NOS. 99031-0, 99032-8

SUPREME COURT
THE STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Petitioner,

v.

TRADESMEN INTERNATIONAL, LLC

and

LABORWORKS INDUSTRIAL STAFFING SPECIALISTS, INC.,

Respondents.

RESPONSE OF TRADESMEN AND LABORWORKS TO NATIONAL EMPLOYMENT LAW PROJECT AMICUS CURIAE BRIEFS

Aaron K. Owada, WSBA #13869
Sean Walsh, WSBA #39735
Richard Skeen, WSBA #48426
Attorneys for Respondents

OWADA LAW, PC
975 Carpenter Road NE #204
Lacey, WA 98516
Tel: (360) 483-0700
Fax: (360) 489-1877

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I. RESPONSE TO ARGUMENTS

1. The policy issues raised by NELP are issues that must be addressed through the legislative or administrative rule making process.

A. The statistical data and policy arguments presented by NELP were rejected by the Board.

NELP sets forth a long list of articles, data and alleged facts describing the plight of temporary workers. The Department presented evidence of a change in employment patterns that have taken place in recent years. Although NELP's articles are different than those presented by the Department, they all reach the same conclusions. In its Decision & Order, the Board addressed the arguments presented by both the Department and NELP at CABR 8, lines 10 – 29 and held:

> "In its Petition for Review, the Department urges us to abandon our reliance of Tradesmen's status as a controlling employer when determining whether it is liable for these violations. The first reasons offered are policy based. The Department presented evidence of a change in employment patterns in recent years. There has been an increase in worker injuries during the first days of a temporary worker's assignment to a worksite. Based on this temporal correlation of events, the Department argues that continued reliance on the status of a company as a controlling employer to determine liability will result in gaps in protection for workers and that policy considerations justify abandoning using the status of

> a controlling employer as the test of [sic] for liability. However, such policy-based decisions, while appropriate for the legislature and for the Department, are not appropriate for us and do not support a decision on our part to abandon established health and safety laws. As an appellate tribunal, our function is to determine whether the Department's citation and notice was warranted under the facts and the law. It is not to create new law based on policy considerations that are outside our purview and we decline the invitation to do so."

NELP argues that the staffing model degrades working conditions and increases vulnerability on black, brown, and immigrant workers, and that temporary workers are paid less than permanent employees. In the case before the Board, the Department presented no evidence of temporary worker vulnerability based on race, nor was there any evidence of exploitation by Tradesmen, LaborWorks or any of the host employers.

Moreover, there was no evidence that the temporary staffing model degraded the working conditions for Mr. Sienafo, the temporary employee, or that host employer viewed him as being expendable any differently than it did for the permanent workers. In the Tradesmen case, in Finding of Fact No. 6, the Board found:

6. The Department of Labor and Industries inspected Dochnahl's Palantine worksite on April 26, 2016 and found hazardous work conditions including lack of fall protection and improper scaffolding.

The hazardous conditions for both fall protection and improper scaffolding exposed Mr. Sienafo as well as the Dochnahl workers to the same safety hazards.

In the LaborWorks case, the Department only presented the testimony of Kari Misterek, the Human Resources and Safety Manager. She, however, had never been to the Strategic Materials jobsite and had no personal knowledge of the working conditions. There was no evidence of disparate treatment between permanent and temporary employees, and the Board made no findings regarding this issue.

Because there is no factual basis in the Tradesmen or LaborWorks record to support NELP's arguments, it is clear that their arguments are based solely on policy grounds which were soundly rejected by the board. For the reasons set forth below, the policy arguments and reasons should be addressed by the legislature or the Department through its rulemaking authority.

B. There are no legal reasons why this Court should accept discretionary review.

NELP argues that there are both policy and legal reasons why this Court should accept Discretionary Review. NELP argues that the triangular employment relationship allows both the host employer and the temporary staffing agency to deny responsibility for safety for temporary employees. The record before the Board and the courts below has no factual basis to support NELP's argument that the temporary staffing model blurred any lines of accountability.

More importantly, this Court has made it abundantly clear that the safety is a non-delegable duty that cannot be shifted to another employer. *Afoa,* 176 Wn.2d at 472, *Stute v. P.B.M.C., Inc.,* 114 Wn.2d 454 (1990). Thus, the line of accountability for the host employer is always clear, it has the paramount duty to protect its own employees, as well as employees it has control over.

The only issue before the Board for the temporary staffing agencies was whether Tradesmen and LaborWorks had sufficient control to make them joint employers under *Aerotek* and *Staffmark.*

2. Current law allows OSHA/WISHA to hold Temporary Staffing Agencies who have sufficient control over the worksite accountable.

A. Case law holds TSA and host employer accountable when the TSA has sufficient ability to control and correct the hazard.

NELP's argument that this Court should grant review in order to protect temporary employees ignores current caselaw which holds both the host employer and the temporary staffing agency accountable. Contrary to NELP's argument that temporary staffing agencies are not held accountable, there are dual employer worksite cases where the temporary agency was cited because it had sufficient control. See, *Sec. of Labor, v. Aerotek* OSHRC Docket No. 16-0618, p. 8 (March 23, 2018).

Aerotek was cited because it had sufficient control by providing an On Premise Manager. The Commission held that:

> In addition to providing contract employees, Respondent also supplied Coorstek with an On Premise Manager, Yarie Ortiz, whose primary responsibility was serving as a liaison between contract employees, Coorstek, and Respondent. (Tr. 94–95, Ex. C-5 at 1). This included enforcing discipline when safety rules were violated by contract employees; performing screening of those employees for qualifications, background checks, and references; attending production and staff meetings; and reporting injuries suffered by contract employees. (Tr. 99; Ex. C-5 at 1). In addition, Ms. Ortiz walked the production floor with new contractor employees as part of their orientation to the Coorstek facility.

This holding is consistent with a recent case decided by the Washington State Court of Appeals, Division II, in *Staffmark, LLC*, No. 52837-1-II. In that case, the Court held:

> "[I]t is settled law that jobsite owners have a specific duty to comply with WISHA regulations if they retain control over the manner and instrumentalities of work being done on the jobsite." *Afoa,* 176 Wn.2d at 472. "[T]his duty extends to all workers on the jobsite that may be harmed by WISHA violations." *Afoa,* 176 Wn.2d at 472."

In *Staffmark,* Andy Johnson, Staffmark's onsite manager, provided onsite supervision and granted supervisory responsibility to some of its lead workers. Additionally, the onsite manager worked on a daily basis and maintained a permanent workstation. He conducted daily walkthroughs of the host facility. Staffmark's lead workers reported to Staffmark's onsite manager who also had the ultimate authority to discipline or terminate workers who were not meeting the host employer's standards. Under these facts, even though Staffmark provided temporary workers, it had sufficient control to be considered as an "Employer" under WISHA.

As held by this Court in *Afoa, supra,* control over the instrumentalities of the work being done at the worksite is the operative factor to determine whether WISHA applies. This is the settled law in Washington which the Court of Appeals followed in affirming the Board's decision to vacate the citations against Tradesmen and LaborWorks.

It is clear that when a temporary agency has sufficient control over the instrumentalities, it also has the ability to correct hazards that adversely affects its temporary workers. Thus, citations under WISHA are appropriate when a temporary staffing agency has control to abate the hazard but fails to do so. This is consistent with the holding in *MLB* where the Commission held that the purpose of the health and safety act is best served when the employer's duty to comply with OSHA standards is based upon whether it created or controlled the cited hazard.

B. WISHA should focus its resources on the host employers who are in the best position to train, supervise and protect temporary employees.

All of the policy arguments made by NELP focus on the plight of temporary employees. All workers, whether temporary or permanent have equal rights to a safe and healthful work environment. In the two cases before the Court, there was no evidence or findings by the Board that Mr. Sienanfo or any LaborWorks temporary employees were treated any differently than the permanent workers.

In Mr. Sienafo's case, it is undisputed that he was exposed to construction safety hazards solely because Dochnahl failed to

follow the fall protection and scaffold rules. Dochnahl was correctly cited by the Department because it violated the safety rules for both its own employees as well as Mr. Sienafo. After being cited, Dochnahl was then required to abate the safety hazards cited by the Department thereby assuring a safe working environment for all employees at the jobsite. There was no evidence in the record, or even arguments made by NELP, that after the host employer abates the hazard, that the temporary staffing agency can do more to further provide a safe and healthful working environment.

Assuming that the statistics and data provided by NELP are true, the Department of Labor & Industries should heed the OSHA Temporary Employee initiative to engage in rulemaking. This would identify both the concerns as well as the solutions. Labor unions, interested parties and employers would have the opportunity to review and comment on proposed rules for temporary staffing agencies. Should it be decided that temporary staffing agencies be required to provide more or specific training to better prepare temporary employees, or to provide clear inspection protocols, the Department has statutory authority to enact administrative regulations that would require temporary staffing agencies to comply.

However, as noted by the Court of Appeals in the present cases, the Department may not enact mandatory compliance through a WISHA Regional Directive. It must follow the Administrative Procedures Act. This Court should not allow the Department to bypass the administrative rulemaking requirements by changing well established case law to conform to the Department's Directive for Dual Employers.

C. Anti-discrimination laws protect temporary employees against retaliation.

NELP goes through great lengths to discuss "Do Not Return" (DNR) policies allegedly engaged in by host employers. This issue has no relevancy to the issue at hand because temporary employees are protected from retaliation even if the temporary staffing agency is not an employer for purposes of WISHA. Moreover, there is no evidence that Mr. Sienafo or any LaborWorks temporary employee had any concerns about reporting unsafe conditions to their host employers for fear of getting a DNR, nor was there any evidence that the host employers had such a policy.

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Regardless, NELP ignores RCW 49.17.160 which protects employees from unlawful discrimination for participating in protected activities such as complaining about safety. RCW 49.17.160(1) provides:

> ***No person*** shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or herself or others of any right afforded by this chapter.
>
> (Emphasis added).

Because this provision applies to "no person" it clearly applies to host employers even if the temporary staffing agency cannot be cited. RCW 49.17.160 provides the exclusive remedy for employees to follow in the event that the host employer retaliates against a temporary employee because unsafe conditions are raised. *Jones v. Industrial Electric-Seattle, Inc.,* 53 Wash.App. 536, 768 P.2d 520, 7 IER Cases 1728 (Div. 2, 1989).

Again, social policy matters are best left to the legislature and the Department.

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II. CONCLUSION

For the reasons stated above, this Court should decline to accept Discretionary Review. The social policy concerns are best left to the legislature and the Department to enact laws to reflect changes in employment patterns. Existing law does not leave any gaps in protection as the host employer has a non-delegable duty to protect temporary employees, and temporary staffing agencies that do not have sufficient control have no ability to modify the host employer's working conditions. It would be fundamentally wrong to cite Tradesmen and LaborWorks for working conditions that it had no ability to control or correct.

RESPECTFULLY SUBMITTED this this 11th day of December 2020.

s/ Aaron K. Owada
Aaron K. Owada
WSBA No. 13869
Owada Law, PC
975 Carpenter Road NE, Suite 204
Lacey, WA 98516
Telephone: (360) 483-0700
Fax: (360) 489-1877
Email: aaron.owada@owadalaw.net
Attorneys for: Respondents, Tradesmen International, LLC and Laborworks Industrial Staffing Specialists, Inc.

CERTIFICATE OF SERVICE

I certify that on December 11, 2020, I caused the original and copy of the **Tradesmen and Laborworks Response to National Employment Law Project Amicus Curiae Briefs,** to be filed via Electronic Filing, with the Washington State Appellate Courts Portal, and that I further served a true and correct copy of same, on:

(X) Email via Washington State Appellate Courts Portal:

Counsels for Petitioner/Washington State Department of Labor and Industries:

Ms. Anastasia Sandstrom Senior Counsel
Office of the Attorney General of Washington
Labor and Industries Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
lniseaeservice@atg.wa.gov

-AND-

Mr. Elliott Furst
Assistant Attorney General
Office of the Attorney General of Washington
Labor and Industries Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

Amicus Curiae Briefs Counsel:

Ms. Rebecca A. Smith
Attorney at Law
National Employment Law Project
300 Lenora Street #357
Seattle, WA 98121

DATED this 11th day of December 2020, in Lacey, Washington.

s/ Donna Perkins
Donna Perkins
Owada Law, PC
975 Carpenter Road NE, Suite 204
Lacey, WA 98516
Telephone: (360) 483-0700
Fax: (360) 489-1877
Email: donna.perkins@owadalaw.net

OWADA LAW PC

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- richard.skeen@owadalaw.net
- rsmith@nelp.org

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Sender Name: Donna Perkins - Email: donna.perkins@owadalaw.net
Filing on Behalf of: Aaron Kazuo Owada - Email: aaron.owada@owadalaw.net (Alternate Email: aaron.owada@owadalaw.net)

Address:
975 Carpenter Rd NE Suite 204
Lacey, WA, 98516
Phone: (360) 483-0700

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