

DOSH DIRECTIVE

Department of Labor and Industries
Division of Occupational Safety and Health
Keeping WA workers safe.

5.10 Unpreventable Employee Misconduct

Date: September 29, 2009

I. Purpose

This directive provides instruction to DOSH staff on the procedures to follow when the issue of unpreventable employee misconduct is brought up by the employer during the course of any DOSH enforcement or consultation activity.

II. Scope and Application

This directive applies to all DOSH staff and replaces all previous instructions or guidance on this issue, whether formal or informal. This guidance is to be used in conjunction with the guidance in the DOSH Compliance Manual.

III. Background

The affirmative defense of “unpreventable employee misconduct”, also known as employee malfeasance, occasionally arises during the course of DOSH enforcement activities and/or litigation of citations. The courts, at the federal and state levels, have developed written decisions which evaluate and specify the elements employers must prove to establish that a violation was the result of unpreventable employee misconduct. In 1999, the legislature amended RCW 49.17.120 to include the elements employers must prove to establish violations were the result of unpreventable employee misconduct. Specifically, it states:

“(5)(a) No citation may be issued under this section if there is unpreventable employee misconduct that led to the violation, but the employer must show the existence of:

(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.”*

Although the statute provides the minimal elements an employer must show to prove the affirmative defense, it does not specifically establish or define what is “thorough,” “adequate” or “effective.” This guidance is intended to assist DOSH staff in evaluating whether or not a violation resulted from unpreventable employee misconduct. These procedures and enforcement policies are summarized below.

A general description of the elements of employee misconduct and a discussion of significant legal decisions are provided in Appendices A and B of this directive. DOSH strongly recommends reviewing these Appendices to better understand the legal context in which the elements of this affirmative defense arise.

IV. DOSH Enforcement Policy

Employee misconduct is an affirmative defense that must be proven by the employer.

- A.** DOSH will evaluate employee misconduct on a case-by-case basis in which all facts specific to the current enforcement activity and the overall history of the employer’s workplace safety & health efforts will be considered.
- B.** If the affirmative defense of unpreventable employee misconduct is raised by the employer during a DOSH enforcement activity or reassumption hearing, staff and their immediate supervisors must determine if the unsafe conditions or practices resulted from unpreventable employee misconduct.
- C.** The guidance contained in Section V of this directive must be used, and the depth of the analysis must be sufficient for the circumstances encountered to provide a credible and defensible conclusion as to whether or not unpreventable employee misconduct had occurred.
- D.** The Regional Compliance Manager must be consulted **and** approve the decision to not issue a citation due to unpreventable employee misconduct.
- E.** No violation will be issued or affirmed if DOSH staff have reviewed the facts of the inspection or consultation and believe the violation was clearly the result of unpreventable employee misconduct.
- F.** The facts and conclusions of the analysis must be documented in the case file by staff conducting the analysis.

V. Procedures for Evaluating Employee Misconduct

- A. The basic premise of the analysis is to determine if the employer has established and implemented a safety and health program that is effective in practice, tailored to their business operations, sufficiently identifies the predictable and routine hazards involved, and establishes the rules employees must follow when conducting the work.

The analysis may need to cover one or more of the following elements using the questions indicated which are relevant to the work circumstances encountered to help provide an adequate determination of employee misconduct:

1. Program Review

- Did the employer establish a written accident prevention program that is tailored to the business operations and the hazards involved?
- Are employees aware of the written programs and familiar with the policy requirements?
- Does the employer consistently follow the policies and procedures contained within the written program?
- Are other written programs required (e.g., lead, respirator, LO/TO, hazard communication, etc.) and does the employer have them?
- Does the written program describe the safety rules employees must follow to conduct the task? Are there specific rules related to the hazard identified?
- Does the employer have written procedures for identifying and evaluating hazards when new substances, processes, procedures or equipment are introduced into the workplace?
- Are there written provisions for reporting and correcting hazards? Are there procedures for identifying, removing and replacing defective equipment?
- Have procedures been established for investigating safety related incidents or accidents?
- Do the written procedures identify methods so that compliance with the safety rules for the workplace will be verified and enforced?

2. Hazard Analysis

- Are there procedures established and implemented for identifying and evaluating workplace hazards?
- Does implementation of the hazard analysis procedures result in a comprehensive evaluation of the work process or equipment involved and the necessary safety methods?
- Has the employer adequately conducted a hazard analysis of the work process involved?

3. Equipment and PPE

- Does the employer provide or ensure that employees have the proper safety related equipment and PPE necessary for the work being performed, prior to the work being performed?
- Have employees received the training necessary to use the PPE and/or related equipment?
- Was the equipment or PPE provided in this case?

4. Communication

- Is there a reliable system for communicating safety and health matters to staff in a form readily accessible and understandable by all affected employees?
- If non-English speaking employees are present, does the employer have a method for communicating with these employees to ensure the requirements are understood?

5. Training and Instruction

- Has the employer designed and implemented a reliable training program to provide employees with specific instruction on the practices necessary for the employee to perform assigned duties in a safe manner?
- Is the content of the training provided adequate to provide the necessary instruction on how to perform the work safely?
- Has the employer adequately documented the safety training (contents, who attended, etc.)?
- Is training provided to all new employees or when employees job assignments change?
- Is training provided for supervisors or the designated person in charge of the worksite to familiarize them with the safety and health hazards for employees under their immediate control and the enforcement expectations of the supervisor?

- Did the employees exposed to the hazard receive the training necessary to perform the work safely?
- Is retraining provided when it is discovered the employee does not adequately understand how to perform the work safely?
- Is periodic refresher training provided to all employees when necessary?
- Were the employees and supervisors involved in the violation provided the necessary training?

6. Hazard Reporting and Correction

- Has the employer established a procedure for employees to report unsafe conditions?
- Is there an established process for employers to report workplace hazards?
- Are workplace hazards corrected in a timely manner?
- When hazards are identified or reported, does the employer consistently ensure employees are removed from exposure. Are mitigating steps taken until the unsafe condition or practice can be corrected?

7. Compliance and Enforcement

- Has the employer established a reliable system for verifying compliance with the safety rules?
- If the employer conducts self inspections, are the inspections random and unannounced?
- Is the frequency of the verification efforts proportional to the volume of work being performed and/or number of employees involved in the business operations? Are they doing enough self inspections related to how many sites/employees they have?
- Does the employer consistently and adequately discipline all employees for using unsafe work practices, and/or not using safe work practices?
- Is there evidence of a continuing compliance problem?
- Was effective supervision present where supervision was needed?
- Was a supervisor aware of the unsafe practice or condition?
- Does the employer discipline or provide retraining to supervisory personnel involved with unsafe conditions or practices?
- Is there evidence in the employer's records or DOSH inspection records of the employer's efforts to be in compliance?

- Are the employees/supervisor involved in the current inspection the same as employees/supervisor on past DOSH inspections where violations were found?
- B.** The inspector may use the checklist at Appendix A as a tool to collect and comment on this data. It is a tool that may be used to document the inspector's findings. The checklist is only a tool and every element need not be completed. If the inspector prefers to document his/her findings in a narrative format, that is acceptable and in that case the checklist would not be needed. If the checklist is used, the "comments" section of the checklist must be filled out in addition to checking the "yes" or "no" box.
- C. Review the facts.** Upon completion of the analysis, the CSHO must review the fact pattern with their immediate supervisor. The supervisor must ensure the CSHO or RHO documents the result of the analysis and conclusions reached. This documentation shall include a brief summary of why the CSHO or RHO believes the violation was, or was not, the result of unpreventable employee misconduct.

If the CSHO or RHO believes the safety and health program is not effective in practice, a summary shall be included in the case file outlining the reasons the program is not effective in practice. If the supervisor agrees the violation or hazard is the result of employee misconduct they must take it to the Regional Compliance Manager or Appeals Manager (when the issue arises during reassumption).

The Regional Compliance Manager or Appeals Manager, as appropriate, must be consulted **and** approve the decision to not issue a citation due to unpreventable employee misconduct. If there is no agreement between regional staff or an RHO and the Appeals Manager, the Statewide Compliance Manager will make a final decision regarding whether or not a citation will be issued.

Approved:


Stephen M. Cant, CIH, Assistant Director

Department of Labor and Industries
Division of Occupational Safety and Health

For further information about this or other DOSH Directives, you may contact the Division of Occupational Safety & Health at P.O. Box 44600, Olympia, WA 98504-4600 --or by telephone at (360) 902-5495. You also may review policy information on the DOSH website (<http://www.lni.wa.gov/Safety-health/>).

APPENDIX A

Checklist

Program Review	Yes/No	Comments
Does the employer have a written accident prevention program that is tailored to the business operations and the hazards involved?		
Does the written program describe the safety rules employees must follow to conduct work tasks? Are there specific rules related to the hazard identified?		
Does the employer consistently follow and implement the policies and procedures contained within the written program?		
Are employees aware of the written programs and familiar with the policy requirements?		
Are other written programs required (e.g., lead, respirator, LOTO, haz com, etc.) and does the employer have them?		
Does the employer have written procedures for identifying and evaluating hazards when new substances, processes, procedures or equipment are introduced the workplace?		
Are there written provisions for reporting and correcting hazards?		
Are there procedures for identifying, removing and replacing defective equipment?		
Have procedures been established for investigating safety related incidents or accidents?		

Program Review	Yes/No	Comments
Do the written procedures identify how the employer will verify employee compliance with the safety and health rules for the workplace?		
Does the employer have procedures established and implemented for identifying and evaluating workplace hazards?		
Does implementation of the hazard analysis procedures result in a comprehensive evaluation of the task involved and the safety methods necessary?		
Has the employer adequately conducted a hazard analysis of the work task involved?		
Does the employer provide or ensure that employees have the proper safety or health related equipment and PPE necessary for the work being performed, prior to the work being performed?		
Have employees received the training necessary to use the PPE and/or related equipment?		
Was the equipment or PPE provided in this case?		
Does the employer have a reliable system for communicating safety and health matters to staff in a form readily understandable by all affected employees?		
If non-English speaking employees are present, does the employer have a method for communicating with these employees to ensure the communication is understood?		

Program Review	Yes/No	Comments
Training and Instruction		
Has the employer designed and implemented a reliable training program to provide employees with specific instruction on the practices necessary for the employee to perform assigned duties in a safe manner?		
Is the content of the training provided adequately instruct employees on how to perform the work safely?		
Is training provided to all new employees or to employees whose job assignment has changed?		
Are supervisors trained on the safety and health hazards for employees under their immediate control and the enforcement expectations of the supervisor?		
Are employees retrained when it is discovered the employee does not understand how to perform the work safely?		
Are employees provided periodic refresher training as necessary?		
Did the employees exposed to the hazard receive the training necessary to perform the work safely?		
Are workplace hazards corrected in a timely manner?		
Has the employer established a reliable system for verifying compliance with the safety rules?		
If the employer conducts self inspections, are the inspections random and unannounced?		

Program Review	Yes/No	Comments
Is the frequency of the employer's self inspections proportional to the volume of work being performed and/or number of employees involved in the business operations?		
Does the employer have a disciplinary policy in place?		
Does the employer consistently and adequately discipline all employees for conducting unsafe work practices?		
Is there evidence of a continuing compliance problem?		
Was a supervisor aware of or involved in the unsafe practice or condition?		
Does the employer discipline or provide retraining to supervisory personnel involved with unsafe conditions or practices?		
Is there evidence in the employer's records or DOSH inspection records of a continuing compliance program?		

APPENDIX B

Guidance on Safety and Health Program

I. Workplace Safety and Health Program

In order to comply with the safe workplace requirement, employers must adopt a workplace safety and health program. One element of an employer's overall workplace safety and health program is an Accident Prevention Program (APP) that is effective in practice (see generally, WAC 296-800-14005). An employer's APP is a set of rules which establishes the expected behavior of all employees as it relates to safety and health within the workplace. The APP includes policies, procedures, safety & health controls necessary and the responsibilities as it relates to preventing unsafe conditions and practices. It often contains an action plan for developing and implementing safe work practices, a guide for involving management and employees in workplace safety and health, and it forms the foundation of the employer's overall safety and health program. The APP must be in writing and tailored to the needs of the employer's workplace and operations and the hazards presented by the workplace and operations (WAC 296-800-14005). This means that the employer must perform a comprehensive assessment of its operations and workplaces to:

1. Identify the regular and predictable hazards of their workplace and work activities. This can be accomplished by assessing the tools, equipment, processes, and chemicals typically used in the workplace, routine work duties, work practices, talking to operators of equipment and tools, hazards typical to the use of equipment, tools, or work practices, and hazards recognized by the employer's industry or business associations.
2. Determine how to protect employees from these hazards. This can be accomplished by referencing regulatory or industry standards and adopting work rules that tell employees how to work safely, identifies necessary safe work practices, and requires the use of tools or equipment that have safety features (such as guards).
3. Identify, and when needed, purchase personal protective equipment (PPE) to protect employees. This can be accomplished by determining which work activities require use of PPE, the types of PPE necessary to provide adequate protection against the hazard involved and the use and care of the PPE. Types of PPE routinely used include, but are not limited to, eye protection, fall protection, leg protection, steel-toed shoes, hard hats, respirators and noise protection.
4. Determine what training and qualifications employees may need to perform the job in a safe manner, and to recognize the hazards and the methods available to protect them from the hazards. Required training must include review of work rules and safe work practices, how to recognize the hazards involved in the duties employees perform, how to report hazardous conditions and unsafe practices, how to properly use PPE, how to properly use tools and

equipment, what to do in the event of an emergency, what to do if someone is injured, etc. The employer must determine the frequency with which the training is necessary. For example some hazards might require initial training on the subject and periodic retraining or requalification.

Once this comprehensive assessment is completed, the employer must document in the APP all these elements and how the steps will be accomplished. The APP must also describe how the employer will enforce safety rules and work practices (ensure employees are following the safety rules), and what steps the employer will take to discover whether employees are complying with the safety rules, and what steps the employer will take if an employee is found in violation of a safety rule or safe work practice. The employer must then implement the elements of the program through training, self inspections, and when necessary, disciplining employees who fail to comply with the program requirements. Overall implementation of the program, both through the actual development of the program elements and carrying out the elements, is necessary to achieve a safety and health program that is effective in practice.

II. Legal Analysis

In 1973, the Washington Legislature enacted the Washington Industrial Safety and Health Act (WISHA), chapter 49.17 RCW. The purpose of WISHA is to ensure “*safe and healthful working conditions for every man and woman working in the state of Washington*” and to adopt regulations which “shall equal or exceed the standards prescribed by the Occupational Safety and Health Act.” RCW 49.17.010. More specifically, WISHA requires employers to provide employees a workplace free from recognized hazards. RCW 49.17.060(1). The legislative act provided to the Washington State Department of Labor & Industries (L&I) the authority and responsibility for implementing the requirements of WISHA.

In accordance with this mandate, L&I adopts administrative rules (also known as standards, regulations, or codes) which describe the minimal actions employers must take in order to protect employees from hazardous conditions or practices. Employers who fail to comply with WISHA requirements may be cited by L&I. RCW 49.17.120. In prosecuting a WISHA citation, L&I must present its case first and must prove that the employer violated the WISHA regulation(s) cited.¹ WAC 263-12-115(2)(b); *see also, In re Exxel Pacific, Inc.*, BIIA Dec., 96 W182 at 12 (1998).

This requires L&I to prove four basic elements:

1. The standard cited applies;
2. The employer violated the cited standard;
3. The employer’s employees had access to the violative condition; **and**

¹ In legal terminology, this means L&I bears the burden of proving, by a preponderance of the evidence, that the employer violated WISHA. WAC 263-12-115(2)(b)

4. The employer knew, or with the exercise of reasonable diligence could have known of the violative condition (i.e., the employer had actual or constructive knowledge of the violation).

In re Longview Fibre Co.

Courts hearing appeals involving WISHA are required to liberally interpret and apply WISHA and regulations adopted under WISHA in order to carry out the purpose of ensuring safe working conditions. *Inland Foundry Co. v. Dep't of Labor & Indus.*, 106 Wn. App. 333, 336, 24 P.3d 424 (2001); *Netversant Wireless Sys. V. Dep't of Labor & Indus.*, 133 Wn. App. 813, 823-24 (2006).

In WISHA cases, an employer may raise defenses or claims (also called “affirmative defenses”) regarding why the employer should not have been cited for a WISHA violation. One affirmative defense available to employers is “unpreventable employee misconduct.” This defense has been recognized in both Washington and OSHA cases, and the Washington legislature adopted the elements in statute in 1999. *See*, RCW 49.17.120(5)(a).

Under the defense of unpreventable employee misconduct, once L&I presents its case and establishes that a violation has occurred, the employer may be relieved of responsibility for the violation by proving four elements. *See Legacy Roofing, Inc. v. Dept' of Labor & Indus.*, 129 Wn. App. 356, 370, 119 P.3d 366 (2005); *Wash. Cedar & Supply Co., Inc. v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 911, 83 P.3d 1012 (2003), *review denied*, 152 Wn.2d 1003, 101 P.3d 866 (2004). Specifically, the employer must prove that it has:

1. A thorough safety program, including work rules, training, and equipment designed to prevent the violation;
2. Adequate communication of these rules to employees;
3. Steps to discover and correct violations of its safety rules; and
4. Effective enforcement of its safety program as written in practice and not just in theory.

RCW 49.17.120(5)(a); *Legacy Roofing*, 129 Wn. App. at 370; *Wash. Cedar*, 119 Wn. App. at 911.

Because the employer is responsible for providing employees a safe and healthful workplace and for ensuring that employees comply with safety and health rules, the elements of the unpreventable employee misconduct defense are challenging and often difficult to prove. Employers must take all reasonable and feasible steps to prevent recognizable and predictable hazards, including dangerous conduct by employees and ensuring employee compliance. *P. Gioioso & Sons, Inc. v. OSHRC*, 115 F.3d 100 (1st Cir. 1997). Final responsibility for compliance with the Act remains with the employers. *Brock v. L.E. Myers Co., High Voltage Division*, 818 F.2d 1270, 1277 (6th Cir. 1987); *citing*, S.Rep. 1282, 91st Cong. 2d

Sess. 10-11, *reprinted in* 1970 U.S.Code Cong. & Admin.News 5177, 5182. Even though a particular event might have been unforeseeable, an employer may be held responsible for the employee's behavior if it could have been prevented by feasible precautions by the employer. Mark A. Rothstein, *Occupational Safety and Health Law* §5:27, at 201 (2006 ed.); 59 ALR Fed. 395, 399 §2(a); *citing General Dynamics v. OSHRC*, 599 F.2d 453, 458-59 (1st Cir. 1979). As a result, an employer can only successfully defend against a citation on the ground of employee misconduct if the employer had taken all feasible steps to prevent the misconduct in question. *Id.*

These are some of the policy considerations that form the basis of RCW 49.17.120(5)(a), Washington's statutory provision on the "unpreventable employee misconduct defense." That statute sets forth the specific elements of the defense. While there are relatively few Washington cases that address RCW 49.17.120(5)(a), guidance in interpreting its language can also be found in the OSHA cases that discuss the federal counterpart of the defense.

III. Case law involving Unpreventable Employee Misconduct

This section provides an overview of some of the more significant cases that discuss unpreventable employee misconduct and the factors in those cases that led to their respective outcomes. It is organized in a manner that addresses each element of RCW 49.17.120 (5)(a). When reviewing these cases and example situations, keep in mind that they are provided as illustrative examples only. Every jobsite is different and the determination of whether or not there has been unpreventable employee misconduct can only be made based on the specific facts and circumstances surrounding a specific violation. Employers should contact a qualified safety professional if they have questions about their own safety program.

A. RCW 49.17.120(5)(a)(i): Thorough Safety Program and Work Rules Designed to Prevent the Violations.

Proving the existence of a thorough safety program is typically the most straightforward element of the unpreventable employee misconduct defense. Rothstein, §5:27 at 202. As is discussed in section I above, one element of an employer's overall workplace safety and health program is an Accident Prevention Program (APP) that is effective in practice (*see generally*, WAC 296-800-14005). An employer's APP is a set of rules which establish the expected behavior of all employees as it relates to safety and health within the workplace. The APP includes policies, procedures, safety & health controls necessary and the responsibilities as it relates to preventing unsafe conditions and practices. It often contains an action plan for developing and implementing safe work practices, a guide for involving management and employees in workplace safety and health, and it forms the foundation of the employer's overall safety and health program. The APP must be in writing

and tailored to the needs of the employer's workplace and operations and the hazards presented by the workplace and operations. WAC 296-800-14005.

A thorough safety program must include work rules, training, and equipment designed to prevent the violation. *See* RCW 49.17.120(5)(a)(i). The Occupational Safety and Health Review Commission (OSHRC) has defined a "work rule" as "an employer directive that requires or proscribes certain conduct, and that is communicated to employees in such a manner that its mandatory nature is made explicit and its scope clearly understood." *Nat'l Eng'g & Contracting Co. v. OSHRC*, 838 F.2d 815, 819 (6th Cir. 1987). The employer's commitment to safety must be reflected by the establishment of work rules effectively implementing the requirements of the standards, which includes providing employees with required safety equipment. *Western Waterproofing Co.*, 7 OSHC 1625, 1979 OSHB ¶23,785 (1979); *Floyd S. Pike Elec. Contractor, Inc.*, 6 OSHRC 1675, 1978 OSHD ¶ 22,805 (1978). The employer's work rules must also be "clear enough to eliminate employee exposure to the hazard covered by the standard." Rothsten, §5:27 at 202. Where there are not clear, established work rules, the affirmative defense of employee misconduct will fail. *Id.*

In *Nat'l Eng'g & Contracting Co. v. OSHRC*, a fatality resulted from an unguarded floor opening in a pump house that an employee fell through. 838 F.2d at 816. The employer was cited for failing to maintain a guard rail around the opening. *Id.* The only safety instructions National had given its employees at a safety meeting in the beginning of the assignment were to replace gratings when work was finished and to "watch your floor openings." *Id.* at 816, 819. The court upheld the administrative judge's ruling that these warnings did not meet the definition of an established "work rule." *Id.* at 819.

In *Danis-Shook Joint Venture v. Secretary*, 319 F.3d 805 (6th Cir. 2003), the court denied the employer's unpreventable employee misconduct defense because the employer had failed to establish adequate work rules to address safety hazards associated with working in water. In that case, Danis-Shook had been hired to expand a wastewater treatment plant. *Id.* at 808. Part of the expansion involved construction of "equalization basins" with large-diameter drain pipes. During construction the drainpipes were covered with sheets of plywood, causing water to accumulate in the basins. Holes were subsequently drilled in the plywood but the basins did not completely drain. Two weeks later, a foreman waded out into one of the basins and "thumped" on the cover with metal bar. The cover dislodged, leading to the drowning death of the foreman. The employer was cited for failing to instruct its employees in the recognition and avoidance of hazards associated with entering a basin filled with water. Raising the defense of unpreventable employee misconduct, the employer argued that it fulfilled its responsibility

to address the hazard in question because it had a comprehensive safety program including a written safety program, a site-specific safety program, an employee safety guide, written programs dealing specifically with personal protective equipment, weekly “toolbox talks” on safety, and one-on-one instruction. The court noted that to be effective, the safety program must be designed so that, if followed, it would prevent the violations at issue. *Id.* at 812-13; citing, *National Engineering & Contracting Co. v. OSHRC*, 838 F.2d 815, 819 (6th Cir. 1987). The court further stated that the employer could and should have required that its employees wear lifelines, harnesses and vests whenever there was a danger of engulfment. *Danis-Shook’s* rule on personal protective equipment, however, was discretionary and not mandatory, and was therefore insufficient. As a result, the court denied the affirmative defense.

In *CMC Electric, Inc. v. OSHA*, 221 F.3d 861 (6th Cir. 2000), CMC Electric was hired to install electrical wiring at an equipment building and antenna tower. CMC was to install a grounding system and run the necessary electrical wiring from the equipment building to a utility pole. *Id.* at 864. The CMC superintendent went to the job site with two wiremen and gave them the work schematic but did not review the job or schematic with them and did not indicate that they would be working near energized high-voltage lines. During the course of the work, one of the wiremen was electrocuted when his head came into contact with a 7,200 volt power line. Neither worker knew the line was energized, rather they believed the power to the pole would not be turned on until they completed their work. CMC contended that the violation resulted from unpreventable employee misconduct, relying in part on its safety manual. The court, however, described the manual as containing “general provisions” and upheld the OSHA Review Commission’s conclusion that “CMC did not have any specific work rules preventing employees from working in close proximity to high-voltage lines.” For this and other reasons, the Court rejected the defense.

An employer’s APP must be in writing and tailored to the needs of the employer’s workplace and operations and the hazards presented by the workplace business operations. The APP must identify the regular and predictable hazards of the workplace and work activities, describe in detail how employees will be protected from these hazards (such as adoption of work rules describing appropriate practices, use of PPE, how to safely use equipment and tools, etc.), what training will be provided to employees, and how these requirements will be enforced.

B. RCW 49.17.120(5)(a)(ii): Adequate Communication of the Work Rules.

This element focuses on the “employer’s overall safety training, specific work instructions, and hazard warnings.” Rothstein, §5:27 at 202-03. Adequate communication of the rules is met by the employer where employees are well trained, experienced, and know the workplace safety rules. *Id.* at 203. This defense has been rejected where the employer has failed to provide the necessary overall safety training to employees (*see, Schuler-Haas Elec. Co.*, 21 OSHC 1489 (2006); *New England Tel. Co.*, 8 OSHC 1478, 1980 OSHD ¶ 24,523 (1980)); where there were inadequate specific work instructions – especially where there are inexperienced employees (*see, Danco Constr. Co.*, 5 OSHC 2043, 1977-78 OSHD ¶ 22,280 (1977); *Floyd S. Pike Elec. Contractor, Inc. v. OSHRC*, 576 F.2d 72, (5th Cir. 1978)); and where warnings of workplace hazards were absent, incomplete, or ineffective (*see, J.K. Butler Builders, Inc.*, 5 OSHC 1075, 1977-78 OSHD ¶ 21,585 (1977)). Employers cannot rely on employees’ common sense and experience to excuse improper or incomplete instructions. *See Danis-Shook*, 319 F.3d at 811; *CMC Elec., Inc. v. OSHA*, 221 F.3d 861, 865-66 (6th Cir. 2000).

In *re Jeld-Wen of Everett*, BIIA Dec., 88 W144 (1990), the Board of Industrial Insurance Appeals (Board) found that Jeld-Wen had adequately communicated the safety rules at its workplace. In that case, an unguarded “nip point” on a conveyor belt at a woodworking plant sucked in a temporary employee, killing him. *Id.* at 9. The Board held that the record clearly established that Jeld-Wen’s number one safety rule, “Do not reach into machinery when it is running...,” was adequately communicated to employees. *Id.* at 17.

In the *Danis-Shook* case, discussed above, the court found that the employer had failed to adequately communicate safety rules to its employees. *Danis-Shook* argued that it had adequately warned its employees, and the foreman in particular, of the engulfment danger and need for personal protective equipment, because: (a) the foreman had been instructed three times in the weeks prior to the accident about the necessity of wearing harnesses and lifelines when working near the basin plugs; (b) a supervisor had told the foreman a few weeks before that the laborers who had drilled the holes in the drain covers had worn lifelines, vests and safety harnesses; (c) the same supervisor, two days before the accident, had again told the foreman about the equipment used; and (d) on the morning of the accident another supervisor told him that when the laborers had drilled the holes, they had worn vests, lines and harnesses. Despite this evidence, the *Danis-Shook* court determined that in none of the conversations were the supervisors explicit that the foreman needed to wear lines, a vest, and a harness nor had the supervisors told the foreman he was required to wear the equipment or adequately convey the danger the plugs presented. The court concluded that

informal conversations were inadequate communication of the work rules or the dangers associated with the work activities.

In *Legacy Roofing*, a case involving a fall protection violation, the Washington Court of Appeals found Legacy had failed to adequately communicate its work rules to employees. 129 Wn. App. at 364. During a December 30, 2000 inspection, a Legacy employee was found on a roof over 10 feet in height with no fall protection in place. *Id.* at 360. Legacy argued at hearing that the fall protection violation resulted from unpreventable employee misconduct and presented evidence that it communicated its work rules to employees through review of fall protection work plans, review of safety rules, employee agreements on use of safety equipment such as fall protection, weekly safety meetings, and safety videos. *Id.* at 364. However, Legacy did not start reviewing this information or holding safety meetings with employees until January 2001. *Id.* Because these practices were not in effect in December 2000, the court found that, as of the date the violations occurred, Legacy had not adequately communicated its work rules to employees. *Id.* at 365.

In the CMC high voltage case, discussed above, the court concluded that CMC did not adequately communicate to or train employees on the relevant hazards or the applicable regulations. Among other things, CMC was cited for failing to instruct its workers on the dangers of working near high-voltage lines. CMC contended it adequately trained employees, in part because it had a safety manual, provided weekly training on unsafe conditions and hazard recognition, and employees were taught to treat all lines as “live” until they were satisfied the lines were not energized. *Id.* at 866. The court, however, found that the employees did not usually perform the type of work they were doing at the time of the accident, that the employees did not understand how to read the schematic they were provided, and that CMC did not have, and did not communicate, any specific work rules preventing employees from working in close proximity to high-voltage lines.

C. RCW 49.17.120(5)(a)(iii): Steps to Discover and Correct Violations.

This element of the defense requires the employer to establish that it exercised reasonable diligence in making attempts to discover and correct workplace hazards and violations of established work rules. Rothstein, §5:27 at 203. Final responsibility for ensuring compliance with the standards rests with the employer. *Brock*, 818 F.2d at 1277. This responsibility includes the obligation to prevent hazardous noncompliant behavior by employees through steps including efforts to discover violations and sanction non-complying employees. *Id.*; see also, *National Engineering & Contracting Co. v. OSHRC*, 838 F.2d 815 (6th Cir. 1987). Where there is evidence of widespread noncompliance in terms of numbers of employees,

duration of exposure, or repeated noncompliance, there is a strong inference that the employer's efforts in detecting and correcting violations are lacking. Rothstein, §5:27 at 203-04; *Standard Glass Co.*, 1 OSHRC 1045, 1971-73 OSHD ¶ 15,146 (1972).

Further, evidence of inadequate supervision or enforcement of safety rules by supervisors raises an inference that the employer did not take adequate steps to discover and correct violations. *See, Brock*, 818 F.2d at 1277. In other words, supervisory involvement in noncompliance with standards raises an inference of lax enforcement by the employer. *Id.* Finally, in determining whether a violation was discoverable or preventable, there must be some inquiry into the nature of the noncomplying act. Where the noncompliance occurred during regular operating procedures, for example, the defense will fail. *General Elec. Co.*, 5 OSHC 1186, 1977-78 OSHD ¶ 21,658 (1977), *aff'd*, 576 F.2d 558 (3rd Cir. 1978).

In *BD Roofing v. Dep't of Labor & Indus.*, 139 Wash.App. 1002 (2007), the company argued that its employees' misconduct was an isolated occurrence and not foreseeable. The court rejected this argument, stating that "[T]he Board has determined that prior citations for similar conduct may preclude the defense [of employee misconduct] because those prior violations provide notice to the employer of the problem, thereby making repeat occurrences foreseeable." The existence of prior violations does not absolutely bar the defense, but rather, it is evidence that the employee conduct was foreseeable and preventable.

The *Legacy Roofing* case is an example of an employer who failed to prove unpreventable employee misconduct due to inadequate efforts to discover and correct safety violations. 129 Wn. App. 356. At hearing, Legacy presented evidence that the company would have seven to eight roofing jobs going on at any given time and that Legacy's safety officer was required to visit each site every day and to also double back on previously visited jobs to ensure continued compliance. *Id.* at 366. However, Legacy's safety officer only visited three to six jobs per day. *Id.* Further, employees caught violating requirements were not consistently counseled or disciplined. *Id.* As a result, the court found that Legacy's steps to discover and correct safety violations were inadequate and the unpreventable employee misconduct defense failed.

Likewise, in the *Danis-Shook* engulfment case, the court found the employer did not enforce its program as written. The company's written program required foremen to report hazards not covered by the program so that the changes and updates could be made to the program. The supervisor who oversaw the foreman, however, did not require the foremen to report hazards if the foremen felt they could correct the hazard.

Another example of an employer's failure to take adequate steps to discover and correct violations of its safety program is described in *Modern Continental Const. Co., Inc. v. OSHRC*, 305 F.3d 43, 52 (1st Cir., 2002). In *Modern Continental*, the Court of Appeals stated:

“Furthermore, the ALJ found that MCC did not establish that it took steps to discover violations of the rule or that it took any disciplinary action when such violations were discovered. Testimony from Rice, Cappuccio, and Pezzano supported this finding. Rice admitted that MCC did not note violations in personnel files and that the company's foremen, who have direct supervision over laborers, were reluctant to issue warnings. In addition, Cappuccio and Pezzano testified that they could not recall any employee who had been “written up,” suspended, or otherwise disciplined for violating the work rule to stay clear of a load. MCC thus failed to satisfy the third and fourth prongs of their proposed defense.”²

As its name makes clear, the third prong of the unpreventable employee misconduct defense requires an employer not only to take steps to discover violations of its safety rules, but also to correct them. This principle is illustrated in *Secretary of Labor v. John Carlo, Inc.*, 2005 O.S.H.D. (CCH) P 32834, 2006 WL 2037376 (O.S.H.R.C.), *aff'd in unpublished decision*, 234 Fed. Appx. 932 (11th Cir. 2007), in which the OSHA Review Commission rejected the defense of unpreventable employee misconduct because the employer had been aware of the potential violation months before it occurred but decided “to deal with the problem when it actually arose.” “Respondent took initial steps to discover violations or hazards. It ignored the violative condition, however, when it was encountered and knowingly exposed its employees to the hazard of cave-in. Taking steps to discover violations necessarily includes addressing and correcting those violations when they are discovered.” *See also Secretary v. American Sterilizer Co.*, 18 O.S.H. Cas. (BNA) 1082, 1995-1997 O.S.H.D. (CCH) P 31451, 1997 WL 694094 (O.S.H.R.C.) (employer found not to have taken steps to discover violations where supervisor spoke with employee about respiratory hazard but did not discuss work rule dealing with hazard; supervisor did not know what respiratory protection worker was using; and had generally “delegated to [the worker] the authority to decide for himself” what respiratory protection he would use”).

Whether an employer effectively enforces its safety plan is a case specific inquiry. In *Secretary of Labor v. Propellex Corp.*, 18 O.S.H. Cas. (BNA) 1677, 1999 O.S.H.D. (CCH) P 31792, 1999 WL 183564 (O.S.H.R.C.), the

² As is often the case, the *Modern Continental* Court relied on much of the same evidence to determine that an employer had failed to satisfy *both* the third prong of the unpreventable employee misconduct defense (“steps to discover and correct violations”) and the fourth prong (“effective enforcement in practice”). This fourth prong is discussed in the next section.

OSHA Review Commission outlined some considerations relevant to the inquiry:

- Specific instances of violations and lack of discipline shows lack of enforcement: “Niemann, who had primary responsibility for disciplining the demilling employees, saw the burn barrel and failed to ask the employees to extinguish the fire, to refrain from relighting it, or to remove it. Niemann also did nothing to otherwise enforce the rules.”
- Disciplinary actions for unrelated violations may not support the defense: Propellex introduced a number of memoranda and employee warning notices dated between 1990 and 1994 that concern general safety infractions and other wrongful acts. While these memos and notices show that Propellex has disciplined its employees for noncompliance with some safety rules, the record does not show that Propellex regularly and effectively enforced its rule requiring that employees obtain flame permits before any “lighters, or other fire, flame, or spark-producing devices” are carried within the plant area. Indeed, no permit was issued authorizing the burning of a fire in a barrel anywhere in the plant area.
- Supervisor involvement in violations suggests ineffective enforcement: “[L]eadperson McKinnerney not only failed to enforce the flame permit rule, she violated it herself.”
- Widespread instances of violations undermine the defense: [T]he fact that *all* of the demilling employees lit or at least utilized the burn barrel in violation of the rule also suggests that the rule was ineffectively enforced.”
- Post-violation discipline may assist an employer seeking to raise the unpreventable employee misconduct defense, but it does not itself show effective enforcement: “Thomas' suspension and eventual termination after the accident do not alter our conclusion. It is true that “Commission precedent does not rule out consideration of *post*-inspection discipline, provided that it is viewed in conjunction with pre-inspection discipline.” *Precast*, 17 BNA OSHC at 1456, 1995-97, CCH OSHD at p. 43,036 (emphasis in original). Here, the record shows that fires were ignited and maintained in the burn barrel for several weeks before the accident and that Thomas had repeatedly thrown black powder into the fire in violation of Propellex's safety rules; however, Propellex failed to discipline him until after the inspection.”

D. RCW 49.17.120(5)(a)(iv): Effective Enforcement of Safety Program, in Practice and not just in theory.

The focus of the unpreventable employee misconduct defense is on the effectiveness of the employer's implementation of its safety program. *Brock*, 818 F.2d at 1277. This final element examines the degree to which the employer has implemented and enforced its safety program. Rothstein, §5:27 at 205. In part, this requires an employer to prove that the employee's misconduct was not foreseeable. *Legacy Roofing*, 129 Wn. App. at 366; *citing, Wash. Cedar*, 119 Wn. App. at 912. Conduct that could have been prevented by feasible precautions by the employer is not idiosyncratic or unforeseeable. 59 ALR Fed. 385, 399 §2. Thus, an employer must show it has taken all feasible steps to prevent the misconduct and that the misconduct in question violated a well-enforced rule. *Id.* Although prior violations do not absolutely bar the use of the defense, prior violations are evidence that the employee's conduct was foreseeable and, therefore, preventable. *Legacy Roofing*, 129 Wn. App. at 366; *citing, Wash. Cedar*, 119 Wn. App. at 912. The defense has therefore been rejected when there were incidents of prior noncompliance because those prior violations provide notice to the employer of the problem, making future repeats occurrences foreseeable. *Wash. Cedar*, 119 Wn. App. at 913. The defense will also be rejected where several employees are in violation. *See, Gem Industrial, Inc.*, 17 OSHC 1861, 1996 OSHD ¶ 21,263 (1976); *Ted Wilkerson, Inc.*, 9 OSHC 2012, 1981 OSHD ¶ 25,551 (1981). On the other hand, the defense has been sustained where there was a single incident of noncompliance by only one or a few employees. *Scheel Constr., Inc.*, 4 OSHC 1824, 1976-77 OSHD ¶ 21,263 (1976); *Daniel Constr. Co.*, 9 OSHC 2002, 1981 OSHD ¶ 25,359 (1981). Further, the employer must be able to show that it has enforced its safety rules through sanctions and discipline of non-complying employees. Rothstein, §5:27 at 205.

In *BD Roofing v. Dep't of Labor & Indus.*, 139 Wn. App. 98, 161 P.3d 387, 394 (2007), the court found that, while the company had satisfied the first three elements of the defense, the employer had failed to establish that its program was effective in practice. The court found that the large number of prior fall protection violations that had been issued to the company established that the violations were foreseeable and preventable and, therefore, not isolated occurrences. Furthermore, while the safety director was given authority to discipline employees for safety violations, there was no evidence that a discipline program designed to correct the behavior was implemented absent an inspection by L&I. Under these circumstances the court concluded that the program was not effective in practice.