Supreme Court No. 99031-0
(Court of Appeals No. 79634-8-I)

SUPREME COURT
STATE OF WASHINGTON

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON,

Petitioner,

v.

TRADESMEN INTERNATIONAL, LLC,

Respondent.

PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

Temporary workers are in a precarious position. They face a significant risk of slipping through the cracks of worker-safety protections. Staffing agencies that employ temporary workers may take a hands-off approach to worker safety. At the same time, hosting companies may fail to invest in training and safety precautions for temporary workers who may only work at a particular job site for a day or two. Temporary workers are vulnerable to exploitation because they often don't recognize safety hazards, and they may fear dismissal if they challenge the hazards they identify. This precariousness has real-world effects: temporary workers file nearly twice as many workers' compensation claims as permanent workers in comparable occupations. Dep't of Labor & Indus., *Temporary Worker Injury Claims*.[1]

Adhering to the state constitution (Wash. Const. art. II, § 35), which commands protections for workers, the Washington Industrial Safety and Health Act (WISHA) protects these vulnerable workers. And it provides for sanctions when, as here, a staffing agency fails to guard against a worker-safety hazard even after being tipped off to unsafe

[1] Dep't of Labor & Indus. Safety & Health Assessment & Research for Prevention, *Temporary Worker Injury Claims*, https://www.lni.wa.gov/safety-health/safety-research/files/2017/76_07_2017_TemporaryWorkerInjuryClaims.pdf (attached as App. at 14).

behavior by hosting companies, exposing its workers to serious safety risks. But the Court of Appeals deeply eroded WISHA's protections by distorting the "employer" test under WISHA. In applying the economic realities test to decide whether a staffing agency constitutes an "employer" under WISHA, the Court of Appeals looked to whether staffing agencies have control over the work environment. But this definition of employer" is far too limited and lets staffing agencies off the hook even when they know their workers face safety risks. If the Court of Appeals decision stands, staffing agencies will escape liability even for known safety violations that the agencies intentionally failed to address.

So, for example, a Tradesmen manager could witness a Tradesmen worker failing to use fall protection on a worksite, and then stand by as the worker falls, claiming the same lack of control over the worksite that Tradesmen asserts in this case. What's more, the Court of Appeals' rule gives staffing agencies license to avoid worksites altogether. Curing this degradation of safety presents an issue of substantial public interest.

And the Court of Appeals' insistence that L&I must show control over the work environment to meet the economic realities test contradicts this Court's decision in *Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186, 198, 332 P.3d 415 (2014). This Court held in *Becerra* that the

economic realities test is a flexible one that considers the totality of the circumstances, including an employer's knowledge of regulatory violations. Tying the "employer" test to control over the worker—rather than the worksite—and to the employer's knowledge of hazards appropriately encourages staffing agencies to be diligent about safety.

The Court of Appeals' decision undermines worker safety, conflicts with a Supreme Court decision, and presents an issue of substantial public interest. RAP 13.4(b)(1), (4). Review should be granted.

II. IDENTITY OF PETITIONER AND DECISION

The Department of Labor & Industries (L&I) asks this Court to review the decision in *Department of Labor & Industries v. Tradesmen Int'l, LLC*, No. 79634-8-I (Wash. Ct. App. Aug. 17, 2020) (cited as "slip op." and attached as App. at 1–13).[2]

III. ISSUE PRESENTED FOR REVIEW

> Should a staffing agency that knows about a hazardous work condition and has control over a temporary worker be deemed an "employer" under WISHA, requiring compliance with safety laws?

[2] L&I has also petitioned for review in a related case in which review should be granted. *See Dep't of Labor & Indus. v. Laborworks Indus. Staffing, Inc.*, No. 79717-4-II (Wash. Ct. App. Aug. 17, 2020).

IV. STATEMENT OF THE CASE

A. Temporary Work Presents Unique Dangers to Employees

The precariousness of temporary workers' employment places them at a much greater risk of injury than other workers. *Temporary Worker Injury Claims*, App. at 14. When a worker's tenure at a particular workplace is brief, several factors increase the worker's risk for injury: unfamiliarity with new work practices and surroundings, limited safety training, and a disproportionate share of younger workers, who often don't recognize hazards, don't refuse hazardous work, or don't demand appropriate protective equipment for fear of dismissal. Dep't of Labor & Indus., *Temporary Workers*.[3] Staffing agencies may neglect learning about the hazards that their temporary workers face at each of the different worksites they supply. *Id.* Hosting employers looking for short-term workers may invest less effort in their safety. *See id.*

Washington has joined with the federal Occupational Safety & Health Administration (OSHA) in an initiative to protect temporary workers. *See* Occ. Safety & Health Admin., *Protecting Temporary*

[3] Dep't of Labor & Indus., *Temporary Workers*, https://www.lni.wa.gov/safety-health/safety-research/ongoing-projects/temporary-workers#overview (attached as App. at 15–16).

Workers.[4] OSHA recognizes the potential for abuse of temporary workers, which Washington shares:

> OSHA has concerns that some employers may use temporary workers as a way to avoid meeting all their compliance obligations under the OSH Act and other worker protection laws; that temporary workers get placed in a variety of jobs, including the most hazardous jobs; that temporary workers are more vulnerable to workplace safety and health hazards and retaliation than workers in traditional employment relationships; that temporary workers are often not given adequate safety and health training or explanations of their duties by either the temporary staffing agency or the host employer. Therefore, it is essential that *both* employers comply with all relevant OSHA requirements.

Id. The initiative by OSHA recognizes that the staffing agency and the hosting company both bear responsibility for worker safety.

Under L&I's established practices, if a staffing agency has notice about a hazard that has arisen on a job site, L&I may cite the agency. Dep't of Labor & Indus., *Dual Employers and DOSH Enforcement*, Directive 1.15.[5] Constructive knowledge is sufficient under WISHA to establish knowledge, meaning knowledge is established when a staffing agency should have known about the hazard. *See Erection Co. v. Dep't of*

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[4] Occ. Safety & Health Admin., *Protecting Temporary Workers*, https://www.osha.gov/temp_workers/ (attached as App. at 18–21).

[5] Dep't of Labor & Indus., Div. of Occ. Safety & Health, *Dual Employers and DOSH Enforcement*, Directive 1.15, https://demo-public.lni.wa.gov/dA/96edf1ea0f/DD115.pdf (attached as App. at 22–26). L&I reissued this directive in 2019 with no changes; it was first adopted in 2000.

Labor & Indus., 160 Wn. App. 194, 206–07, 248 P.3d 1085 (2011). To show that a staffing agency had constructive knowledge, L&I can show that the agency did not act with due diligence. *See id.* OSHA takes the same approach. *Protecting Temporary Workers*, App. at 19 (ignorance of hazards is no excuse; staffing agency has a duty to find out about work conditions). Due diligence requires that an employer must take reasonable steps to discover safety hazards. *Erection Co.*, 160 Wn. App. at 206–07.

B. Tradesmen Agrees It Has Nondelegable Duties About Its Employees' Safety

Tradesmen International, Inc. is a staffing agency that provides its employees as temporary workers to various customers, including Dochnahl Construction. AR 677–78. Tradesmen pays its employees' wages and pays industrial insurance premiums to L&I. AR 739.

Tradesmen agrees it inspects the job sites where it sends its workers as part of its nondelegable duty to protect workers. Resp't's Br. 30–31. Tradesmen reviews each worksite to make sure it is safe before sending its employees there. AR 676–77. Once a job begins, if Tradesmen sees a hazard, Tradesmen does not allow its employees to work there until the customer corrects the hazard. *See* AR 683.

Tradesmen has a safety program and safety rules that it expects its employees to follow at customers' worksites. AR 745. Tradesmen pays for

and supplies basic safety equipment and ensures that the equipment is onsite. AR 693, 742.

If a Tradesmen supervisor gives an employee an order, Tradesmen expects the employee to comply. *See* AR 686–87. This includes moving to the worksite of another customer. AR 686–87.

C. Tradesmen Did Not Compel Its Hosting Companies to Provide Notification When the Hosting Company Moved a Worker to a Different Job Site

Tradesmen contracted with Dochnahl to send one of Tradesmen's employees, Reti Sienafo, to a construction site to work as a laborer. AR 678–79. Tradesmen inspected the site specified in the contract. AR 679. But, in April 2016, Dochnahl sent Sienafo to a different worksite (North Palatine) without informing Tradesmen. AR 679.

At the North Palatine construction site, Dochnahl used a ramp over an unsafe trench, without guardrails. AR 704, 707. It also used scaffolding that was not designed by a qualified specialist. AR 711–12. L&I issued WISHA citations to Dochnahl and Tradesmen, finding that Sienafo was exposed to falls at the job site due to a ramp with no guardrails in violation of WAC 296-155-24609(3) and due to an improperly constructed scaffold in violation of WAC 296-874-2002(1)(a). AR 707, 711–12.

In reviewing L&I's inspection photos of the North Palatine worksite, Tradesmen's management agreed there were obvious fall hazards and WISHA violations present. AR 682–83. Tradesmen's management also agreed that, if its managers had seen these hazards, Tradesmen would not have allowed Tradesmen's employees to work at the site until Dochnahl corrected the hazards. *See* AR 683.

A Tradesmen manager said he expected, based on an informal agreement, that Dochnahl would tell Tradesmen if it sent an employee to a different worksite. AR 679. But Tradesmen does not, by contract, require its customers to inform Tradesmen when they move Tradesmen employees to a different worksite that Tradesmen has not yet inspected. AR 743. Tradesmen knew that its customers moved its employees to different worksites without informing Tradesmen. AR 681. One manager testified that, for his customers, he learned about instances around once per month of customers failing to tell Tradesmen that they had moved an employee to another worksite. AR 681.

Tradesmen imposes no consequences on customers that move employees to a new job site without informing Tradesmen. AR 680. Tradesmen presented no evidence that it had a policy requiring that its

employees immediately contact their supervisor when the customer asks them to work at a location that Tradesmen has not yet inspected.

L&I cited Tradesmen because it did not exercise due diligence in ensuring its customers notified Tradesmen before moving a worker and because Tradesmen knew that hosting companies often moved workers without such notification, it had constructive knowledge of the hazards.

Tradesmen appealed the citation to the Board of Industrial Insurance Appeals, and the Board vacated the citation. AR 4, 12. On appeal, the superior court affirmed the Board. CP II 99. L&I appealed to the Court of Appeals, which affirmed the superior court. Slip op. at 13.

V. ARGUMENT

The Washington Constitution and WISHA mandate the protection of workers at worksites. Wash. Const. art. II, § 35; RCW 49.17.010; *see Bayley Constr. v. Dep't of Labor & Indus.*, 10 Wn. App. 2d 768, 781, 450 P.3d 647, *review denied*, 195 Wn.2d 1004 (2020). And this mandate is never more important than for vulnerable temporary workers. Statistical research shows that temporary work is a dangerous business. *Temporary Worker Injury Claims*, App. at 14. And temporary workers' hosting employers do not always take necessary safety precautions.

To combat dangers facing temporary workers, federal OSHA and L&I require both staffing agencies and hosting employers to protect workers, recognizing that both have control over the worker. With this control, actual or constructive knowledge of a hazard shows an employment relationship. The rule cannot be that a staffing agency can sit on its hands and do nothing when it knows or should have known about a workplace hazard. Washington's workers deserve better.

To determine whether control over the worker and knowledge establish that a company is an "employer" under RCW 49.17.020(4), courts apply the economic realities test.[6] The economic realities test authorizes state regulation when a company has a sufficient connection to a worker. The test must be liberally interpreted to further the state constitution's mandate of worker safety protection (*see* Wash. Const. art. II, § 35) and WISHA's purpose to provide "safe and healthful working

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[6] The factors in the economic realities test used by the Court of Appeals are:

> "1) who the workers consider their employer; 2) who pays the workers' wages; 3) who has the responsibility to control the workers; 4) whether the alleged employer has the power to control the workers; 5) whether the alleged employer has the power to fire, hire, or modify the employment condition of the workers; 6) whether the workers' ability to increase their income depends on efficiency rather than initiative, judgment, and foresight; and 7) how the workers' wages are established.

Slip op. at 9 (quoting *Potelco, Inc. v. Dep't of Labor & Indus.*, 191 Wn. App. 9, 31, 361 P.3d 767 (2015)).

conditions for every man and woman working in the state of Washington" (*see* RCW 49.17.010). *See Bayley Constr.*, 10 Wn. App. 2d at 781–82.

When applying the economic realities test, this Court has emphasized it will not apply any particular factor mechanically, and "[t]he determination of the relationship does not depend on . . . isolated factors but rather upon the circumstances of the whole activity." *Becerra*, 181 Wn.2d at 198 (establishing joint-employer test for wage violations) (quotations omitted). This Court considers whether a company knew about a regulatory violation to determine whether the economic realities test is met. *Becerra*, 181 Wn.2d at 198.

To best protect workers, the economic realities test for WISHA should permit a finding that a staffing agency is an employer if it knew or should have known about the hazard (*see infra* Part V.A) when it controlled the worker rather than when it controlled the work activity and work environment (*see infra* Part V.B). Consideration of this issue warrants review.

A. Disregarding an Employer's Duty to Address Known Hazards Conflicts with This Court's Precedent and Presents an Issue of Substantial Public Interest

Leaving the gap in protection when a staffing agency knows about a hazardous condition undermines the state constitution's and WISHA's

mandate to safeguard persons working in dangerous conditions. Wash. Const. art. II, § 35; RCW 49.17.010.[7] In contrast, considering knowledge under the economic realities test fulfils this mandate because it best protects workers. L&I has long imposed liability on a staffing agency when it knows or should have known about a workplace hazard. *Dual Employers and DOSH Enforcement*, App. at 26.[8] L&I's policy mirrors this Court's approach under the economic realities test to examine "whether the putative joint employer knew of the . . . violation." *Becerra*, 181 Wn.2d at 198.

Knowledge serves the same purpose as control over the work environment as it allows a company to address the hazardous conditions. Federal cases find an employer responsible for safety violations when the employer does not control the worksite but exposes the worker to the hazard and knows about the unsafe condition. *E.g.*, *D. Harris Masonry*

[7] "The legislature shall pass necessary laws for the protection of persons working in mines, factories and other employments dangerous to life or deleterious to health; and fix pains and penalties for the enforcement of the same." Wash. Const. art. II, § 35.

[8] The Court of Appeals rejected L&I's argument about its policy because L&I's policy is not in a rule. Slip op. at 8. But L&I offered it as persuasive authority, and the Court gives a "high level of deference" to L&I's interpretations because of its "expertise and insight." *Brady v. Autozone Stores, Inc.*, 188 Wn.2d 576, 581, 397 P.3d 120 (2017). As the front-line agency implementing WISHA, L&I's interpretation should have been deferred to over the Board's. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 594, 90 P.3d 659 (2004); *Dep't of Labor & Indus. v. Slaugh*, 177 Wn. App. 439, 452, 312 P.3d 676 (2013); *see Chao v. Occ. Safety & Health Review Comm'n*, 540 F.3d 519, 526 (6th Cir. 2008).

Contracting, Inc. v. Dole, 876 F.2d 343, 345–46 (3rd Cir. 1989); *Havens Steel Co. v. Occ. Safety & Health Review Comm'n*, 738 F.2d 397, 400–01 (10th Cir. 1984); *Bratton Corp. v. Occ. Safety & Health Rev. Comm'n*, 590 F.2d 273, 275–76 (8th Cir. 1979); Mark A. Rothstein, *Occ. Safety & Health L.* § 7:7 (2020 ed.) (compiling cases).

If a staffing agency knows about a hazard, it must take steps to have the hosting company address it or remove the worker from the job site. *Aerotek*, 2018 CCH OSHD ¶ 33,663, 2018 WL 2084250, at *5 (O.S.H.R.C.A.L.J. Mar. 23, 2018) (staffing agency's "obligation extends at least as far as informing [the hosting company] of a hazard, requesting it be abated, and ensuring steps are taken by [the hosting company] to protect employees from the hazard."); *Air Conditioning & Elec. Sys., Inc.*, 3 BNA OSHC 1351, 1975 WL 4883, at *3 (O.S.H.RC.A.L.J May 22, 1975) (removal from the job site suffices to protect the worker); *see Elec. Smith, Inc. v. Sec'y of Labor*, 666 F.2d 1267, 1270 (9th Cir. 1982) (with knowledge of a hazardous condition, a non-controlling company can "persuade the employer responsible for the condition to correct it [or] instruct its employees to avoid the area where the hazard exists.") (quotation omitted).

It enfeebles workplace safety to excuse a staffing agency that profits from a temporary worker from protecting its workers from known safety risks. The state constitution's framers and the Legislature did not intend such a result when the Legislature adopted WISHA. Wash. Const. art. II, § 35; RCW 49.17.010. The law should encourage staffing agencies to act on known hazards rather than sanction them by closing their eyes to potential danger. Otherwise, the law would permit the scenario described above of a Tradesmen manager watching a safety violation and doing nothing.

A staffing agency is not a stranger to a temporary worker, and it makes sense to impose WISHA responsibilities on it when it knows a worker is subject to danger. Because knowledge of a hazardous condition makes it possible for a staffing agency to act to protect its workers, a finding of knowledge (combined with control over the worker as discussed *infra* Part V.B) should be a persuasive element under the economic realities test.

Tradesmen had constructive knowledge of the hazard. Constructive knowledge of a hazard is sufficient under WISHA to establish knowledge. *Erection Co.*, 160 Wn. App. at 206–07. To show that Tradesmen had constructive knowledge, L&I can show that Tradesmen did not act with

due diligence. *See Erection Co.*, 160 Wn. App. at 206–07. Due diligence requires an employer take reasonable steps to discover safety hazards. *Id*.

Showing constructive knowledge is Tradesmen's knowledge that its hosting companies moved its employees to different worksites without informing Tradesmen. AR 681. A manager conceded that, for his customers, he learned about an instance around once per month of customers failing to tell Tradesmen that they had moved an employee to another worksite. AR 681.

With this knowledge, Tradesmen had a duty to ensure the customer told them about the switches: "Reasonable diligence involves several factors, including an employer's obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence." *Erection Co.*, 160 Wn. App. at 206–07. Tradesmen's work practices virtually guarantee it will not know when its customers move employees to a hazardous area without notice. Due diligence requires, at a minimum, effective processes that require a customer to notify the staffing agency when the customer's worksite assignments change so that Tradesmen could inspect the new worksite.[9]

[9] The Court of Appeals said it would not find knowledge because Dochnahl did not inform Tradesmen of the move. Slip op. at 8 & n.2. But this ignores that under WISHA, employers are responsible for constructive knowledge, not just actual knowledge, and Tradesmen knew clients were switching job sites and did nothing to stop that. This is not due diligence.

Considering knowledge under the economic realities test will motivate employers to provide these effective processes, and encouraging such behavior warrants review.

B. Requiring Control Over the Work Environment to Qualify as an Employer Undermines Worker Safety

It would better serve worker safety to interpret the control factors in the economic realities test to allow control over the worker, rather than control over the work activity and work environment. A staffing agency that controls a worker and knows of a safety violation should have to ameliorate the hazard and ensure the worker's safety. Tradesmen controlled the worker, as shown by its ability to hire, fire, assign work, pay wages, train in safety techniques, provide safety equipment, assess safety, direct compliance with safety requirements, and remove a worker from a worksite. AR 676–78, 686–87, 739–45.[10]

This Court has held that, under the economic realities test, control over the manner work is to be performed is not a litmus test. *Anfinson v.*

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[10] Tradesmen agreed it had nondelegable duties (Resp't's Br. 30–31) and points to basic facts, which show control:

> [T]he record unequivocally establishes that Tradesmen does take care of its workers and their safety. For instance, Tradesmen provides its employees with OSHA 10 training at Tradesmen's expense; it provides its employees with basic personal protective equipment; it conducts walkouts to ensure the job site is safe and healthy; and it provides monthly safety training during its Toolbox Talks. Resp't's Br. 31.

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FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 870–72, 281 P.3d 289 (2012) (right to control not determinative in remedial wage legislation). Interpreting control over the worker to mean control over the work activity and work environment, the Court of Appeals said control over the worker was the key question. Slip op. at 9–11. But interpreting control over the worker to require control over the work activity and work environment sets the bar too high, with temporary workers unable to obtain workplace protections from the staffing agencies.

The *Potelco* Court's recital of the economic realities test says nothing about employers needing to control the work activity or work environment, but articulates the test as control over the workers. *Potelco*, 191 Wn. App. at 31. In another recent staffing agency case, *Staffmark*, Division II applied *Potelco* to look to control over the worker:

> As to whether Staffmark, as the alleged employer, has the power to control the workers, Staffmark retained the authority to discipline or terminate an employee because Johnson had the ultimate authority to discipline or terminate Staffmark employees who were not meeting client standards. Johnson could also reassign employees who did not 'fit in with [a] particular work group' to another client. Thus, because Staffmark had the power to control the workers, Staffmark was the employer.

S*taffmark Inv., LLC v. Dep't of Labor & Indus.*, No. 52837-1-II, 2020 WL 824709, at *6 (Wash. Ct. App. Feb. 19, 2020) (unpublished); *see also*

Staffchex, No. 10-R4D3-2456-2458, 2014 WL 4546924,*3 (Cal. Occ. Safety & Health Admin. Aug. 28, 2014) ("When [a staffing agency] assigns an employee to a worksite, it has a nondelegable duty to inspect the site and make certain that it is safe for its employees' intended activities . . . . [a staffing agency] cannot escape liability by its assertions of lack of control.") (quotation omitted).

Federal law also supports looking at an agency's control over the worker, not the worksite. Federal law thus imposes liability on employers who do not control worksite hazards but do control workers and expose those workers to harm. *D. Harris*, 876 F.2d at 345–46; *Havens Steel*, 738 F.2d at 400–01; *Bratton Corp.*, 590 F.2d at 275–76. When an employer knows about a condition, liability under federal law may attach. *Id.*

Focusing on control over the work environment and abandoning the consideration of knowledge creates a blueprint for staffing agencies to reduce safety. Under this blueprint, staffing agencies can avoid the work environment altogether. They have no incentive to perform safety checks. By holding staffing agencies responsible only if they control the work environment, there is no reason to inspect the worksite and hold the hosting company accountable. The watchdog feature of the staffing agency is reduced or even eliminated. At the same time, the hosting

company is less likely to provide safety protections for workers that are only there a couple of days.

In contrast, focusing on control over the worker, combined with knowledge, compels the staffing agency to exercise due diligence in determining whether the work environment is safe for its employees. It also provides continuity for the temporary worker. The nature of temporary work, where temporary workers go from job site to job site, means that the staffing agency is in the best position to provide monitoring of the safety of the worker because it controls the worker. But under the Court of Appeals' approach, the status of temporary workers changes depending on where they are. A worker could be an employee when standing in Tradesmen's office where there is control over the work environment, but no longer an employee when the worker arrives at the hosting company's business where there is no such control. This ever-changing status is unfair to the worker and increases the risk of work hazards to an already vulnerable population.[11]

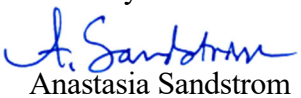
[11] Another consideration for granting review is that employers may use the case here to argue that control over the work environment should apply to all employers. So it may cast doubt on the legal principle that there can be exposing employers who do not control the worksite (like a subcontractor) but are still responsible for workplace safety. L&I has already seen such an argument. *See* Corr. Appellant's Br. at 17–18, *Hamilton Constr. Co. v. Dep't of Labor & Indus.*, No. 54578-1-II (Wash. Ct. App. July 6, 2020).

VI. CONCLUSION

To ensure workplace safety, this Court should take review.

RESPECTFULLY SUBMITTED this 16th day of September 2020.

ROBERT W. FERGUSON
Attorney General



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Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Appellant, v. TRADESMEN INTERNATIONAL, LLC, Respondent.	No. 79634-8-I DIVISION ONE PUBLISHED OPINION

CHUN, J. —Tradesmen International, LLC, a staffing company, assigned a temporary worker to a Dochnahl Construction job site. One day, without notifying Tradesmen, Dochnahl sent the temporary worker to a different job site, where the Department of Labor and Industries discovered several violations of the Washington Industrial Safety and Health Act (WISHA). The Department cited Tradesmen with two serious violations.

Tradesmen appealed. An industrial appeals judge (IAJ) determined that Tradesmen was not an employer under WISHA for purposes of the citation. The IAJ issued a proposed decision vacating the citation. The Board of Industrial Insurance Appeals affirmed (3-0) the IAJ's proposed decision. The superior court affirmed the Board's decision. The Department appeals, asserting that we should hold Tradesmen liable under the "knew or clearly should have known"

standard from its Dual Employer Directive (Directive).[1] We reject this argument, apply the "economic realities test," and affirm the superior court's conclusion that Tradesmen was not an employer liable for the violations.

I. BACKGROUND

Tradesmen, a staffing company, assigns temporary workers to other employers. Most of the company's business in Washington takes place in the construction industry.

Tradesmen provides safety training to their workers and provides, or helps their workers acquire, necessary personal protective equipment such as hard hats, safety glasses, and gloves. The company also ensures that job sites where it sends workers are safe by conducting a "walkout." During a walkout, a Tradesmen field representative goes to the job site, checks for obvious safety hazards, and discusses general safety topics with its employees.

Tradesmen entered into a Client Service Agreement (CSA) with Dochnahl. In the CSA, Tradesmen agreed to assign temporary workers as needed and to be responsible for paying and determining the workers' compensation.

Dochnahl agreed to be "solely responsible for directing, supervising and controlling Tradesmen employees as well as their work," to "verify[] the accuracy of the records of actual time worked by Tradesmen employees," and "to provide Tradesmen workers a safe work environment that complies with all applicable Federal [Occupational Safety Hazard Act (OSHA)] and/or equivalent state

[1] Wash. Dep't of Labor & Indus., Div. of Occupational Safety & Health (DOSH), Directive 1.15, at 3 (Feb. 15, 2019), https://www.lni.wa.gov/dA/96edf1ea0f/DD115.pdf [https://perma.cc/GA2K-QXNN].

agency standards." Dochnahl also agreed "to provide Tradesmen workers any specific safety training and/or equipment required for their work assignment, exclusive of boots, hard hats and safety glasses, . . . [and to] ensure Tradesmen workers wear all required safety equipment, as well as inspect, maintain and replace this equipment as needed." Dochnahl, at its sole discretion, could terminate a Tradesman worker from its employ. Only Tradesmen, however, could fire a temporary worker from its staffing company.

Under a protocol, if a client wanted to move a temporary worker to a job site Tradesman had not yet inspected, the client was to notify the staffing company. Though the protocol was not in the written agreements with clients, Tradesmen established it through verbal agreement. Tradesmen said it was "rare" for a client not to call it when moving a worker.

In the spring of 2016, Dochnahl needed a temporary worker to perform "[t]ypical labor" and clean up at a construction site on Federal Avenue in Seattle. A Tradesmen field representative conducted a walkout and determined the site "checked out okay." Tradesmen assigned a temporary worker to the site.

One day, Dochnahl sent Tradesmen's temporary worker to a different job site, which was on Palatine Avenue in Seattle. Despite the protocol, Dochnahl moved the temporary worker without notifying Tradesmen. Tradesmen had not conducted a walkout at that site.

The Department inspected the Palatine Avenue site after receiving a tip that it had improper trenching and unsafe scaffolding. The Department discovered multiple WISHA violations and cited Dochnahl. The Department also

cited Tradesmen with two serious violations for failing to ensure that (1) fall protection systems were implemented, and (2) a qualified person designed a wooden job-made scaffold.

Tradesmen appealed the citation to an IAJ, who issued a proposed order vacating the citation. The IAJ concluded that Tradesmen was not an employer for purposes of the citation based on findings that Tradesmen did not control the temporary worker or work environment.

The Department then appealed to the Board. The Department asked the Board to apply a standard from the Directive, as opposed to the economic realities test. The Directive, which establishes inspection and enforcement policies for situations involving two or more employers, states that the Department should cite an employer for a violation of which it knew or clearly should have known. Directive, at 5. The Board affirmed 3-0. It rejected the Department's argument under the Directive and concluded that Tradesmen was not liable as an employer for any violations the Department discovered during its inspection of the Palatine Avenue job site. The Board made several findings regarding the control that both Tradesmen and Dochnahl had over the temporary worker and the Palatine Avenue job site:

> 2. Tradesmen International, LLC, (Tradesmen) leases workers to its clients pursuant to agreements between Tradesmen and the clients. Under the agreements the client is solely responsible to direct and supervise the workers provided by Tradesmen and their work; to provide the worker with safety training specific to the work being done; to provide a safe work environment that complies with all applicable state and Federal health and safety standards; and may terminate the worker for any reason but a discriminatory one.

3. Tradesmen inspects each worksite to which it is informed that its workers are dispatched to ensure compliance with applicable safety and health laws, and will direct that corrections to any safety and health problems it discovers be effected. If the client moves the worker to work at a site other than the one Tradesmen has been informed of, protocol requires the client to inform Tradesmen of the move in order to permit Tradesmen to inspect the new site and arrange for correction of any safety and health hazards.

. . .

5. On April 26, 2016, Dochnahl transferred [the temporary worker] to a worksite located at 6521 N. Palatine, Seattle, Washington, without notifying Tradesmen of the change in [the temporary worker]'s worksite. [The temporary worker] did not inform Tradesmen of the change in worksites.

. . .

8. On April 26, 2016, Tradesmen did not control [the temporary worker] or the work he was performing at 6521 N. Palatine, Seattle, Washington.

9. On April 26, 2016, Tradesmen did not control the worksite or the work environment at 6521 N. Palatine, Seattle, Washington.

10. On April 26, 2016, Tradesmen did not know, nor through the applicable diligence could it have known, of the safety and health hazards to which [the temporary worker] was exposed at 6521 N. Palatine, Seattle, Washington.

The Department appealed the Board's decision to the Superior Court, which affirmed the Board's decision. The Department appeals.

II. ANALYSIS

In WISHA appeals, we review the Board's decision based on the record before the agency. Erection Co. v. Dep't of Labor & Indus., 160 Wn. App. 194, 201, 248 P.3d 1085 (2011). We review the Board's findings of fact to determine whether substantial evidence supports them. Potelco, Inc. v. Dep't of Labor & Indus., 191 Wn. App. 9, 21, 361 P.3d 767 (2015). Substantial evidence is what "would persuade a fair-minded person of the truth or correctness of the matter."

Erection Co., 160 Wn. App. at 202. If substantial evidence supports the factual findings, then the findings are conclusive and we next determine whether the findings support the conclusions of law. Id. at 202. We view the evidence and its reasonable inferences in the light most favorable to the prevailing party in the highest forum that exercised fact-finding authority. See id. at 202. Thus, we must view such evidence and inferences in the light most favorable to Tradesmen, who prevailed before the Board.

"The legislature enacted [WISHA] 'to assure, insofar as may reasonably be possible, safe and healthful working conditions for every [worker] in the state of Washington.'" Id. at 201 (quoting RCW 49.17.010). We liberally interpret WISHA statutes and regulations to achieve their purpose of providing safe working conditions for every Washington worker. Id. at 202.

WISHA renders employers responsible for the health and safety of their employees. Potelco, 191 Wn. App. at 30. "Any entity that engages in any business and employs one or more employees is an employer for WISHA purposes." Martinez Melgoza & Assoc., Inc. v. Dep't of Labor & Indus., 125 Wn. App. 843, 848, 106 P.3d 776 (2005) (citing RCW 49.17.020(4)). To promote WISHA's safety objectives, if two or more employers share responsibility for the same employee "the Department may cite multiple employers for violating workplace safety standards." Potelco, 191 Wn. App. at 30.

A. Dual Employer Directive

The Department argues that the Board erred by declining to apply the Directive and by failing to conclude that Tradesmen is liable for the WISHA

violations under the "knew or clearly should have known" standard. Tradesmen responds that the Directive does not apply and, even if it did, substantial evidence supports the Board's finding that Tradesmen neither knew nor clearly should have known of the WISHA violations. We decline to apply the standard from the Directive.

The Department developed internally the Directive to "establish[] inspection and enforcement policies for assessing situations where two or more employers may share liability for safety or health violations that expose employees to workplace hazards." Directive at 1. The Department noted that "[d]ual employer situations have increased over recent years with the growth of temporary services and employee leasing agencies, which provide employees to work at a site under the supervision and control of another employer." Directive at 1. The Directive refers to primary and secondary employers. Directive at 1-5. A primary employer is the "employer of record, who contracts with the employee to perform work in exchange for wages or a salary and issues the employee's pay check, secures workers' compensation insurance for the employee, and usually retains hiring and firing authority." Directive at 1. Here, Tradesmen is the primary employer. Secondary employers, like Dochnahl, are those who control the employee at the job site. Directive at 1.

Under the Directive, the Department will typically decline to cite a primary employer for safety and health violations at the job site so long as they meet certain requirements for providing training and personal protective equipment and do not supervise or control the employees' work activities at the job site.

Directive at 2. The Department may cite a primary employer, however, "if they had knowledge or clearly should have had knowledge of the violation." Directive at 5. The Department asserts that a primary employer meets the "clearly should have known" standard if they could have discovered the violation through reasonable diligence.

But the Department did not promulgate the Directive under the rulemaking requirements of the Administrative Procedure Act (APA). In contrast to agency rules, the Directive constitutes a policy statement, which lacks the force of law and is advisory only. See J.E. Dunn Nw., Inc. v. Dep't of Labor & Indus., 139 Wn. App. 35, 51-53, 156 P.3d 250 (2007) (explaining why WISHA Regional Directive 27.00, which was not promulgated under the APA, cannot operate to shift burden of proof on element of WISHA violation). We thus decline to apply the "knew or clearly should have known" standard from the Directive.[2]

[2] The Department also asserts that we should defer to OSHA cases applying the "knew or clearly should have known" standard to staffing agencies because WISHA is meant to be as effective as OSHA. But the cases cited by the Department for this proposition, Barbosa Grp., Inc., 2005 CCH OSHD (No. 02-0865, 2007) and Aerotek, 2018 CCH OSHD (No. 16-0618, 2018), do not explicitly apply the "knew or clearly should have known" standard and are distinguishable on their facts, as the staffing agencies provided on-site managers. Tradesmen did not provide any on-site manager at Dochnahl's Federal Avenue or Palatine Avenue job sites and did not otherwise exercise comparable control over the sites.

Furthermore, even if we were to apply the knowledge standard, we would not conclude that Tradesmen is a liable employer for the violations at issue. The record demonstrates that Tradesmen's protocol was for clients, such as Dochnahl, to notify it before moving a temporary worker to a job site that Tradesmen had not yet inspected. Despite this protocol, the record shows that Dochnahl did not inform Tradesmen that it was sending the temporary worker to the Palatine Avenue job site and that Tradesmen did not have the opportunity to inspect the Palatine Avenue job site for safety violations. This constitutes substantial evidence to support the Board's finding that "Tradesmen did not know, nor through the applicable diligence could it have known, of the safety and health hazards to which [the temporary worker] was exposed at 6521 N. Palatine, Seattle, Washington."

B. Economic Realities Test

The Department next claims that the Board erred by concluding that Tradesmen is not a liable employer under the economic realities test. Tradesmen responds that the Board correctly determined that, under the test, it was not an employer because it did not control the job site or the temporary worker. We agree with Tradesmen.

Washington courts use the "economic realities test" in cases of leased or temporary workers to determine who is an employer for the purposes of a WISHA citation. Potelco, 191 Wn. App. at 30-31. The test involves seven factors:

1) who the workers consider their employer;
2) who pays the workers' wages;
3) who has the responsibility to control the workers;
4) whether the alleged employer has the power to control the workers;
5) whether the alleged employer has the power to fire, hire, or modify the employment condition of the workers;
6) whether the workers' ability to increase their income depends on efficiency rather than initiative, judgment, and foresight; and
7) how the workers' wages are established.

Id. at 31. Under this test, "[t]he key question is whether the employer has the right to control the worker." Id. at 31. The record lacks evidence on the first and sixth factors.[3] We address the remaining factors in turn.

[3] The Department asserts that the first factor shows Tradesmen was an employer for the purposes of the citation. But the Department's argument under this factor is that the temporary worker believed Tradesmen to be his employer because Tradesmen hired him, leased him to Dochnahl, and he could call his Tradesmen supervisor with questions. These points fail to address who the temporary worker considered as his

Payment of Wages

Under the CSA, Tradesmen agreed to pay the temporary worker wages owed for work under the agreement. This factor suggests Tradesmen was an employer with respect to the citation.

Responsibility to Control the Worker

Dochnahl, not Tradesmen, had the responsibility to control the worker under their contract. In the CSA, Dochnahl agreed that it would be "solely responsible for directing, supervising and controlling Tradesmen employees as well as their work" and "to provide Tradesmen workers a safe work environment that complies with all applicable Federal [Occupational Safety Hazard Act (OSHA)] and/or equivalent state agency standards." Because Dochnahl agreed to assume the responsibility for controlling the temporary worker assigned to it, this factor weighs against considering Tradesmen an employer.

Power to Control the Worker

Tradesmen had some control over the temporary worker as it controlled his work assignments. But the record shows Tradesmen had little control over the temporary worker's work and duties at the job sites. While Tradesmen would have a field representative inspect the job site for safety, it did not have any Tradesmen employees at the job site to supervise the temporary worker. Tradesmen lacked any authority to control Dochnahl's project or the work done there. That Dochnahl moved the temporary worker to a new job site without the

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employer while at the Palatine Avenue job site, and thus do not sufficiently address the first factor.

temporary worker informing Tradesmen also shows Tradesmen's lack of control over the temporary worker.

Tradesmen also lacked control over the Palatine Avenue job site. Although the Department asserts that courts do not consider control over the job site as part of the economic realities test, legal authority holds otherwise. See Potelco, 191 Wn. App. at 32 (considering whether the alleged employer exercised control over the job site under the economic realities test). The Board has also previously noted that "in leased employment situations, whether the lessor or the lessee should be cited for WISHA violations depends on the economic realities of who controls the workplace. Both employers cannot be cited unless they both have *substantial control over the workers and the work environment* involved in the violations." In re Skills Res. Training Ctr., No. 95 W253, at 2 (Wash. Bd. of Ind. Ins. App. Aug. 5, 1997) (emphasis added). While Tradesmen typically inspected a job site to ensure it was safe, here it did not have a chance to do so because Dochnahl sent the temporary worker to the Palatine Avenue job site without notifying Tradesmen. This factor also weighs against Tradesmen being considered an employer.

Power to Fire, Hire, or Modify the Employment Condition of the Worker

Under the CSA, Dochnahl had the sole discretion to terminate a temporary worker from its employ. But only Tradesmen could fire a temporary worker from its staffing company. Tradesmen also lacked the power to modify the employment conditions of the temporary worker, as it did not control the "means and methods" of the temporary worker's performance. Finally, although

Tradesmen would inspect the job site for safety reasons, Dochnahl was responsible for providing a safe work environment and any specific safety training or equipment. While this factor presents a close question, because we must view the evidence and reasonable inferences therefrom in the light most favorable to Tradesman, it weighs against holding Tradesman liable as an employer.

Establishment of Worker's Wage

In the CSA, Tradesmen agreed to "determine and provide compensation, including wages and benefits." This factor supports Tradesmen being an employer.

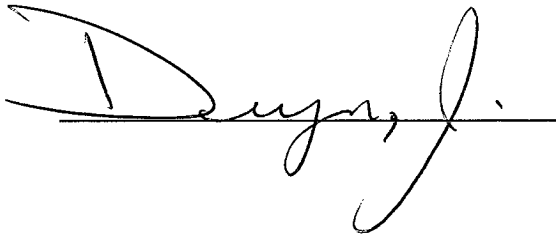
Thus, the two factors relating to control—plus the factor relating to the power to hire, fire, or modify the employment condition of the worker—weigh against us considering Tradesmen an employer for purposes of the citation. The Department did not challenge the Board's finding that Tradesmen did not control the job site or the work environment at the Palatine Avenue job site. Unchallenged findings of fact constitute verities on appeal. Potelco, 191 Wn. App. at 22. While two other factors support Tradesmen being an employer, as stated above, the key question of the test is who had the right to control the worker.

We determine substantial evidence supports the Board's findings that Tradesmen did not have control over the temporary employee when at a job site for Dochnahl and did not control the Palatine Avenue job site. And the Board's

findings support its conclusion that the Department could not cite Tradesmen as an employer for the WISHA violations.[4]

We affirm.

WE CONCUR:



[4] This outcome tracks Board and Occupational Safety and Health Commission cases that have addressed similar facts. See Skills Res. Training Ctr., slip op. at 4 (determining that a company that provided workers to employers "operated as a human resources department" and was not an employer under WISHA); Union Drilling, 16 OSHC 1741 (No. 93-154, 1994) (deciding that although the company providing the personnel paid the workers and controlled their work assignments, it was not an employer for WISHA purposes); Murphy Enterprises, dba Murphy Brothers Exposition, 17 OSHC 1477 (No. 93-2957, 1995) (noting that an employee leasing company was not an employer under WISHA even though it handled payroll and other administrative tasks); MLB Indus., Inc., 12 OSHC 1525 (No. 83-231, 1985) (concluding that a company was not liable as an employer under WISHA because it merely served as a "conduit for labor").

SHARP
Safety & Health Assessment & Research for Prevention

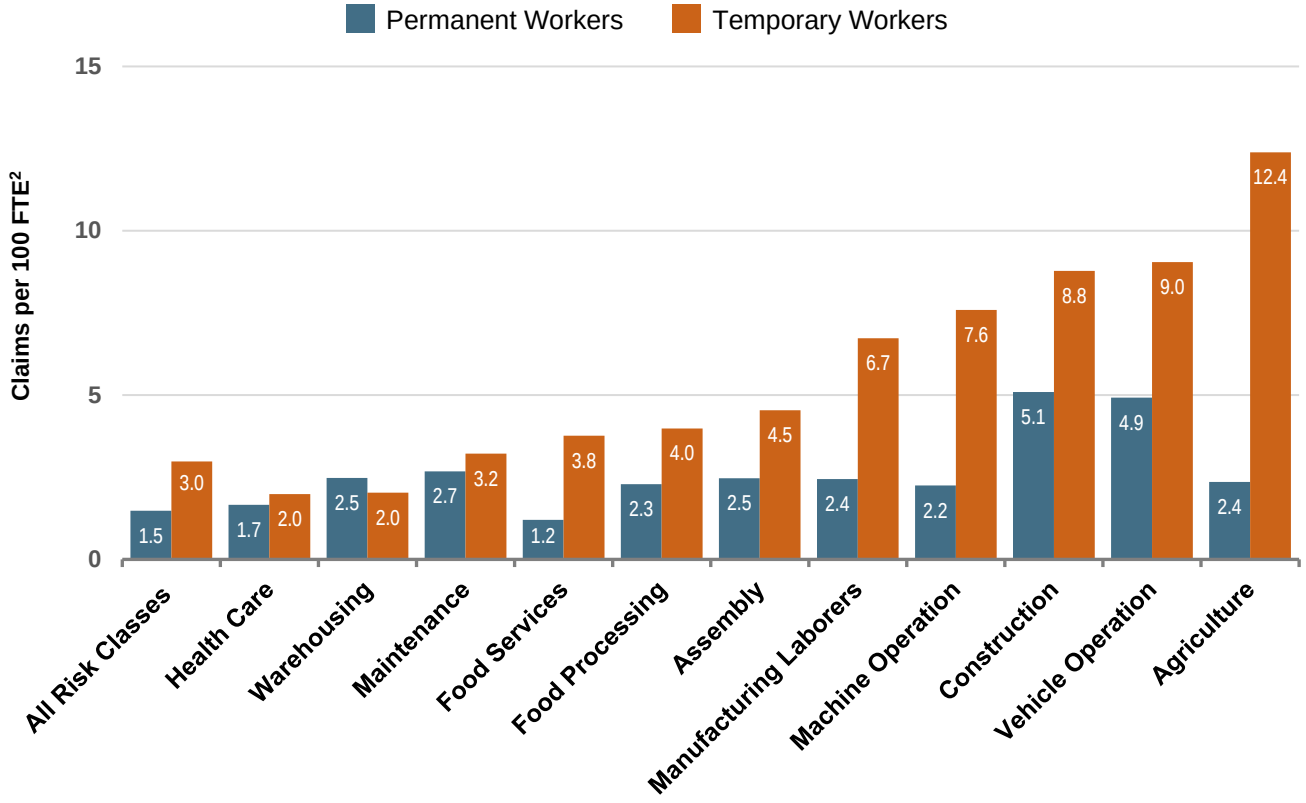
SHARP Stats

Temporary Worker Injury Claims

Workers' Compensation Claim Rates: Temporary vs. Permanent Workers

Washington State Workers' Compensation System 2011–2015

Time-loss Claim Rates by Risk Class[1]



- Workers' compensation claim rates for temporary workers are about twice those of permanent workers in comparable occupations.[3,4]
- Highest risk occupations for temporary workers are in agriculture, vehicle operations, construction, and machine operations.
- Lower claim rates for temporary workers in warehousing suggest an opportunity to learn from safety practices in this industry.

1. Washington State workers' compensation risk classes use industry and occupation to group workplaces with similar injury risk, with 16 designated for temporary help services
2. Full Time Equivalent. 1 FTE = 2000 hours worked in year
3. Adjusted rate ratio for all risk classes = 2.01
4. Comparisons are based on groupings of permanent worker risk classes matched to each temporary worker risk class

For more information: http://onlinelibrary.wiley.com/wol1/doi/10.1002/ajim.22763/abstract

SHARP publication: 76-07-2017

Washington State Department of Labor & Industries

Washington State Department of Labor & Industries (https://lni.wa.gov)

Overview

Temporary Workers

Background

When a worker's tenure at a particular workplace is brief, several factors may increase their risk for injury: unfamiliarity with new work practices and surroundings; limited safety training; a disproportionate share of younger workers; or an inability to recognize hazards and refuse hazardous work, or to demand appropriate protective equipment for fear of dismissal. Agency employers may not be sufficiently aware of the hazards faced by temporary workers at each of the different worksites they supply. Host employers looking for a short-term worker may invest less time in providing them with appropriate training and protection equipment. In addition, having two separate parties who are responsible for worker safety raises the possibility that neither will take full responsibility to prepare the worker adequately.

The precariousness of temporary workers' employment may also place them at greater risk for adverse physical and psychosocial hazards in their employment that lead to injury. In surveys, temporary workers have been found to be more likely than their permanent peers to experience "mismatched placements", lack of familiarity with their host employer's worksite, limited communication about physical hazards, which creates barriers to risk mitigation, and lower levels of job control and security.

The temporary help supply (THS) workforce in Washington State has grown rapidly since 1990 as compared to that of the directly employed workforce. Over the same time period the distribution of temporary help supply workers has spread beyond its traditional focus in office services towards higher hazard sectors such as construction, food processing, light assembly and warehousing/logistics.

This project uses both administrative workers' compensation data and survey-derived data to both compare temporary workers' claims rates to their standard-employed peers

and to explore the factors that could be driving the higher injury rates for temporary workers.

Goals

The overall goal of this project is to evaluate the fundamental risk factors associated with temporary agency employment by:

1. Measuring the magnitude of workers' compensation claim incidence among workers employed by temporary agencies and comparing these to workers employed under standard employment arrangements. We will isolate the effect of temporary work status and the probability of injury by controlling for other factors such as age, sex, industry and tenure.
2. Conducting interviews with recently injured temporary and permanent workers, matched by workplace and demographic characteristics and covering such topics as:
    - Most common hazards and injuries.
    - Whether they felt able to, or knew how to report hazard.
    - Safety training provided by the temp agency and the client businesses.
    - Safety equipment provided and by whom.
    - Priority given to safety by temp agency staff and client supervisors.
    - Whether temporary workers were given more hazardous work.
    - The type and format of educational materials that would be effective in improving safety.
3. Conducting interviews with temporary agency managers and managers of client businesses which use temporary employees and covering such topics as:
    - Whether temporary employees are given more hazardous jobs.
    - What training, supervision and personal protective equipment is given to temporary workers.
    - Whether temporary workers know how to report an injury hazard.

- Whether temporary workers do not report injuries or hazardous job conditions due to fear of job loss or lack of knowledge.
- Whether temporary workers are asked to do jobs different from what they were sent to do.

4. Developing appropriate educational materials and dissemination methods tailored to each type of industry and to each party in the temporary labor market. Areas of focus for educational materials include:
   - Hazard awareness.
   - Safe work practices.
   - Personal protective equipment.
     Employee rights to a safe workplace and to workers' compensation benefits.

Publications

SHARP Stats

Temporary Worker Injury Claims (https://lni.wa.gov/safety-health/safety-research/files/2017/76_07_2017_TemporaryWorkerInjuryClaims.pdf)

Journal Articles

Foley MP (2017). **Factors underlying observed injury rate differences between temporary workers and permanent peers.** *American Journal of Industrial Medicine*. DOI: 10.1002/ajim.22763 (https://onlinelibrary.wiley.com/doi/full/10.1002/ajim.22763). Research Findings (https://lni.wa.gov/safety-health/safety-research/files/2017/75_27_2017_Foley_TempsWorkers.pdf)

Smith CK, Silverstein BA, Bonauto DK, Adams DA, Fan ZJ, Foley MP (2010). **Temporary workers in Washington State.** *American Journal of Industrial Medicine.* DOI: 10.1002/ajim.20728 (https://onlinelibrary.wiley.com/doi/10.1002/ajim.20728).

Foley M (1998). **Flexible work, hazardous work: The impact of temporary work arrangements on occupational safety and health in Washington State, 1991-1996.** *Research in Human Capital and Development.* Eds. Sorkin A and Farquhar I. vol. 12: 123-147.

Protecting Temporary Workers

Employer Responsibilities to Protect Temporary Workers

To ensure that there is a clear understanding of each employer's role in protecting employees, OSHA recommends that the temporary staffing agency and the host employer set out their respective responsibilities for compliance with applicable OSHA standards in their contract. Including such terms in a contract will ensure that each employer complies with all relevant regulatory requirements, thereby avoiding confusion as to the employer's obligations.

Joint Responsibility

While the extent of responsibility under the law of staffing agencies and host employers is dependent on the specific facts of each case, staffing agencies and host employers are *jointly responsible* for maintaining a safe work environment for temporary workers - including, for example, ensuring that OSHA's training, hazard communication, and recordkeeping requirements are fulfilled.

OSHA could hold both the host and temporary employers responsible for the violative condition(s) - and that can include lack of adequate training regarding workplace hazards. Temporary staffing agencies and host employers share control over the worker, and are therefore jointly responsible for temporary workers' safety and health.

OSHA has concerns that some employers may use temporary workers as a way to avoid meeting all their compliance obligations under the OSH Act and other worker protection laws; that temporary workers get placed in a variety of jobs, including the most hazardous jobs; that temporary workers are more vulnerable to workplace safety and health hazards and retaliation than workers in traditional employment relationships; that temporary workers are often not given adequate safety and health training or explanations of their duties by either the temporary staffing agency or the host employer. Therefore, it is essential that *both* employers comply with all relevant OSHA requirements.

Both Host Employers and Staffing Agencies Have Roles

Both host employers and staffing agencies have roles in complying with workplace health and safety requirements and they *share* responsibility for ensuring worker safety and health.

A key concept is that each employer should consider the hazards it is in a *position* to *prevent and correct*, and in a position to *comply* with OSHA standards. For example: staffing agencies might provide general safety and health training, and host employers provide specific training tailored to the particular workplace equipment/hazards.

- The key is *communication* between the agency and the host to ensure that the necessary protections are provided.
- Staffing agencies have a duty to inquire into the conditions of their workers' assigned workplaces. They must ensure that they are sending workers to a safe workplace.
- Ignorance of hazards is not an excuse.
- Staffing agencies need not become experts on specific workplace hazards, but they should determine what conditions exist at their client (host) agencies, what hazards may be encountered, and how best to ensure protection for the temporary workers.
- The staffing agency has the duty to inquire and *verify* that the host has fulfilled its responsibilities for a safe workplace.
- And, just as important: Host employers *must treat temporary workers like any other workers* in terms of training and safety and health protections.

How Can OSHA Help?

Workers have a right to a safe workplace. If you think your job is unsafe or you have questions, contact OSHA at 1-800-321-OSHA (6742). It's confidential. We can help. For other valuable worker protection information, such as Workers' Rights, Employer Responsibilities and other services OSHA offers, visit OSHA's Workers' page.

OSHA also provides help to employers. OSHA's On-Site Consultation Program offers free and confidential occupational safety and health services to small and medium-sized businesses in all states and several territories, with priority given to high-hazard worksites. To locate the OSHA On-Site Consultation Program nearest you, call 1-800-321- 6742 (OSHA) or visit www.osha.gov/consultation.

Workers' Rights

Highlights

- Recommended Practices: Protecting Temporary Workers
- Policy Background on the Temporary Worker Initiative
- Temporary Worker Initiative (TWI) Bulletin No. 1 - Injury and Illness Recordkeeping Requirements
- Temporary Worker Initiative (TWI) Bulletin No. 2 – Personal Protective Equipment
- Temporary Worker Initiative (TWI) Bulletin No. 3 – Whistleblower Protection Rights
- Temporary Worker Initiative (TWI) Bulletin No. 4 - Safety and Health Training
- Temporary Worker Initiative (TWI) Bulletin No. 5 - Hazard Communication

- Temporary Worker Initiative Bulletin No. 6 – Bloodborne Pathogens
- Temporary Worker Initiative Bulletin No. 7 - Powered Industrial Truck Training
- Temporary Worker Initiative Bulletin No. 8 - Respiratory Protection
- Temporary Worker Initiative Bulletin No. 9 - Noise Exposure and Hearing Conservation
- Temporary Worker Initiative Bulletin No. 10 - The Control of Hazardous Energy (Lockout/Tagout)
- Temporary Worker Initiative Bulletin No. 11 – Safety and Health in Shipyard Employment
- Temporary Workers' Rights Pamphlet

News Releases

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DOSH DIRECTIVE
Department of Labor and Industries
Division of Occupational Safety and Health
Keeping Washington safe and working

1.15 Dual Employers and DOSH Enforcement

February 15, 2019

I. Purpose

This Directive establishes inspection and enforcement policies for assessing situations where two or more employers may share liability for safety or health violations that expose employees to workplace hazards.

II. Scope and Application

This Directive applies to all DOSH operations statewide and replaces all previous instructions on this issue, whether formal or informal. It supplements the guidance on "creating, correcting, and controlling" employers that is provided in the DOSH Compliance Manual. This Directive has been reviewed for applicability, and remains effective with a new issue date of February 15, 2019.

III. Background

Under the 1973 Washington Industrial Safety and Health Act, employers are responsible for the workplace safety and health of their employees. Employers may also have a responsibility for the safety and health of other employees as a creating, correcting, or controlling employer. In applying these responsibilities, the department must determine whether the employer of record (primary employer), or any other involved employer, did not reasonably meet their obligations under the statute.

Dual employer situations have increased over recent years with the growth of temporary services and employee leasing agencies, which provide employees to work at a site under the supervision and control of another employer. A dual employer situation exists when two or more employers may be cited for violating a safety or health standard that created a hazard to which employees were exposed.

In assessing such situations, CSHOs must consider the roles of the:

- Employer of record, who contracts with the employee to perform work in exchange for wages or a salary and issues the employee's pay check, secures workers' compensation insurance for the employee, and usually retains hiring and firing authority; **and**
- On-site employer (secondary or host employer) who controls the employee at the worksite.

Citations related to dual employer situations are distinct and different from citations issued to general and upper-tier contractors in construction under the *"Stute"* decision, which is the subject of separate guidance.

IV. Enforcement Policies

A. The primary employer:

1. Must ensure employees are covered by an effective and appropriately tailored written Accident Prevention Program (APP) and receive all required training and Personal Protective Equipment (PPE) in order to safely perform work for the secondary employer. However, the primary employer can fulfill their obligation for training and PPE by taking reasonable steps to ensure the secondary employer provides the employees with the required training and appropriate PPE for the work to be done.
2. Will generally not be cited for safety or health violations that expose their employees to a hazard at the secondary worksite, as long as the primary employer meets the requirements in Section IV-A.1 above, and does not exercise supervision and control over the employees' work activities at the secondary worksite.
3. May be cited for safety or health violations at the secondary worksite whenever they:
   (a) Did not take reasonable steps to ensure the requirements above were met.
   (b) Disregard information about uncontrolled hazards at the worksite.
   (c) Supervise or control their employees at the secondary worksite (for example, in situations where the primary employer provides a crew, complete with a supervisor, to perform particular activities, or where the primary employer provides specialized staff not subject to the direction of the secondary employer).

B. The secondary employer will be cited for safety or health violations at the worksite when responsible for supervising or controlling the primary employer's employees at the worksite.

C. There are situations where DOSH will issue citations to both the secondary and primary employers. For example, if neither the primary employer nor the secondary employer took steps to ensure the appropriate selection and use of respiratory protection to protect employees from inhalation hazards while engaged in assigned work duties.

D. Situations where neither employer would be cited for safety or health violations are truly unforeseeable situations, or situations involving unpreventable employee misconduct. Otherwise, at least one employer will be cited for any documented safety or health violation that exposed an employee to a hazard.

V. Special Consultation and Compliance Protocols

A. Determine whether a dual employer situation exists. When safety or health violations are documented and employee exposure may involve a dual employer situation, CSHOS are expected to find out and document if there is evidence that a secondary employer was supervising, or was supposed to be supervising, the employees' work.

1. If the answer is *no*, then there is no dual employer issue.
2. If the answer is *yes*, then CSHOs are expected to apply the guidance in the remainder of this directive.

B. Evaluate the nature of the dual-employer relationship. CSHOs are expected to evaluate the level of secondary employer involvement by documenting answers to the following questions:

1. Was the primary employer aware or should they have been aware of the hazardous condition(s) found at the secondary worksite?
   - If so, the primary employer shares responsibility for the violation because they did not take reasonable steps to protect their employees from the hazard in question.
2. Did the primary employer control or influence work at the worksite?
   - If so, the primary employer shares responsibility for the worksite conditions and any violations that result from them. The primary employer who exercises control at the worksite cannot be relieved of safety and health obligations by a contract that assigns the responsibility for those issues to the secondary employer.
3. Did the primary employer have authority by contract, custom, or practice to enter the secondary worksite to supervise the employees' work?
   - If so, the primary employer may have a greater responsibility to take steps to identify and correct violations on the worksite.
4. Did the violation arise because the secondary employer relied on the primary employer for guidance about workplace safety or health?
   - If so, the primary employer may be responsible for the violations. In such circumstances, the secondary employer may be relieved of responsibility by demonstrating the affirmative "creating employer" defense.
5. Did the primary employer take steps to correct or prevent employee exposure to the hazardous condition found at the secondary worksite?
   - If so, then the primary employer may have reasonably fulfilled their obligations.

C. Violations that appear to be shared between both employers. As a general principle, all employers who knew or should have known about the safety or health violation, and who had or who controlled employees that were exposed to the hazard, are responsible and should be cited.

1. Secondary employers are normally responsible for safety or health violations and should be cited for each hazard that employees were exposed to. It does not matter whether the employees were their own or another's, or if it is determined that the primary employer is also liable for the violation.
2. A primary employer cannot be cited for safety or health violations at another worksite if the department cannot document exposure of the primary employer's employees. This is true even if the primary employer did not ensure that the secondary employer would provide effective APP coverage, adequate training, and appropriate PPE.

   In such a case, the primary employer should be messaged about the responsibility to ensure APP coverage, training, and PPE.

3. If the primary employer's employees were exposed to a hazard at the secondary site, the decision whether to cite the primary employer for the safety or health violation will be based on the nature of the violation, the level of involvement the primary employer had with the secondary worksite, and the primary employer's knowledge of the hazard.

   a. If the analysis in *Section V.B.,* above, suggests that there is no significant involvement of the primary employer at the secondary employer's worksite, safety or health violations should be cited as follows:

      (1) APP, Training and PPE Violations. The primary employer must generally be cited for any failure to comply with APP or any other safety and health standards requiring the provision of PPE or training. However, do not cite the primary employer if they were unaware of the violations **and** took "reasonable action" to ensure that the secondary employer would provide APP coverage and all required training and PPE.

      - Reasonable action is demonstrated by steps that as a whole result in a reasonable degree of certainty that APP coverage, training, and PPE will be provided to the employee as required. Reasonable action may include the following examples:

        - Making explicit arrangements in writing with the secondary employer to provide all required APP coverage, PPE and appropriate training.

        - Establishing a system where employees are not allowed to begin work at a secondary worksite until the primary employer receives a copy of the secondary employer's APP and confirmation that all required training was completed, including a description of the type of training. If the primary employer documented an on-site inspection that included reviewing the secondary employer's APP, this is an acceptable substitute for a physical copy of the secondary employer's APP on file.

      - Establishing a system of periodically monitoring the secondary employer to ensure compliance with agreements about employee safety.

      - Communicating to employees about the types of training that must be received before beginning work at the secondary site, and instructing employees to contact the primary employer immediately if the secondary employer requests that work begin before the training is received, or if employees feel that the work is unsafe.

      (2) Other Violations. If the primary employer is cited for not providing or not taking reasonable steps to provide effective APP coverage, appropriate training, or PPE, the primary employer may also be cited for other types of safety or health violations identified at the secondary worksite. In such cases, CSHOs are expected to cite the primary employer if their employees were exposed to hazards that directly relate to the deficiencies for which the primary employer is liable.

b. In addition to the situations described in *Section V.C.3.a.,* above, the primary employer can be cited if they had knowledge or clearly should have had knowledge of the violation.

Do not cite the primary employer if all of the following conditions are present:

(1) The primary employer took reasonable steps to abate the hazard, including giving the secondary employer a reasonably short timeline to correct the hazard, and the correction timeline had not yet passed without further action when the hazard was identified by DOSH.

(2) The primary employer, due to lack of direct control over the worksite, was unable to bring about immediate hazard correction.

(3) The hazard was not an imminent danger situation. Imminent danger would require the primary employer to prohibit the employee from going to work at the secondary site until the imminent danger situation was corrected.

c. In addition to the situations described in *Sections V.C.3.a. and V.C.3.b*. above, the primary employer may be cited if they were able to exercise control over the worksite, had authority to enter the site to supervise employees' work, or gave deficient advice or guidance related to employee safety or health issues.

VI. Who to Contact

CSHOs dealing with complex issues involving dual employers are encouraged to contact the Compliance Operations Manager for assistance. If DOSH staff have questions or need additional guidance or interpretive assistance, they are encouraged to contact DOSH Technical Services.

VII. Review and Cancelation

This DOSH Directive will be reviewed for applicability two years from the issue date, and will remain effective unless superseded or canceled.

Approved: _____

Anne F. Soiza
L & I Assistant Director
Division of Occupational Safety and Health

Supreme Court No. _____
(Court of Appeals No. 79634-8-I)

SUPREME COURT
STATE OF WASHINGTON

DEP'T OF LABOR & INDUS., Petitioner, v. TRADESMEN INT'L, LLC, Respondent.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department of Labor & Industries' Petition for Discretionary Review and this Certificate of Service in the below described manner:

E-Filing via Washington State Appellate Courts Portal:

Richard D. Johnson
Court Administrator/Clerk
Court Of Appeals, Division I

Susan L. Carlson
Supreme Court Clerk
Washington State Supreme Court

E-Mail via Washington State Appellate Courts Portal:

Aaron K. Owada: aaron.owada@amslaw.net
Owada Law, P.C.

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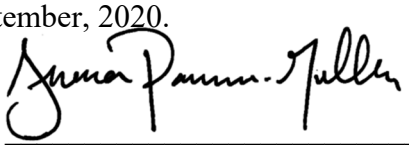
DATED this 16th day of September, 2020.



SHANA PACARRO-MULLER
Legal Assistant

WASHINGTON ST. ATTORNEY GENERAL - LABOR & INDUSTRIES DIVISION - SEATTLE

September 16, 2020 - 3:36 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Department of Labor & Industries, Appellant v. Tradesmen International, LLC, Respondent (796348)

The following documents have been uploaded:

- PRV_Petition_for_Review_Plus_20200916153319SC578667_7685.pdf
  This File Contains:
  Certificate of Service
  Petition for Review
  The Original File Name was 200916_Tradesmen_PFR.pdf

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- aaron.owada@owadalaw.net
- elliottf@atg.wa.gov

Comments:

Filing: Petition for Discretionary Review and Certificate of Service. *Note: The Department is contemporaneously filing a PFR in Case No. 79717-4-I along with a Motion to Consolidate.

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