



## Employment Law Note

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### Supervisor's Knowledge of Safety Violation(s) May Be Imputed to the Employer



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Employers depend on their supervisory employees to supervise other employees' work performance and help prevent company policy violations. So, what happens when the supervisory employee violates a serious company policy or safety rule? In *Central Steel, Inc. v. Wash. State Dep't of Labor & Industries*, Washington state's Court of Appeals (Division I) ruled that the Department of Labor & Industries (the "Department") may hold the employer liable by imputing the supervisor's knowledge of their own violation to the employer.

#### Background

Central Steel was one of the subcontractors for the construction of a multistory residence hall at Seattle University. Central Steel was hired "[t]o place the rebar in the building and the post-tension cable." In December 2017, nine levels of the residence hall were under construction. On December 30, 2017, Central Steel employees Nicholas Hoffman (journey-level worker) and Ray Estores (apprentice) were assisting in constructing a structure in the residence hall. As testified by Central Steel's general foreperson, Hoffman was designated as the "supervisor" for the day. Hoffman and Estores were specifically assigned to "tie back the rebar elements" of the north core structure. After completing the tie-back and during his descent, Estores fell 90 feet onto a concrete slab; he did not survive. Hoffman was about 10 feet from the leading edge when he learned that Estores had fallen. He detached from his fall protection equipment and ran down to check on Estores. As he did so, he ran away from the leading edge.

The Department investigated the fatality and issued a single "serious" citation - pursuant to the Washington Industrial Safety and Health Act of 1973 ("WISHA") - to Central Steel on June 22, 2018. The Department determined that two incidences served as the basis for the singular citation. First, Estores "did not have his fall protection attached to a proper attachment..." Second, "[t]wo employees were exposed to falls of 90 feet to the ground level, which resulted in the death of one worker and the possibility of severe disabling injuries or death to the other."

Central Steel appealed the Department's citation to the Board of Industrial Insurance Appeals (the "Board"). The industrial appeals judge issued a proposed order affirming the corrective notice of redetermination solely on the basis that "Central Steel committed a serious violation of WAC 296-155-24609(1) because its employee, acting in a supervisory role, failed to remain 100 percent tied off in an area where he was required to be tied off." The industrial appeals judge also found that, "[b]ecause Mr. Hoffman was acting as a supervisor, his knowledge of his own violation is imputed to the employer. Central Steel knew of the violative condition." Central Steel petitioned the Board for review of the proposed order. After the Board denied review, Central Steel appealed the Board's denial to the superior court. On October 19, 2020, the superior court entered an order affirming the Board's order.

#### What Constitutes a "Serious" WISHA Safety Violation?

To establish a "serious" WISHA safety violation, the Department is required to prove "(1) the cited standard applies, (2) the employer did not meet the standard, (3)

employees were exposed to, or had access to, the violative condition, (4) the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition, and (5) there is a substantial probability that death or serious physical harm could result from the violative condition." Once the Department establishes a sufficient case of a WISHA violation, the burden shifts to the employer to establish that the "unpreventable employee misconduct was the actual cause of the violation." *J.E. Dunn NW, Inc. v. Dep't of Labor & Indus.* (2007).

## Proving Unpreventable Employee Misconduct

To show unpreventable employee misconduct, the employer must establish the following elements: "(i) A thorough safety program, including work rules, training, and equipment designed to prevent the violation; (ii) Adequate communication of these rules to employees; (iii) Steps to discover and correct violations of its safety rules; and (iv) Effective enforcement of its safety program as written in practice and not just in theory." RCW 49.17.120(5).

## Supervisory Employee's Knowledge of Violation Imputed to Employer

In its appeal to the Washington state Court of Appeals (Division I), Central Steel contended that the Board erred because Hoffman was a journey-level worker, not a supervisor, and because it would amount to strict

liability to impute his knowledge of the violation to the employer. The Court of Appeals disagreed and noted that when a supervisor has actual or constructive knowledge of a safety violation, such knowledge can be imputed to the employer. Moreover, "an employer may delegate supervisory authority to an employee whose job title is not that of a supervisor." Because a Central Steel general foreperson testified that "Hoffman was designated as the supervisor for the day that Hoffman engaged in the safety violation," the Court ruled that was sufficient to impute his knowledge of *his own safety violation* to Central Steel, justifying a "serious" violation.

## Takeaways

*Central Steel* makes clear that the decision to classify an employee as a supervisory employee or assign supervisory duties to an employee carries significant risks for employers, particularly the risk of imputed liability in a case stemming from a serious safety violation. Therefore, employers should perform consistent reviews to identify those employees who are not supervisors but who carry out supervisory tasks or duties. Once identified, employers should regularly train these employees (as if they are supervisors) on the company's safety policies, as well as all other areas where the exercise of supervisory responsibility can bind the company, such as employee discipline, harassment complaints, and wage and hour issues.

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