

66403-4

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No. 66403-4

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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GARY MERLINO CONSTRUCTION COMPANY, INC.,

Appellant,

vs.

CITY OF SEATTLE,

Respondent,

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

This appeal arises from a Decision and Order of the Board of Industrial Insurance Appeals (“Board”). The case involves a dispute between two self-insured employers as to which one employed a worker at the time of his injury. Both the Board and the Superior Court found that at the time of his injury, the worker was the employee of Appellant Gary Merlino Construction (“Merlino”), not Respondent City of Seattle (“City”). The Department of Labor and Industries (“Department”) is also participating in this appeal and supports the arguments of Merlino.

The question before this Court is very simple – Whether substantial evidence supports the Board’s and the Superior Court’s findings. The Board’s findings are presumed correct and both Merlino and the Department have the burden to demonstrate by a preponderance of credible evidence that the findings were incorrect. If this Court finds the evidence to be equally balanced, the findings of the Board and Superior Court must stand. The Court is required to take the record in the light most favorable to the party who prevailed in Superior Court (the City).

In this case, an off-duty Seattle Police Officer, Danny Allen, was injured while directing traffic for Merlino Construction in an intersection adjacent to a Merlino project site. Neither the City nor the Seattle Police Department (“SPD”) had prior knowledge of Allen’s off-duty activities.

Allen was in the intersection at the sole request of Merlino's superintendent. Merlino's Traffic Control Supervisor had previously told Allen to leave the intersection. At the time of his injury, no authority required an off-duty officer to direct traffic. As such, Allen was not acting in a law enforcement capacity. Any flagger could have accomplished the task, but Merlino asked Allen because it provided a benefit to them and furthered their interests.

## **II. RESTATEMENT OF THE ISSUES**

1. Whether substantial evidence supports the Board and the Superior Court's finding that at the time of his injury, Allen was an employee of Appellant Merlino Construction?
2. Whether a mutual agreement of employment existed between Danny Allen and the City of Seattle when at the time of his injury, Allen believed his employer was Merlino, he obtained the job through an independent third party, he was not on-duty for the Seattle Police Department and neither the Seattle Police Department nor the City had prior knowledge of Allen's off-duty activities because Allen failed to obtain the requisite approval to perform an off-duty job directing traffic?
3. Whether Merlino controlled the performance of Allen's duties when Merlino paid his wages, set his work hours, assigned the nature and location of his tasks, supervised his activities, determined when he could leave the job site and filled out his timecard?
4. Whether Allen was acting at the direction of Merlino and furthered its interests when Merlino's Traffic Control Supervisor testified there was no reason for an off-duty officer to direct traffic in the intersection, Merlino's Traffic Control Supervisor told Allen to leave the intersection, Allen re-entered the intersection at the request of Merlino's Superintendent and there is no traffic control or contractual

authority requiring an off-duty officer to direct traffic at the time of the injury?

### **III. RESTATEMENT OF THE CASE**

The worker, Danny Allen, is employed as a police officer for the City of Seattle Police Department (“SPD”). On occasion, he obtains work with other employers during his off-duty hours. [Allen 6:1-11].<sup>1</sup> On July 29, 2008, Allen had independently obtained employment with Gary Merlino Construction. [Allen 8:11-26]. Allen was injured on that date while directing traffic at a Merlino construction site. [Allen 12:6 - 13:7]. At the time of the injury, Allen was wearing his SPD uniform. [Allen 16:18-24].

#### **A. Off-duty officers are only required to direct traffic under certain conditions.**

Merlino’s Traffic Control Supervisor, James Wiley, testified that Merlino contracted with the Seattle Department of Transportation [“SDOT”] for this roadway improvement project. [Wiley 109:4-6]. The contract required Merlino to hire off-duty police officers to direct traffic under certain conditions. [BR - Exhibit 1].<sup>2</sup> SDOT’s Supervisor of the

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<sup>1</sup> This brief refers to the testimony taken at the Board of Industrial Insurance Appeals by the surname of the witness followed by the page number of the hearing transcript, which is located in the Certified Appeal Board Record (BR)(CP Sub 8 and 9).

<sup>2</sup> A copy of Exhibit 1 of the Board Record is attached as an Appendix for the Court’s convenience.

Construction and Special Events Section, Marilyn Vancil, testified that off-duty police officers are required to direct traffic in intersections only when countermanding a traffic signal or the signal is turned off. [Vancil 131:19 - 132:24].<sup>3</sup> Ordinary flaggers may direct traffic in many circumstances. [Wiley 107:12-15]. It is possible to conduct work adjacent to or within an intersection without requiring a flagger or an off-duty police officer. [Vancil 137:25 - 138:19].

Merlino employs flaggers to direct traffic. [Wiley: 107:5-15]. Even when it is not required, Merlino often uses off-duty police officers to direct traffic because it provides a benefit to them. [Wiley 113:25 - 114:9]

There was no authority requiring Merlino to hire off-duty officers from SPD. [BR - Exhibit 1]. Merlino could have hired an off-duty officer from any jurisdiction. [Vancil 136:20 - 137:4]. The Standard Specification identified the officers as off-duty. [BR - Exhibit 1].

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<sup>3</sup> In its brief, the Department states the City's Standard Specifications and ordinances require an off-duty police officer to direct traffic whenever a traffic signal "may be countermanded". [pg. 6]. This is inaccurate and unsupported by its citations to authority. The Standard Specification states "only an off-duty uniformed peace officer shall be used as a flagger" to countermand a traffic signal. [BR Ex. 2]. Further, neither SMC 11.12.100 nor .120 mention off-duty officers, traffic signals or intersections.

**B. Off-duty work is voluntary, not assigned by SPD and is strictly prohibited without prior notice and approval.**

“Off-duty” is a term of art with a specific meaning to law enforcement employers and employees. SPD Assistant Chief Richard Reed testified that “off-duty” jobs are those obtained at the choice of the employee as opposed to those assigned by the police chain of command. [Reed 74:3-14]. There is no requirement that SPD officers seek off-duty assignments. In fact, SPD specifically prohibits officers from working in an off-duty capacity without prior approval. [Reed 74:21 – 75:8] Police officers may engage in off-duty work only if they file a secondary work permit. [Reed 76:3-21]. This permit must be approved by a commanding officer. [Reed 74:8-14; 76:3-7]. SPD takes no role in obtaining off-duty employment for officers. [Reed 75:9-15].

It isn't necessary to be a current City employee to wear an SPD uniform and direct traffic. Some retired officers wear their old uniform and work at traffic control jobs or security jobs to supplement their income. [Reed 81:3-14; 89:22-25].

**C. Allen participated in this off-hours activity without prior notice or approval of the City or the Seattle Police Department.**

In its brief, Merlino implies the City had notice of Allen's off-duty job with Merlino because SPD requires and approves secondary work

permits. However, Merlino neglects to mention that Allen did not obtain such a permit. [Reed 79:24 - 80:12]. A thorough search of SPD records revealed no secondary work permit for Allen for the summer of 2008, whether for traffic control work generally or for Merlino. [Reed 79:24 - 80:12]. This is a violation of SPD policy that can result in department discipline. Without a secondary work permit, SPD has no knowledge of whether an officer is working at an off-duty job, much less the date, time, location or nature of the work. [Reed 78:18-25].

As he drives around during his workday, Assistant Chief Reed notices SPD employees he sees directing traffic. However, he does not make a point of driving around town for that purpose. SPD is not informed of every construction project occurring within the City limits. [Reed 81:15 - 82:5].

**D. Allen obtained this off-duty job through a third party who was acting without the knowledge or approval of the City or the Seattle Police Department.**

Allen obtained this off-duty job through his contact Kathleen Boone-Jakobsen. Ms. Boone-Jakobsen is a parking enforcement officer employed by SPD. [Boone-Jakobsen 34:6-12]. Parking enforcement officers are civilians employed by the police department. Although they wear police uniforms, they are not police officers or peace officers. [Reed 82:7-12].

As a personal business venture, Boone-Jakobsen coordinates off-duty positions for officers who choose to engage in off-duty work. [Boone-Jakobsen 36:5-25]. She admitted she has never filed a secondary work permit for this coordinating business. [Boone-Jakobsen 44:3-5]. She collected a fee from Merlino for her coordinating efforts. [Boone-Jakobsen 37:16-26]. Occasionally, she assigns herself a position directing traffic. [Boone-Jakobsen 39:1-5]. Although she is not a police officer, she has personally directed traffic in intersections and countermanded traffic signals for Merlino. [Boone-Jakobsen: 47:13-14; 49:12-16].

In its brief, Merlino states that SPD and the police officers' union, the Seattle Police Guild ("Guild"), set the rate of pay for officers working at off-duty jobs. That may be true for officers who obtain off-duty work through the Guild. The Guild is a separate entity from the SPD. [Reed 82:23 - 83:2]. However, Allen obtained his assignment through Kathleen Boone-Jakobsen. She may look to Guild guidelines when setting her rates of pay. However, she alone determines the officers' rates of pay and has even negotiated with contractors for higher rates of pay than the minimum established by the Guild. [Boone-Jakobsen 44:22 - 45:3].

Boone-Jakobsen has never been directed by SPD to engage in this coordinating activity. [Boone-Jakobsen 36:23 - 37:6]. She is not acting on behalf of SPD or the Guild. [Boone-Jakobsen 42:11-14]. Prior to this

litigation, SPD had no knowledge that Boone-Jakobsen was engaged in this business. [Reed 80:13-18]. To engage in this type of off-duty work, she should have filed a secondary work permit. [Reed 80:19-24].

**E. At the time of his injury, Allen was acting at the sole direction of Merlino.**

Prior to his injury, Allen had no knowledge that Merlino had contracted with the SDOT for this project. [Allen 16:25 - 17:5]. Allen was paid by Merlino for this off-duty job. [Allen 15:22-26]. Throughout the day, Merlino supervisors assigned him tasks and determined his work location. [Allen 11:15 - 12:5]. Merlino supervisors dictated when he could leave the job site and filled out his timecard. [Allen 9:24 - 10:14; 16:13-17].

In its brief, Merlino states they provide the City with a copy of off-duty officers' timecards the next working day. However, the record contains no evidence that such timecards were submitted to the City. Merlino's Traffic Control Supervisor, James Wiley, testified that he did not personally submit timecards to the City and had no knowledge as to whether other Merlino employees did either. [Wiley 117:22-118:3].

At the time of the accident, the traffic signal was fully functional and Allen was not countermanding it. [Allen 13:13-18]. There were no workers in the intersection, traffic was able to move without assistance, and

there were no construction vehicles that needed assistance with ingress or egress. [Allen 14:9-15:21].

James Wiley admitted there was no reason for an off-duty officer to be in the intersection at the time Allen was injured. [Wiley 111:20-23]. The work was completed and the intersection was in the same condition it would be left when going home for the night. [Wiley 111:7-11]. Wiley told Allen to leave the intersection and take a break. [Wiley 110:25 - 111:6].

After Wiley told Allen to leave, a Merlino Superintendent, Dan Trudeau, asked Allen to go back into the intersection. [Allen 13:19 - 14:8]. At the time, Allen questioned the need for someone to direct traffic under these circumstances. The work near the intersection was completed. The signal was fully functioning. Traffic was flowing. There were no ingress or egress issues for construction vehicles. There were no patches or plates in the ground. There were no obstacles that vehicles needed help negotiating. No trucks needed assistance around turns. [Allen 14:9 - 15:21]. Trudeau responded that he wanted someone in the intersection to “make sure it didn’t get jammed up.” [Allen 14:4-8]. Despite his misgivings, Allen went back into the intersection at Trudeau’s request. [Allen 12:7-19]. He was subsequently injured while directing traffic in the intersection.

When James Wiley arrived at the scene immediately after the accident, he saw no reason why a police officer needed to be directing

traffic. [Wiley 123:21-24]. Wiley was Merlino's on-site traffic control expert and he was neither informed nor consulted prior to Allen re-entering the intersection. [Wiley 122:10 - 123:2, 125:15-17].

Allen testified that, at the time of his injury, Allen considered his employer to be Merlino Construction. [Allen 17:6-14].<sup>4</sup>

#### IV. STANDARD OF REVIEW

Judicial appeal of a workers' compensation decision by the Board is de novo, but is based solely on the evidence presented to the Board. *Romo v. DLI*, 92 Wn. App. 348, 962 P.2d 844 (1998). On review, the superior court may substitute its own findings and decision for those of the Board only if it finds from a fair preponderance of credible evidence that the Board's findings and decision are incorrect. *Ruse v. DLI*, 138 Wn.2d 1, 977 P.2d 570 (1999) (emphasis added). Appellate review of factual issues in worker's compensation cases is limited to determining whether the findings of fact are supported by substantial evidence. *Brown v. Board of Indus. Ins. Appeals, et al.*, 11 Wn. App. 790, 525 P.2d 274 (1974).

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<sup>4</sup> In its brief, the Department states Allen "identified both the City and Merlino as his employers on his workers' compensation claim". [pg. 4, 28]. The Department's citations to the record do not support this statement. BR 32 is a copy of the Board's jurisdictional history, not Allen's application for benefits. This document was not authored by Allen. The Board's Finding of Fact 1 ("FF1") states Allen filed an Application for Benefits for injury during the course of employment with the City or Merlino. This document was not authored by Allen either. His Application for Benefits is not part of the Board Record.

The Board's findings are presumed "prima facie correct and burden of proof shall be upon the party attacking the same". RCW 51.52.115. A party challenging the Board's decision must show by a preponderance of the evidence that the Board's findings are incorrect. *Ruse, supra*; *Cochran Elec. Co. v. Mahoney*, 129 Wn. App. 687, 121 P.3d 747, review denied, 157 Wn.2d 1010, 139 P.3d 349 (2005). This burden requires the challenging party to "produce sufficient substantial facts, as distinguished from a mere scintilla of evidence, to make a case for the trier of fact." *Sayler v. Department of Labor & Industries.*, 69 Wn.2d 893, 896, 421 P.2d 362 (1966).

If the trier of fact finds the evidence to be equally balanced, the findings of the Board must stand. *Allison v. DLI*, 66 Wn.2d 263, 268, 401 P.2d 982 (1965). In other words, if the trier of facts finds itself unable to make a determination because of equally persuasive evidence, the *prima facie* presumption of the Board's correctness of findings will control. *Groff v. DLI*, 65 Wn.2d 35, 395 P.2d 633 (1964).

The Court of Appeals' review is limited to examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings. *Ruse, supra*, at 5-6. Its function is to review for sufficient or substantial evidence, taking the

record in the light most favorable to the party who prevailed in superior court. *Rogers v. DLI*, 151 Wn. App. 174, 180, 210 P.3d 155 (2009). The Court is not to reweigh or rebalance the competing testimony and inferences, or to apply anew the burden of persuasion, for doing so would abridge the right to trial by jury. *Rogers, supra*, at 180-81.

## V. ARGUMENT

### A. Merlino improperly raises multiple issues for the first time on appeal.

For the first time in this litigation, Merlino raises the issues of whether: (1) Allen may be an independent contractor; (2) Allen had qualified immunity while directing traffic; (3) the City can delegate police powers to Merlino; (4) any delegation of police powers to Merlino is unconstitutional; and (5) Allen was outside the course and scope of his employment with Merlino. None of these issues were reviewed by the Board or the Superior Court. [BR 13-18, CP 43-44].

The appellate court may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a). Issues not raised in appeals to the Board are deemed waived. RCW 51.52.104. A manifest error affecting a constitutional right may be raised for the first time in the appellate court. RAP 2.5(a)(3). However, this exception is construed narrowly. *State v. WWJ Corp.*, 138 Wn.2d 595, 980 P.2d 1257 (1999).

The error must be manifest and truly of constitutional magnitude. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (quoting *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988)). Constitutional issues not considered at trial will not be considered on appeal unless the jurisdiction of the court is at issue. *Northlake Marine Works, Inc. v. City of Seattle*, 70 Wn. App. 491, 857 P.2d 283 (1993); *Bernstein v. State*, 53 Wn. App. 456, 767 P.2d 958, review denied, 112 Wn.2d 1024 (1989).

RAP 2.5(a)(3) was not designed to allow parties “a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’ ” *Scott, supra*, at 687. Further, if the record from the trial court is insufficient to determine the merits of the constitutional claim, the claimed error is not manifest and review is not warranted. *McFarland*, 127 Wn.2d at 333, 899 P.2d 1251 (citing *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)).

An alleged error is manifest only if it results in a concrete detriment to the claimant's constitutional rights, *and* the claimed error rests upon a plausible argument that is supported by the record. *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992) . To determine whether a newly claimed constitutional error is supported by a plausible argument, the court must preview the merits of the claimed constitutional error to see if the argument has a likelihood of succeeding. *WWJ Corp., supra* at 603.

Appellate courts will not waste their judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits. *Id.*

Merlino's improperly raised arguments should not be considered by this Court. Merlino has not asserted a constitutional right that has been infringed.

**B. This Court may not consider evidence that is not part of the Board Record.**

As a matter of statutory law, the superior court "shall not receive evidence or testimony other than, or in addition to, that offered before the board or included in the record filed by the board in the superior court". RCW 51.52.115.

In support of its brief, the Department submitted an "Appendix B", described as the "Cited portion of Traffic Control Manual for In-Street Work." This document was never admitted as part of the Board record.

Further, although SDOT Supervisor Marilyn Vancil testified regarding some aspects of the Traffic Control Manual, she never identified specific sections or quoted from provisions. Appendix B contains no verifying markers as to title, date or author. Appendix B mentions neither off-duty police officers, nor traffic signals or intersections. Finally, Vancil testified the Traffic Control Manual contains no authority dictating which

situations require a uniformed police officer to direct traffic. [Vancil 132:15-24].

The addition of this Appendix as relevant authority is misleading and inaccurate. It violates the evidentiary rules for authentication and is contrary to the statutory requirements governing the contents of the record on appeal. As such, this Court may not consider evidence contained in or arguments relying upon the Department's "Appendix B".

**C. At the time of his injury, there was no Employer/Employee Relationship between Allen and the City of Seattle.**

For an employee to be acting in the course of employment, the employee must be acting at his employer's direction, or in furtherance of his employer's business. *DLI v. Johnson*, 84 Wn. App. 275, 928 P.2d 1138 (1996); *Lunz v. DLI*, 50 Wn.2d 273, 310 P.2d 880 (1957). An employment relationship exists only when (1) the employer has the right to control the servant's physical conduct in the performance of his duties, and (2) there is consent by the employee to this relationship. *Bennerstrom v. DLI*, 120 Wn. App. 853, 86 P.3d 826 (2004); *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wn.2d 550, 588 P.2d 1174 (1979) (emphasis added).

To determine whether there is control on the part of an employer, factors that may be examined are: (1) who controls the work to be done;

(2) who determined the qualifications; (3) who sets pay and hours of work and issues paychecks; (4) who executes day-to-day supervision responsibilities, (5) who provides work equipment; (6) who directs what work is to be done; and (7) who conducts safety training. *Bennerstrom, supra* at 863.

The right of control is not the single determinative factor in establishing the existence of an employer-employee relationship. A mutual agreement must exist between the employee and employer to establish a relationship. *Novenson, supra*, at 553. Unlike the rules of vicarious liability at common law, which focus on whether the “master” accepted and controlled the activities of the “servant”, under workers’ compensation law, the focus is upon the employee or “servant”. *Id.* An employee’s subjective belief as to the existence of an employer-employee relationship is material to the issue of consent. *Rideau v. Cort Furniture Rental*, 110 Wn. App. 301, 39 P.3d 1006 (2002); *Fisher v. City of Seattle*, 62 Wn.2d 800, 384 P.2d 852 (1963); *Jackson v. Harvey*, 72 Wn. App. 507, 864 P.2d 975 (1994).

At the time of his injury, Allen was not on duty as a Seattle Police Officer, was not being paid by the City of Seattle and was not required by his duties as a Seattle Police Officer to obtain this off-duty job with Merlino. He violated SPD policies and procedures by failing to file a second work permit.

Allen had no knowledge of whom Merlino had contracted with for this project and no knowledge of specific contract provisions. Merlino paid Allen for this job and set his work hours. Merlino employees assigned him tasks throughout the workday, supervised his activities, and dictated when he could leave the job site. Merlino supervisors also filled out timecards for the off-duty officers.

Allen obtained this off-duty job through Kathleen Boone-Jakobsen's private coordinating business. Boone-Jakobsen was not acting on behalf of SPD, the Guild, or the City of Seattle. [Boone-Jakobsen 36:23-37:6, 42:11-14]. She set Allen's wage rate. [Boone-Jakobsen 44:22-45:3]. Prior to this litigation, SPD had no knowledge that Boone-Jakobsen engaged in this coordinating business. She also violated SPD policies and procedures by failing to file a secondary work permit for this private business venture. Boone-Jakobsen assigned Allen to this off-duty position without the knowledge or approval of SPD.

A mutual agreement must exist between the employee and employer to establish a relationship. *Novenson, supra*, at 553. In this case, no mutual agreement existed. Not only did Allen consider his employer to be Merlino, he never filed the required permit that would notify SPD that he would be engaging in this off-duty assignment.

At the time of his injury, Allen was in the intersection at the specific request of Merlino's superintendent, Dan Trudeau. The work was completed and there was no reason for a police officer to be directing traffic at that time. Allen was not countermanding the traffic signal and the signal was fully functioning. In essence, Allen was acting as a flagger at the time of his injury.

Merlino and the Department emphasize that Allen was wearing his SPD uniform when he was injured. The uniform does not dictate whether Allen is acting at the direction of his law enforcement employer. Further, the officer's police authority is not conferred by his uniform. Many officers, such as detectives or undercover officers, don't wear uniforms. Some retired officers wear their old uniform and contract with other employers for security or traffic control jobs. Further, many people, such as security guards or parking enforcement officers (like Boone-Jakobsen), wear uniforms but are not police officers.

As such, Allen was not acting in the course of his employment with the City of Seattle. Both the Board and the Superior Court had substantial evidence to support the finding that at the time of his injury, Allen was an employee of Merlino.

**D. At the time of his injury, Allen was within the course of his employment with Merlino Construction.**

To determine whether an employee is acting in the course of his employment, one looks to whether the employee was engaged in the performance of duties required of him by his contract of employment or by specific direction of his employer or whether he was engaged in the furtherance of the employer's interest. *Cochran Elec. Co. v. Mahoney*, 129 Wn. App. 687, 121 P.3d 747 (2005); *Lunz v. DLI*, 50 Wn.2d 273, 310 P.2d 880 (1957).

It was only at the insistence of Merlino's Superintendent, Dan Trudeau, that Allen re-entered the intersection. [Allen 14:4-8]. The reasoning for Trudeau's request (to keep traffic from "getting jammed up") was not supported by any traffic control authority in these circumstances. [Vancil 132:15 - 133:6].

Merlino's Traffic Supervisor testified that because the signal was functioning and not being countermanded, there was no reason for a police officer to direct traffic at the time of the injury. [Wiley 111:20-23]. This request was purely at the whim and preference of Merlino's Superintendent, who was neither the Traffic Control Supervisor nor a Traffic Engineer. [Wiley 125:10-24]. James Wiley was Merlino's on-site

traffic control expert and he was neither informed nor consulted prior to Allen re-entering the intersection. [Wiley 122:25 - 123:2, 125:15-17].

Any Merlino flagger could have responded to Trudeau's request. However, he asked Allen to direct traffic because it provided a benefit to Merlino. James Wiley testified that even when a police officer was not required, it provided a benefit to Merlino to have police officers in intersections rather than flaggers. [Wiley 113:21 - 114:9].

At the time of injury, Allen was acting at the direction of Merlino and furthering Merlino's interests alone. As such, Allen was acting in the course of his employment with Merlino.

**E. Off-duty officers cannot be acting in the course of their law enforcement employment unless they are acting in a law enforcement capacity.**

Both Merlino and the Department cite to authority from other jurisdictions regarding off-duty officers. All of these cases can be distinguished due to significant factual disparities from the matter on appeal.

In most of the cases, the law enforcement employer had knowledge or notice of the officers' off-duty activities. *See City of Hialeah v. Weber*, 491 So.2d 1204, 1205, (Fla. Dist. Ct. App. 1986) (off-duty officer remained on call for his law enforcement employer and was frequently called away to attend to other police matters); *City of Monessen v.*

*Workmen's Comp. Appeal Bd.*, 387 A.2d 1000 (Pa. Commw. Ct. 1978) (over half the City's police force participated in the assignment, the off-duty officers were provided by the patrolmen's fund, the officers' assignments were posted at the police station and the off-duty officers were supervised by other officers on-site); *Rainbow Gardens v. Industrial Commission, et. al.*, 202 N.W.2d 329 (Wis. 1925) (the sheriff suggested an officer for the assignment and accompanied the requesting employer to the officer's residence to inquire about his availability).

In another case, there was a question of fact as to whether the officer was injured while directing traffic or in transit to the assignment. *Blackwell v. Harris County*, 909 S.W.2d 135, 138 (Tex. Ct. App. 1995).<sup>5</sup> The *Blackwell* court adopted a standard set forth by the Supreme Court of Virginia. That court used a test based on the inquiry of what capacity was the officer acting at the time he committed the acts for which the complaint is made. *Glenmar Cinestate Inc. v. Farrell*, 292 S.E.2d 366, 369-70 (Va. 1982) (an off-duty officer directing traffic out of a drive-in

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<sup>5</sup> The *Blackwell* case is silent as to the law enforcement employer's knowledge of the officer's off-duty activities. In Texas, workers' comp coverage is not available for injuries occurring while travelling to and from work. *Blackwell*, 909 S.W.2d at 137.

theater onto a state highway was acting as an independent contractor, not as an employee of his law enforcement employer)<sup>6</sup>.

The *Blackwell* court provided the following example:

If an officer is hired for the deterrent effect associated with his “visibility,” and while walking around the premises he trips and fall, the activity leading to the injury is probably not within the course and scope of his employment as a law enforcement officer. [*Citations omitted*]. However, if the officer observes criminal activity, his status changes from one of a private ‘ornament’ to a public law enforcement officer. If the officer is then injured while attempting to enforce the law or apprehend a criminal suspect, he is acting within the course and scope of his employment as a law enforcement officer.

*Blackwell*, 909 S.W.2d at 139-40.

At the time of Allen’s injury, there was no reason for a police officer to be directing traffic. Any Merlino flagger could have served that purpose because the traffic signal was functioning and not being countermanded. Allen was not investigating criminal activity, questioning a suspect, making an arrest or issuing a citation. It furthered Merlino’s interest to use Allen for his “visibility” or as a “private ornament.” As

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<sup>6</sup> Other cases cited by the Department are equally inapplicable. They are not workers’ compensation cases and the analysis for course and scope of employment is entirely different. Even if the analysis was on point, the off-duty officers were found to be acting in their law enforcement capacity because they were investigating criminal activity and making arrests. See *State v. Brown*, 36 Wn. App. 166, 672 P.2d 1268 (1983); *State v. Graham*, 130 Wn.2d 711, 927 P.2d 227 (1996).

such, Allen was not acting in the course of his law enforcement employment.

**F. The issue of Qualified Immunity is not properly before this Court and would not prevent Allen from acting as Merlino's employee at the time of his injury.**

Both Merlino and the Department argue that Allen would never knowingly or rationally consent to employment with Merlino because he would be waiving the privilege of qualified immunity. Neither the Board nor the Superior Court considered a qualified immunity issue. [BR 13-18, CP 43-44]. The appellate court may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a). Issues not raised on appeal are deemed waived. RCW 51.52.104.

Further, there was no testimony regarding Allen's understanding of his qualified immunity or even whether he knew such a privilege existed. The argument that Allen's consent was irrational based on a possible waiver of qualified immunity is pure speculation. Also, the argument inaccurately presupposes that qualified immunity applies only if an officer is acting within the course and scope of his law enforcement employment. This is inaccurate.

42 U.S.C. § 1983 creates a civil cause of action for a violation of a person's constitutionally protected rights effected under color of state law. There are two essential elements to a § 1983 claim: "(1) whether the

conduct complained of was committed by a person under color of state law; and (2) whether the conduct deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States.” *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds*; *Daniels v. Williams*, 474 U.S. 327 (1986).

“[T]here is no ‘rigid formula’ for determining whether a state or local law official is acting under color of state law.” *Anderson v. Warner*, 451 F.3d 1063, 1068 (9th Cir. 2006). The acts of a public official are not automatically considered to be under color of law merely because he or she committed the act while on duty and in uniform. *Van Ort v. Estate of Michael Stanewich*, 92 F.3d 831, 838 (9th Cir. 1996) (citations omitted).

Whether a police officer is entitled to qualified immunity from liability under § 1983 for alleged constitutional violations depends on whether a reasonable officer could have believed the officer's actions were lawful in light of clearly established law and the information the officer possessed. *Dang v. Ehredt*, 95 Wn. App. 670, 977 P.2d 29 (1999); *Staats v. Brown*, 139 Wn.2d 757, 991 P.2d 615 (2000).

The standard is one of objective legal reasonableness; *e.g.*, whether the officer acted reasonably under settled law under the circumstances, not whether another reasonable, or more reasonable, interpretation of events can be constructed after the fact. *Dang, supra*, at 678-79 (law

enforcement officials who reasonably but mistakenly conclude that probable cause is present are entitled to qualified immunity). *See also, Staats, supra*, at 626 (qualified immunity to a claim of unconstitutional search in violation of the Fourth Amendment is available if the unconstitutionality of the search under the alleged circumstances was not clearly established at the time). Therefore, an officer's qualified immunity is not dependent on whether he is acting in the course and scope of his law enforcement employment.

Allen does not have to be acting as an SPD employee to enjoy the privilege of qualified immunity. As such, by consenting to Merlino as his employer, Allen does not waive his qualified immunity privilege. Therefore, an argument that such consent would be unreasonable or irrational on that basis is incorrect.

**G. If the Loaned Servant Doctrine applies, Allen was an employee of Merlino Construction.**

When an employer lends an employee to another party, that party becomes liable for workers' compensation if: (a) the employee has made a contract of hire, express or implied, with the second employer; (b) the work being done is essentially that of the second employer; and (c) the second employer has the right to control the details of the work. 3 Arthur

Larson & Lex K. Larson, *Larson's Workers' Compensation Law*, § 67.01[1] (2010) (*Larson's*).

First, the application of this doctrine presupposes the City “lent” its employee to Merlino. This concept also presupposes the lender had knowledge of a relationship between its employee and another employer. The contract between Merlino and SDOT did not specify that Merlino hire off-duty officers from the City of Seattle. Further, given that Allen failed to notify SPD that he was engaging in this work, it is unreasonable to conclude the City “lent” its employee to Merlino.

However, even if the doctrine applies, Allen would still be considered Merlino’s employee. Allen contracted with Merlino Construction for his off-duty assignment at the construction site. He failed to file the required permit for off-duty work and SPD had no knowledge of this activity.

At the time of his injury, Allen’s task was primarily for the benefit of Merlino. He was in the intersection at the specific request of Merlino’s superintendent. There was no reason for an off-duty police officer to be directing traffic in the intersection. The intersection was in the same condition it would be left when going home for the night. Merlino’s Traffic Control Supervisor had previously told Allen to leave the intersection and take a break.

Finally, the testimony is undisputed that Merlino paid Allen's wages<sup>7</sup>, set his hours, supervised his activities, dictated his tasks and location, filled out his timecard and determined when he could leave the job site. As such, the facts of this case dictate that Merlino was Allen's employer at the time of his injury.

**H. There was no improper delegation of police power.**

As detailed above, this issue is not properly before this court. However, as the record reflects, Allen was acting solely at the direction of Merlino at the time of the injury. He returned to the intersection at the specific request of Merlino's superintendent. He was not countermanding the traffic signal and the signal was fully functioning. He was not acting in response to some authority requiring the use of a police officer. He was not acting with the notice or approval of the City of Seattle. Merlino's contract specified the officers were off-duty. The provision could not be more specific.

In essence, Allen was acting as a flagger, not a police officer, when his injury occurred. Allen was not exercising a non-delegable police power at the time of the accident.

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<sup>7</sup> In its brief, the Department asserts that because Merlino was performing a street improvement project for the City, the payment for the required use of a uniformed police officer is "presumably incorporated in the City's payment to Merlino." This is pure speculation and there is no evidence in the Board record to support this assumption.

**I. If Allen was an independent contractor at the time of his injury, the essence of the contract was his personal labor.**

Merlino argues that Allen is an independent contractor under RCW 51.08.180. Further, Merlino argues that the essence of this independent contract is not his personal labor, but his skills as a uniformed police officer. As detailed previously, this issue is not properly before this court.

Notwithstanding the above, the essence of any independent contract would be Allen's personal labor and he would be considered an employee of Merlino. At the time of the injury, the traffic signal was fully functioning and did not need to be countermanded. As the record shows, there was no requirement for a uniformed police officer to direct traffic in that circumstance. Any flagger would have sufficed. Therefore, Allen was acting as a flagger, not as a police officer, when he was injured.

**VI. CONCLUSION**

To interpret the law as Merlino and the Department request would make law enforcement employers the insurer for all officers' activities, regardless of notice or knowledge, whether the officer was on-duty, off-duty or working for another employer. This result is absurd and contrary to the spirit and purpose behind RCW Title 51's requirement of an employee to be acting in the course of their employment.

Substantial evidence supports the findings of the Board and the Superior Court. Neither Merlino nor the Department has presented a preponderance of credible evidence to indicate both those courts were in error. The City respectfully requests this Court affirm the finding of the Superior Court and the Board of Industrial Insurance Appeals that at the time of his injury, Allen was an employee of Merlino Construction, not the City of Seattle.

DATED this 26<sup>th</sup> day of May, 2011.

PETER S. HOLMES  
Seattle City Attorney

By: Anne E. Vold  
ANNE VOLD, WSBA #26484  
Assistant City Attorney

Attorneys for City of Seattle

**DECLARATION OF SERVICE OF BRIEF OF RESPONDENT**

I hereby certify under penalty of perjury under the laws of the State of Washington that I caused the BRIEF OF RESPONDENT to be served on the following:

ORIGINAL & COPY TO: Richard D. Johnson  
Court Administrator/Clerk  
Court of Appeals Division I  
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Seattle, WA 98101-1176  
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SIGNED this 27<sup>th</sup> day of May, 2011.



Kim Baasch, Paralegal to Anne E. Vold

**APPENDIX**  
**BR, Ex. 1, City of Seattle Std. Plans for Mun.**  
**Const., 2008 Ed., p. 1-94**

**CITY OF SEATTLE**  
 2008 edition  
**STANDARD PLANS**  
**FOR**  
**MUNICIPAL CONSTRUCTION**

Prepared by  
 Seattle Public Utilities  
 Chuck Clarke, Director

**Reviewed and Approved by**

*Linda Deboldt*  
 Linda Deboldt

Seattle Public Utilities

12/6/07  
 Date

*Richard T. Kent, Jr.*  
 Richard T. Kent, Jr.

City Light

12/6/07  
 Date

*William Martin*  
 William Martin

Seattle Transportation

12/11/07  
 Date

*Rebecca Rufin*  
 Rebecca Rufin

Parks and Recreation

12/11/07  
 Date

*Dove Alberg*  
 Dove Alberg

Fleets & Facilities

12/7/07  
 Date

*Jill Cary*  
 Jill Cary

Seattle Center

12/7/07  
 Date

**Adopted by**

*Linneth Riley-Hall*

Linneth Riley-Hall  
 Department of Executive Administration

12/13/07  
 Date

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Board of  
 Industrial Insurance Appeals  
 In re: *Danny Allen*  
 Docket No. 09/11189  
 Exhibit No. 1  
 ADM 11-17-09  REJ  
 Date

The Pioneer Square Area is that area within the boundaries of Alaskan Way on the west, 2nd Avenue and 2nd Avenue South on the east, Columbia Street on the north and King Street on the south.

3. **Parking:** Where parking restricts traffic flow or is a hazard to through traffic or to the construction work, parking may be restricted either entirely or during the time when it creates a hazard. Parking restrictions may be requested by the Contractor and upon approval of the Engineer be established within construction and maintenance areas. In areas where parking meters are present, the Contractor shall apply to SDOT for installation of meter covers restricting such parking. In areas with parking pay stations and sidewalk containing **D-22 signage** ("Pay R", "Pay L", "Pay H", and "Pay RL" signs and posts), and "numbered" base plates, the Contractor shall apply to SDOT for "no parking markers" restricting such parking. Where no meters, parking pay stations, and D-22 signage and "numbered" base plates are present, the Contractor shall contact SDOT so that the Contractor may install "NO PARKING" (T-39) easel signs. Signs must be inspected by a parking enforcement officer or uniformed peace officer 24 hours prior to enforcement. See Section 1-07.28, item 1 for notification requirements.

"NO PARKING" signs shall conform in message, dimension and color as indicated in Part V of the "Seattle Traffic Control Manual". Spacing of signs shall be in accordance with Project Site conditions.

"NO PARKING" (T-39) easel signs should be installed at an approximate interval of 50 feet to 75 feet, with a minimum of four units, per each full block. For partial block parking prohibition, R-101's or T-39's should be installed at approximately 50-foot intervals with R-160 signs at the terminus as shown in Figure V-1 of the "Seattle Traffic Control Manual".

The employees of the Contractor shall not park their private vehicles on the street, at the Project Site, or in commercial areas where general parking has been prohibited for construction or safety purposes.

### 1-10.3 FLAGGING, SIGNS, AND OTHER TRAFFIC CONTROL DEVICES

#### 1-10.3(1) FLAGGING

##### 1-10.3(1)A GENERAL

Flaggers shall have a current certification (flagging card) from the State Department of Labor and Industries (WAC 296-155-305), except where the flagging job requires a uniformed off-duty peace officer. The Contractor shall furnish all personnel for flagging and for the setup and removal of all temporary traffic control devices and construction signs necessary to control traffic during construction operations. Prior to performing any traffic control Work on the Project Site, these personnel should be trained with the video, "Safety in the Work Zone" produced jointly by WSDOT and Laborers' International Union of North America. The video is available from WSDOT's Engineering Publications Office, Transportation Building.

Pursuant to WAC 296-155-305, flaggers and spotters shall possess a current flagging card issued by the State of Washington Department of Labor and Industries. Current flagging cards from Oregon and Idaho are also acceptable. The flagging card shall be immediately available and shown to the Engineer upon request.

Workers engaged in flagging or traffic control shall wear reflective vests and hard hats. During hours of darkness, white coveralls or white or yellow rain gear shall also be worn. The vests and other apparel shall be in conformance with Section 1-10.3(1)C. During hours of darkness flagger stations shall be illuminated to ensure that flaggers can easily be seen without causing glare to the traveling public. The Contractor shall furnish the MUTCD standard Stop/Slow paddles (18 inches wide, letters 6 inches high, and reflectorized) for the flagging operations.

##### 1-10.3(1)B TRAFFIC CONTROL LABOR (PEACE OFFICERS)

Only an off-duty uniformed peace officer shall be used as a flagger to:

1. Countermand a traffic signal indication at a signalized intersection, and
2. Direct vehicle and pedestrian traffic when a traffic signal indication is turned off or inoperative.

Officers are also required for new traffic signal Work, see Section 8-31.3(1)A. The off-duty uniformed peace officer shall be provided by the Contractor.

The Contractor shall **submit** to the Engineer on the next Working Day, a copy of the daily time card for the off-duty uniformed peace officer showing the hours actually worked countermanding a signal at a signalized intersection and the hours actually worked directing vehicular and pedestrian traffic at a signalized intersection when the traffic signal is inoperative or turned off.

##### 1-10.3(1)C HIGH VISIBILITY APPAREL AND EQUIPMENT

The Contractor shall furnish for the use of flaggers, reflective vests and hard hats for the flagging and control of traffic. This equipment shall be used by the flaggers while actually flagging traffic. The Contractor shall also provide any such equipment used that is necessary or desirable to protect personnel engaged in other activities.

The Contractor shall require all personnel at the Work site under their control (including Subcontractors and lower tier Subcontractors) to comply with the following:

1. To wear reflective vests, except that during daylight hours, orange clothing equivalent to "Ten Mile Cloth" or hunter orange may be worn in lieu of reflective vests,
2. To wear white coveralls at night,
3. Whenever rain gear is worn during hours of darkness, it shall be white or yellow, and
4. The reflective vests shall always be the outermost garment.

Exceptions to the above requirements are: