

NO. 66842-1-I

DIVISION ONE COURT OF APPEALS
OF THE STATE OF WASHINGTON

PILCHUCK CONTRACTORS INC.,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LABOR
& INDUSTRIES,

Respondent.

Superior Court of Snohomish County Cause No. 09-2-09980-2
BIIA Docket No. 08 W1253, C&N No. 312325400

APPELLANT'S RESPONSE BRIEF

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I. ARGUMENT

- A. Where substantial evidence supports employees were not flagging, the Board of Industrial Insurance Appeals and Superior Court erred by finding the Department met the prima facie burden to establish a violation of WAC 296-155-305(3)(a).**

There is no dispute that a uniformed officer was onsite to flag but was called away due to an emergency. The Hsiao Brothers were only providing positive guidance to passing motorists by setting up traffic control devices and occasionally reminding confused motorists to abide by the traffic signal and traffic signs. The Employer wanted to ensure the safety of its employees and motorists by providing additional safety measures. To assert the Employer's efforts are wrong is against the public policy of ensuring the safety of drivers and workers.

The Department alleges the Employer violated WAC 296-155-305(3)(a) because the Hsiao Brothers, were flagging traffic without stop/slow paddles. To violate this regulation, an Employer's worker must first be found to be flagging.

Washington State Trooper Ron Somerville clearly testified that the functioning traffic light controlled traffic flow and that even his own primary role was *not* to direct the flow of traffic. Rather, his role was to make sure traffic flowed smoothly with the revised traffic pattern.

The Department does not dispute that the Employer clearly intended for the Hsiao Brothers to act as spotters. (Kelderman Tr. 5/19/09, p. 16, lines 18-25). Employees who are acting as spotters cannot be flaggers at the same time because they cannot carry a stop/slow paddle while repositioning traffic cones. (Kelderman Tr. 5/19/09, p. 22, lines 16-19). Although the Department belittles the importance of the traffic signal, it is relevant to the issue of control and demonstrates it was not necessary for Mr. Mingkang to control traffic because it was controlled by the traffic signal. (Mingkang Hsiao Tr. 5/15/09, p. 81, lines 18-22 and p. 89, lines 5-7).

Mr. Mingwah Hsiao also testified that he was not controlling traffic and did not need a stop/slow paddle in performing his duties. (Mingwah Hsiao Tr. 5/15/09, p. 106, lines 16-19). Mr. Mingwah Hsiao was performing the same duties as Mr. Mingkang. Simply, the Hsiao Brothers did not need stop/slow paddles in performing their duties because their duties did not include controlling traffic through the work zone.

The Department relies on the testimony of Mr. Beraki to establish the Employer's "flagging" actions. However, Mr. Beraki never having been a professional flagger and having a limited understanding of flagging, incorrectly assumed the actions of the Hsiao brothers was characterized as flagging. (Beraki Tr. 5/15/09, p. 52, lines 1-6). The belief that an individual signaling motorists where to proceed is controlling the direction of traffic flow is conclusory.

The Employer assigned the Hsiao Brothers to help support the temporary traffic plan that was in use. Even with

adequate traffic controls being used, motorists may still be confused where to proceed. (Richards Tr. 5/19/09, p. 74, lines 12-16). The record reflects Trooper Somerville has flagged traffic at many other intersections, commented in his deposition that motorists are “creatures of habit” and when they are placed in an unfamiliar situation they tend to act as they normally do rather than follow instructions. Mr. Ron Martinez, Pilchuck’s safety director who has much experience as a flagger, and is also a traffic control flagger instructor, testified that, “In our atmosphere of working on the construction industry, over the years, motorists, no matter what you put up, even the guide signs or the markers . . . are inattentive to what they’re doing.” (Martinez Tr. 5/19/09, p. 56, lines 11-15). The Employer well aware of the dangers in traffic control, instructed both the Trooper and the Hsiao Brothers to provide additional safety measures for positive guidance.

Where the record clearly reflects the Hsiao brothers only provided guidance for the motorists but did not direct traffic

flow, there is a lack of substantial evidence to support Violation 1-1 and the citation must be vacated.

B. Where substantial evidence supports employees worked in a restricted work zone, the Board of Industrial Insurance Appeals and the Superior Court erred in finding a violation of WAC 296-155-305(9)(b).

Contrary to the Department's assertion, the Employer provided a safe job site for its employees by positioning traffic cones around the work area in the intersection. The Hsiao Brothers were performing their duties in the work area within the traffic cones and only stepped outside this area when oncoming traffic was stopped. Under the regulation, stepping outside the traffic cones into the restricted area is simply not a violation unless there is oncoming traffic in the lane in which a person is standing.

There is no dispute that Trooper Somerville was onsite the day of incident. Trooper Somerville clearly testified that he never observed either of the Hsiao brothers do anything he considered unsafe while at this intersection. That is, they never

stepped into oncoming traffic.

Where the record reflects employees at issue did not engaging in flagging activities in a restricted area of the work zone or where vehicles were still in motion, the lack of substantial evidence indicates Violation 1-2 must be vacated.

II. CONCLUSION

The affirmation of the violations as they stand not only punishes Pilchuck Contractors but takes away any incentive for future employers to initiate and implement safety mechanisms.

Where the traffic control pattern was required to be altered, the Employer took the best approach possible to ensure healthful working conditions. For all of the reasons set forth above, the Employer respectfully urges the Court to direct the Board to reverse the Findings and Conclusions of the Board and to vacate the violations at issue.

DATED this 19th day of September, 2011.

AMS LAW P.C.

A handwritten signature in cursive script that reads "Aaron K. Owada". The signature is written in black ink and is positioned above a horizontal line.

Aaron K. Owada, WSBA No. 13869
Attorney for Appellant

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Appellant,

**CERTIFICATE OF
SERVICE**

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WASHINGTON STATE
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Respondent.

I, Lisa Ockerman, hereby certify under penalty of perjury under the laws of the State of Washington that on September 19, 2011, I filed with the Court of Appeals Division One, via U.S. MAIL the original of the following document:

1. Appellant's Response Brief

and that I further served a copy via U.S. Mail upon:

Sarah E. Kortokrax, AAG
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SIGNED in Lacey, Washington on September 19, 2011


Lisa Ockerman

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