being tied off or I would have said something to them.
2/3/97 Tr. at 10.

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

Q. Do you remember a conversation - - well, did you talk to Bob Johnson?
A. Yep. Yes.
Q. And do you recall Mr. Johnson having a conversation with you about not being tied off?
A. Yes, he came up the ladder when I was moving it. Because as you progressively get work done you need to progressively move your system further towards the work. And he popped his head up when we were moving it. So he was always going - - sure, we're moving it, so we're not tied off because we're picking it up and moving it.
Q. Do you remember indicating to him that that's what you were doing at the time?
A. Yes.
Q. Did he have any response to that?
A. He told me to get tie off. His response was to get tied off.
Q. And did you do that?
A. Oh, yeah, bam, bam, bam.

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

Further testimony on the subject does suggest there may have been some discussion as to whether Mr. Johnson would write-up the incident. Nevertheless, the whole of the testimony suggests it is questionable whether an actual violation occurred. Other than Safety Inspector Weech's conclusory characterization of the incident as a "violation," we have no other explanation as to why we should view Mr. Johnson's intervention as anything other than an appropriate intervention and reinforcement of safety rules in a questionable situation. Although elicited by the Department as evidence that Exxel's safety program was not, "effective in practice," the testimony just as readily demonstrates Exxel's commitment to active enforcement of the safety standards.

Exxel's Safety and Health Policy No. 3, Assistant Superintendent Safety Orientation, under Enforcement, Item 3, states:
If a subcontractor is involved in a safety violation, the assistant superintendent or superintendent will inform the worker of the infraction. If the worker does not take corrective action, the superintendent will inform the office for further action.

Exhibit No. 20.

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

Exxel’s Safety and Health Policy No. 5, Disciplinary Action for Subcontractors, also contained in Exhibit No. 20, lists a more severe requirement that the involved subcontractor employee leave the site and not return if the infraction is serious (can result in disabling injury or fatality.) The Policy also anticipates replacing the subcontractor, after a warning letter, if the subcontractor does not take corrective action and continually disregards safety requirements.

Exxel utilized, with Master Framing, the 1995 Edition of Subcontract Form of The Associated General Contractors of Washington, Exhibit No. 21. In some contrast to Policy No. 5, the Subcontract General Conditions, Section N. states: "Contractor’s supervisor may direct Subcontractor’s superintendent to remove employees not in compliance with the requirements of this Agreement." Exhibit No. 21, at 8 (Emphasis added.) Reading these documents together, Exxel’s write-up of the August 1995 incident substantially complied with Exxel’s written enforcement procedures, as did Acting Superintendent Johnson’s handling of the incident on January 16, 1996.

We do not believe the Department presented sufficient evidence to discredit, as ineffective, Exxel’s written policies or Exxel’s proven active, on site, enforcement.

In his dissent, our fellow Board member indicates that Exxel’s failure to show that it disciplined Master Framing for the violation on January 17, 1996, at issue here, demonstrates ineffective enforcement. Acting Superintendent Johnson did call the incident into the office, and he provided a written report on January 18. We do not consider Exxel’s further action or lack
thereof concerning the violation immediately at hand should be a fair and reliable indicator of
Exxel's safety program enforcement. Our inquiry as to effective enforcement should focus upon
actions taken by a contractor historically and as of the date and time of the violation in question, so
as to determine whether or not the contractor had a reasonable belief that the violation in question
should not have occurred. Certainly, severe discipline after a cited violation that is on appeal to
this Board would not tend to convince us of what expectations a general contractor reasonably held
just before the violation occurred. Likewise, when an appeal is pending before us, we are reluctant
to assume that the general contractor has taken final action on the matter or that the matter is
closed as between the general contractor and the subcontractor.

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

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

Finally, we turn to our industrial appeals judge's determination that Exxel Acting Superintendent Johnson "should have provided primary priority to strict supervision" of Master
Framing's employees, that "enforcement was not absolute and continuous," and that Mr. Johnson failed to "maintain a constant vigilance that resulted in a lapse in the implementation of the safety program and, thereby, undermined its effectiveness." 11/25/97 Proposed Decision and Order, at 11-12. Our industrial appeals judge acknowledged some "hindsight" here, but also supported the determination by way of pointing to "sufficient indicators to create the suspicion that a problem could reoccur if enforcement was not absolute and continuous." Among these "indicators" were Master Framing's history of violations and the January 16 incident. Also, Safety Inspector Weech testified that Exxel Acting Superintendent Johnson told Mr. Weech there had been "considerable problems in the past few days with getting Master Framing to comply with the fall protection work plan and company regulations." 3/10/97 Tr. at 47.

We have already stated our view that Exxel's safety program and enforcement was adequate, considering Master Framing's past history with other general contractors and the August 1995 violation, as well as the specific incident on January 16, wherein Exxel appropriately intervened. We have also described testimony that established the fact of Mr. Johnson's daily, and often more frequent, reminders to Master Framing to adhere to safety standards, including during the immediate time frame in question. Neither Safety Inspector Weech, nor our industrial appeals judge, identified any specific instances of violations in which Mr. Johnson failed to intervene. We are truly presented, then, with the question of whether, in the circumstances of this case, Exxel was required to meet its obligations under Stute by providing direct and continuous supervision of its subcontractor Master Framing's employees.

The violations in question occurred in the relatively early morning of January 17. Master Framing owner/operator Wade Brown testified that, on January 17, he had just been on the site with two of his employees present and two more expected. Mr. Brown testified that he left just moments before the violation occurred. We have nothing in the record before us to indicate
whether Mr. Brown informed Mr. Johnson that he was leaving the jobsite, nor whether he had
requested that Mr. Johnson provide direct, immediate supervision of Master Framing’s employees.
The violations may not have occurred had Mr. Brown been present and directly supervising his
employees at the time. We believe the violations certainly would not have occurred had
Mr. Johnson been providing direct, constant supervision of Master Framing’s employees.

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

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

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

After consideration of the Proposed Decision and Order and the Petition for Review filed thereto, and a careful review of the entire record before us, we make the following:

**FINDINGS OF FACT**

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

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

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

On April 3, 1996, the Department issued Corrective Notice of Redetermination No. 115221699 that changed the repeat serious violation to a serious violation, changed the abatement date of January 17, 1996, to complied, and reduced the total penalty assessed from $1600 to $800. Exxel received the Corrective Notice of Redetermination on April 4, 1996.

On April 16, 1996, Exxel filed a Notice of Appeal of the April 3, 1996 Corrective Notice of Redetermination with the Board of Industrial Appeals. On April 16, 1996, the Board issued a Notice of Filing of Appeal, assigning the appeal Docket No. 96 W182. The Department transmitted its records supporting the citation to the Board on May 16, 1996.
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 or 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
project, Exxel conducted weekly safety meetings that were attended by Master Framing employees. A weekly safety meeting held on January 15, 1996, directed that a full body harness will be worn and secured at all times when working on the roof.

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

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

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

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

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of this appeal.


3. Corrective Notice of Redetermination No. 115221699, issued by the Department of Labor and Industries Safety Division to Exxel Pacific, Inc., on April 3, 1996, that modified the citation and notice issued on February 14, 1996, from repeat serious to a serious violation of WAC 296-155-100(1)(a), changed the abatement date of January 17, 1996, to complied, and changed the total penalty assessed from $1600 to $800, is incorrect, and is reversed. This matter is remanded to the
Department of Labor and Industries with directions to vacate the
citation.

It is so ORDERED.

Dated this 6th day of July, 1998.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/________________________________________
S. FREDERICK FELLER       Chairperson

/s/___________________________
JUDITH E. SCHURKE             Member

DISSENT

I would adopt in its entirety the Proposed Decision and Order that affirmed the Corrective
Notice of Redetermination finding a violation by Exxel Pacific, Inc. The Proposed Decision and
Order, issued by the industrial appeals judge who personally heard all of the testimony in this case,
very thoroughly sets forth the evidence and reaches the correct conclusion. Exxel's safety program
was not effective in practice on January 17, 1996, when the fall protection violations occurred. The
fall protection violations occurred as a direct result of this failure. Exxel did not meet its primary
responsibility as a general contractor for a safe and healthful jobsite.

Exxel's failure was exactly as determined in the Proposed Decision and Order. Exxel did not
provide adequate supervision and they did not provide adequate discipline to account for the lack
of supervision on the jobsite. Master Framing was known to have a history of poor safety
performance with repeated violations in the 10 months preceding January 17, 1996, at least one of
which was on an Exxel jobsite. Exxel, as demonstrated by its own safety program, understands
what is necessary to obtain adherence to safety regulations. Exxel had the prior past experience
with Master Framing and Exxel admittedly had the recent experience of problems getting Master
Framing's employees to comply with fall protection regulations. When considered together, Exxel had two options short of direct, constant supervision—discipline Master Framing with sufficient severity to obtain compliance, or, terminate the contract pursuant to terms allowing for this. Exxel did not exercise either of these options. In fact, even after the January 17, 1996 violation, Exxel could not point to any severe discipline of Master Framing or its employees. Thus, lack of enforcement is absolutely clear. The overly embellished testimony of Master Framing employees to the contrary, in support of Exxel, is only as one would expect it to be, given the ongoing business relationship with Exxel. This testimony should not have been afforded any weight.

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

Finally, the majority is too "cautious" with regard to placing the full, affirmative burden on a general contractor to show that an admitted violation on its jobsite was truly "unpreventable." The present case belies this point. By assigning "primary responsibility" to the general contractor, our Supreme Court, in *Stute*, squarely placed the burden on the general contractor precisely because the general contractor is innately in control. Exxel simply failed to exercise its control, and the
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