

**Constructive Knowledge of Employee Hazards Results in Fine**  
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By [Darren A. Feider](#)

Under the Washington Industrial Safety and Health Act (WISHA), employers are responsible for ensuring that the workplace is safe. A question, however, arises as to whether an employer is liable for employees' unsafe practices of which it not aware. This was recently addressed in *Erection Co. v. Labor & Industries*, 160 Wn. App. 194 (2011).

In *Erection*, an employee was killed installing a roof deck when a bundle of decking material to which he had affixed his safety lanyard fell from the roof structure, pulling him down with the material. The employer was unaware of this practice, but WISHA found that with reasonable diligence it could have known of this hazard of attaching safety lines to movable materials. In this particular case, the employees were constructing a Microsoft data center in Quincy, Washington. L&I had previously inspected the employer's accident protection and fall protection plans and found no violations; however, at that time, there was no evidence that employees were attaching their safety lines to decking material bundles.

On the day of the accident, two journeyman ironworkers who were securing metal decking relocated a bundle of decking material in their way. During the move, the bundle teetered and fell over and an employee who had secured his safety lanyard to the bundle fell to his death. The employer was charged with a \$10,000 penalty for violation of the fall restraint/arrest system standard. WISHA and the superior court affirmed the penalty. The employer continued to appeal, arguing that there was no evidence that it had actual or constructive knowledge of the practice in question.

On appeal, the *Erection* court first recognized that WISHA's broad requirement of ensuring safe and healthy working conditions which requires a liberal interpretation of its rules

and regulations. The appellate court therefore reviewed the evidence and reasonable inferences in the light most favorable to WISHA. All parties agreed that the employer did not have actual knowledge that its ironworkers occasionally attached safety lanyards to the decking bundles while moving them. The employer also argued that the practice was not easily viewed from below and that there were other methods for him to tie off his safety lanyard to stable parts of the structure, as did his co-worker moving the bundle of deck material. The employee's actions were completely unexpected, the employer argued.

Despite this, the *Erection* court found that the employer should have known of the employee practice of tying off safety lines to movable bundles. According to the court, the employer could, with reasonable diligence, have learned or anticipated that its employees were engaged in this hazardous practice because it had provided catenary lines on the bundles, and a co-worker testified that it was "pretty common" to tie off to a bundle. Also, the field superintendent testified that it was common for workers to move bundles on the roof and that bundles of decking material were not secure when they were moved. The ironworkers' practice of undoing bundles occurred in plain view, as did their tying off to the bundles. A general contractor employee and safety director had warned the employer of this risk from his observation of the practice. Thus, the *Erection* court found that there was substantial evidence that the employer was aware of this unsafe practice.

The employer also challenged WISHA's finding that it had committed a serious violation because it had constructive knowledge that its safety plans were deficient for accident prevention. The employer argued that since there was no evidence that tying off to a moving load is a known construction hazard, it could not be responsible for failing to warn its employees. The *Erection* court found that a safety plan need not identify every possible accident that could ever

occur, but must warn of hazardous conduct the employer could have reasonably anticipated. Since the employer had constructive knowledge that its employees might tie off to moving or otherwise insecure bundles, the employer should have developed a safety plan to address this safety hazard. The fact that WISHA had reviewed the safety plans two weeks before the accident did not relieve the employer of liability for the fine because WISHA was unaware of the unsafe conduct.

The takeaway from the *Erection* decision is straightforward: Employers must engage in constant vigilance and inspection of employee work practices or face a substantial fine from the Department of Labor and Industries. In *Erection*, there was no evidence that the employer was directly aware of the employees' unsafe work practices. However, because others had observed and reported this unsafe practice, the employer was held responsible for the accident and fined heavily. Also, the *Erection* court emphasizes that a prior citation for a similar safety hazard will result in an amplified fine later if a similar hazard but different conduct exposes the employee to injury. Thus, employers should develop a safety plan, engage in proactive conduct to ensure employees are working safely, investigate and respond to third party observations of unsafe work practices and take all reasonable actions to eliminate a safety hazard on the job.