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NO. 52837-1

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STAFFMARK INVESTMENT, LLC,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF
THE STATE OF WASHINGTON,

Respondent.

OPENING BRIEF OF APPELLANT STAFFMARK INVESTMENT, LLC

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I. INTRODUCTION

Plaintiff, Staffmark Investment, LLC (Staffmark), is a staffing agency that provided temporary workers to Expeditors International of Washington (Expeditors) to work in Expeditors' facility. Defendant, the Department of Labor & Industries (Department), issued a Citation and Notice (C&N) to both Staffmark and Expeditors after a temporary worker of Staffmark, named Brandon Strumsky, was injured while working at Expeditors' facility. (CABR 872-877).

After hearings were held on May 31, 2017, June 1, 2017, and June 2, 2017, Industrial Appeals Judge Kathleen A. Stockman (hereinafter "IAJ") issued a Proposed Decision and Order affirming the Citation. (CABR 39-47). Staffmark timely filed a Petition for Review of the Proposed Decision and Order, but the Board of Industrial Insurance Appeals (Board) issued an Order Denying Petition for Review. (CABR 4). As a result, the Proposed Decision and Order became the Decision and Order of the Board. (CABR 4). The Employer then timely appealed the Board's Decision and Order to Pierce County Superior Court; however, the Superior Court affirmed the Board's Decision and Order.

Staffmark respectfully appealed to this Court for a reversal of the Board's Decision and Order because it is not supported by substantial evidence, as Staffmark lacked the requisite control over Expeditors' facility

and the temporary workers at Expeditors' facility to be a liable employer under the Washington Industrial Safety and Health Act (WISHA) at Expeditors' facility. Additionally, even if Staffmark is found to be an Employer for the purposes of WISHA, the Board erred in determining that Staffmark had constructive knowledge of Mr. Strumsky operating the forklift in plain view because the trainings were for short periods of time and away from where workers customarily worked. (CABR 43). For these reasons, the Board's affirmation of the C&N is not supported by the record and, accordingly, the Board's Decision and Order must be reversed, and the C&N must be vacated in its entirety.

II. ASSIGNMENTS OF ERROR

Staffmark respectfully asserts that the Board and the Superior Court erred as follows:

1. In affirming C&N No. 317938372, and the citations and penalties therein;
2. In making Finding of Fact Numbers 2 through 8; and
3. In making Conclusions of Law Numbers 2 through 6.

III. ISSUES

A. Whether the Board's Decision and Order is supported by substantial evidence when Staffmark was not an employer for the purposes of WISHA at Expeditors' facility under the "economic realities" test?

B. Whether the Board's Decision and Order is supported by substantial evidence when the Department failed to establish that Staffmark had knowledge of the alleged violative conduct?

IV. STATEMENT OF FACTS

This appeal arises out of two inspections conducted by Compliance Safety and Health Officer Edgar Alvarez (CSHO Alvarez) based off a referral regarding a forklift accident involving Branden Strumsky, a Staffmark general laborer. (Tr. 5/31/17, p. 14, lines 9 – 25). The first inspection was of Staffmark, and the second inspection was of Expeditors. (Tr. 5/31/17, p. 14, lines 19-25). The inspections occurred at an Expeditor's facility in Sumner, Washington, which is a shipping and receiving warehouse. (Tr. 5/31/17, p. 14, lines 2-3, p. 17, lines 2 - 10). The main activity performed at Expeditor's facility is the loading and unloading of trailers. (Tr. 5/31/17, p. 17, lines 3 – 5).

Staffmark is a staffing agency that provides temporary workers for Expeditor's warehouse. (Tr. 5/31/17, p. 17, lines 11 – 15). Specifically, Staffmark provides general laborers, forklift drivers, and quality control personnel to Expeditors. (Tr. 5/31/17, p. 17, lines 17-19). Expeditors trained and coached Staffmark's employees on how to do their jobs at the facility, and Expeditors controlled the means and method of the work performed by Staffmark's employees. (Tr. 5/31/17, p. 110, line 19 – p. 111, line 8; p. 158, line 17 – p. 159, line 1; Tr. 6/2/17, p. 32, lines 20 – 23).

The relationship between Staffmark and Expeditors is governed by a Service Provider Agreement. (Exhibit 6). The wages for the Staffmark

employees are covered under the agreement. (Tr. 6/2/17, p. 10, lines 18 – p. 14, line 8). Forklift operations are also covered under the agreement, which stated:

> For all requests for operating power industrial trucks, Service Provider will only assign employees who have had previous experience (certificate) operating a powered industrial truck. This experience will be verified by Service Provider through reference checks with previous employers. In compliance with OSHA regulations, all Service Provider employees who will be operating a powered industrial truck will sign a statement verifying that they have been trained and observed by a representative of Expeditors to verify that they have the skill needed to operate powered industrial trucks and that they understand all of the safety guidelines Expeditors' has established for the operation of powered industrial trucks. ***Expeditors will not request or permit any Service Provider employee to use any vehicle, regardless of ownership, in connection with the performance of services for Expeditors that has not been authorized by Service Provider or, if authorized, that is not indicated on the employee's certification or license.*** (Emphasis added); (Exhibit 6, p. 64).

Under the agreement, Expeditors was not supposed to put a Staffmark employee on a forklift without certifying the employee and informing Staffmark of the certification. (Tr. 6/2/17, p. 21, lines 15-25). That is, the process for becoming a new certified forklift operator involved the following: an employee would first have to take a written test administered by Staffmark, and then the employee would have a hands-on training and an evaluation to demonstrate that he or she can operate a forklift, which was administered by Expeditors. (Tr. 5/31/17, p. 30, lines 5 – 15; p. 196, line 20 – p. 170, line 1). Expeditors drafted the contract and did not negotiate over any of its terms, even though Staffmark

proposed changes to the contract. (Tr. 6/2/17, p. 31, line 23 – p. 32, line 19). While some of the personnel was provided by Staffmark, the forklifts were owned by Expeditors. (Tr. 6/2/17, p. 37, lines 21-25). Significantly, Staffmark did not, and does not, have the ability to enforce the activities of Expeditors' employees. (Tr. 6/2/17, p. 26, lines 2-4).

During his investigation, CSHO Alvarez learned that Ricky Maghanoy, an Expeditors lead, was training Branden Strumsky, a Staffmark temporary worker, to operate a forklift. (Tr. 5/31/17, p. 30, lines 3-4). Mr. Strumsky had been asking Mr. Maghanoy to train him to become a forklift operator for a while. (Tr. 5/31/17, p. 151, line 6 – p. 152, line 5). Mr. Maghanoy testified that he spoke with Steve Tiffany, his supervisor, about training Mr. Strumsky on the forklift. (Tr. 5/31/17, p. 140, lines 10 – 17). Unfortunately, Mr. Maghanoy never told anyone at Staffmark that he was training Mr. Strumsky on the forklift. (Tr. 5/31/17, p. 152, lines 6 – 9). Staffmark had no knowledge that Expeditors was training Mr. Strumsky to use a forklift, which was done in contrast to the Agreement.

Mr. Strumsky asked Mr. Maghanoy to train him to drive a forklift because Mr. Maghanoy was the person he always talked to, Mr. Maghanoy was the head of his department, and Mr. Maghanoy taught him how to perform his work as a general laborer. (Tr. 6/1/17, p. 74, line 19 – p. 75, line 6). Mr. Strumsky confirmed that he was not aware of anyone from Staffmark being involved in his

forklift training. (Tr. 6/1/17, p. 75, lines 14 – 16). Indeed, Mr. Theysell, Staffmark's swing shift lead, did not play a role in training Mr. Strumsky. (Tr. 5/31/17, p. 152, lines 16 – 21; Tr. 6/1/17, p. 34, line 23 – p. 35, line 1). Nor was Mr. Strumsky aware of Jeffrey Theysell ever observing him while operating a forklift. (Tr. 6/1/17, p. 73, lines 24 – p. 74, line 2).

Mr. Strumsky was given a copy of the Staffmark Employee Handbook. He was provided a copy of it to keep, and he took it home and read it. (Tr. 6/1/17, p. 60, line 13 – p. 61, line 17; Exhibit 5). Significantly, Staffmark's Employee Handbook states: "***Never*** operate a forklift or other powered industrial vehicle unless you have been permitted to do so by Staffmark and have been trained and certified to do so by the customer facility." Exhibit 4, p. 19. (emphasis original). He further watched a video when he started working for Staffmark, which covered forklift operations. (Tr. 6/1/17, p. 61, line 24 – p. 62, line 8).

Mr. Strumsky was also given an orientation packet when he was hired at Staffmark. (Tr. 6/1/17, p. 70, line 14 – p. 71, line 7; Exhibit 1). The Orientation package states:

> ***Only employees who have been trained, authorized, and certified by both Expeditors and <u>Staffmark</u> are allowed to operate forklifts.*** If you are asked and aren't authorized, please contact Staffmark.
> Exhibit 1, p. 30; (emphasis added).

Overall, Mr. Maghanoy trained Mr. Strumsky to drive a forklift three or four times alone, away from people or containers. (Tr. 5/31/17, p. 143, lines 4-

17). Each training session was approximately 30 to 45 minutes long and were typically towards the end of Mr. Strumsky's shift because there was less work and more forklifts available. (Tr. 5/31/17, p. 143, line 24 – p. 144, line 5; Tr. 66, lines 15 – 24). The first training session was in a bay, and two other training sessions were in the general warehouse. (Tr. 5/31/17, p. 143, line 24 – p. 144, line 5). The bay is located away from where people work. (Tr. 5/31/17, p. 153, lines 13 – 18).

Altogether, Mr. Strumsky only drove the forklift once for approximately 30 minutes to unload a trailer on the night of his accident. (Tr. 5/31/17, p. 144, line 7 – p. 145, line 9). The training was usually done towards the end of the shift when there was less work and more forklifts available. Mr. Strumsky never trained at the beginning of his shift, as freight was usually there. (Tr. 6/1/17, p. 66, line 22 – p. 67, line 4). The training sessions also involved Mr. Strumsky following Mr. Maghoney around in a circle, again away from other workers. (Tr. 5/31/17, p. 154, lines 16 – 22).

As a result of his inspection into Expeditors, they were issued the following violations:

> Violation Item 1-1a Repeat Serious WAC 296-863-60005 – Employer did not ensure employee successfully completed an operator training program before operating PITs (Power industrial Trucks).
>
> Violation Item 1-1b Repeat Serious WAC 296-863-40010 – Employer did not ensure operator operate PITs according to

> the manufacturer's instructions and kept PITs under control at all times.
> (Exhibit 11, page 5 of 18; Tr. p. 36, line 14 – p. 38, line 9).

CSHO Alvarez recommended the same citations be issued to Staffmark with the exception that they were not issued as repeat serious violations. (Tr. 5/31/17, p. 38, lines 10 – 18).

V. ARGUMENT

A. The Department bears the burden of proving all elements of a WISHA violation.

The Department bears the initial burden to prove a violation. WAC 263-12-115(2)(b); *Mowat Constr. Co.*, 148 Wn. App. at 924. To establish a prima facie case of a "serious" violation under WISHA, the Department must prove the following five elements by a preponderance of the evidence: (1) the cited standard applies; (2) the requirements of the standard were not met; (3) employees were exposed to, or had access to the violative conditions; (4) the employer knew or through the exercise of reasonable diligence, could have known of the violative condition; and (5) there is a substantial probability that death or serious physical harm could result from the violative condition. RCW 49.17.180(6); *SuperValu, Inc. v. Dep't of Labor & Indus.*, 158 Wn.2d 422, 433, 144 P.3d 1160 (2006); *Washington Cedar & Supply Co., v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 914, 83 P.3d 1012 (2004).

As WISHA is required to be as effective as the federal OSHA counterpart, Washington courts will consider decisions interpreting OSHA to protect the health and safety of all workers. *Adkins v. Aluminum Company*, 110 Wn.2d 128, 147 (1988).

Here, the Board erred in affirming the Citation against Staffmark because it mistakenly determined that Staffmark was an Employer for the purposes of WISHA even though Staffmark lacked sufficient control over the workers and the worksite, and it did not create or control the hazard. (CABR 60-61). Additionally, even if Staffmark is found to be an Employer for the purposes of WISHA, the Board erred in determining that Staffmark had constructive knowledge of Mr. Strumsky operating the forklift in plain view because the trainings were for short periods of time and away from where workers customarily worked. (CABR 43). For these reasons, the Board's Decision and Order is not supported by the record and, accordingly, it must be reversed, and the C&N must be vacated in its entirety.

B. Staffmark was not an "employer" for purposes of WISHA under the facts of this case.

Federal OSHA caselaw and Washington State caselaw does not support the Department's assertion that Staffmark is an "employer" for the purposes of WISHA as cited in the C&N because Staffmark lacked sufficient control over the worker and the worksite, and it did not create or control the hazard. Therefore, the Board's Decision and Order affirming the C&N is not supported by substantial evidence and must be reversed.

For temporary employees, both the Occupational Safety and Health Review Commission and the Board have addressed the issue of who is an

"employer" for the purposes of who should be cited. In *Secretary of Labor v. MLB Industries,* OSHRC Docket No. 83-0231, the Commission vacated a fall protection citation against MLB, the loaning employer, because it was not an "employer" for purposes of the Occupational Safety and Health Act.

In the *MLB* case, the Commission held:

> This case involves the circumstances under which a particular company can be considered an "employer" under the Act so as to be held responsible for the safety of its employees. The Supreme Court has held, in the context of other statutes, that it is inappropriate to use varying state common law definitions of an employee and employer in construing federal legislation. *United States v. Silk*, 331 U.S. 704 (1974). Instead of looking at narrow common law definitions, the Supreme Court has looked to the purpose of the statute involved in deciding how employment relationships should be defined. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 124 (1944) (the meaning of the term" employee" under the National Labor Relations Act is to be determined primarily from the history, terms, and purposes of the legislation). Further, the United States courts of appeals that have addressed the issue under the Act have held that employment relationships should be determined by reference to the Act's purpose and policy. *Clarkson Construction Co. v. OSHRC*, 531 F.2d 451, 457-58 (10th Cir. 1976); *Frohlich Crane Service, Inc. v. OSHRC*, 521 F.2d 628, 631-32 (10th Cir. 1975); 504 F.2d 1255, 1261 (4th Cir. 1974).
>
> The express purpose of the Act is to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. 651(b). To effectuate this purpose, it is appropriate for the Commission, ***in considering whether an employment relationship exists, to place primary reliance upon who has control over the work environment such that abatement of the hazards can be***

> ***obtained.*** This approach is consistent with the above-cited Supreme Court and courts of appeals opinions. It is also in keeping with the Commission's analysis in the analogous situation of the multi-employer construction worksite, where the Commission has concluded that ***the Act's purpose is best served if an employer's duty to comply with OSHA standards is based upon whether it created or controlled the cited hazard.*** (emphasis added).

Likewise, the Board adopted the *MLB* holding in *In re Skills Resource Training Center*, BIIA Dec., 95 W 253 (1997) (holding that the Employer, for purposes of a WISHA Citation, is the employer with control over the worksite).[1] Significantly, both employers cannot be cited unless both have substantial control over the workers and the work environment involved in the violations. *Id.* The employer, for the purposes of a WISHA citation, is the employer with control over the worker and the work site. *Id.* (determining that the employer who leased employees should not have been cited for any WISHA violations because it did not control the worksite where the violations occurred).

Furthermore, in *In re Skills Resource Training Center*, the Board adopted the Federal Government's seven part "economic realities" test in joint employment situations to determine which employer should be issued a

[1] The Board has also addressed this issue in *See In re Tradesmen International, Inc.*, Dkt. No. 14 W1359 (2015); *In re Tradesmen International, Inc.*, Dkt. No. 16W1262 (2018); and *In re Ever-Green Tree Care,* BIIA 15W1079; the OSHRC has also addressed this issue in *The Barbosa Group, Inc., d/b/a Executive Security*, 21 BNA OSHC 1865 (No. 02-0865, 2007) and *In re Aerotek*, OSHRC Docket No. 16-0618.

WISHA citation. *Id.* The economic realities test has also been used by the Court of Appeals in determining whether there is a WISHA violation involving leased or temporary employees. *Potelco, Inc. v. Dept' of Labor and Indus.,* 191 Wn. App. 9, 30-31, 361 P.3d 767 (2015). The economic realities test analyzes: (1) who the worker considers 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. *Potelco,* 191 Wn. App. at 31.

However, the key question is whether the employer has the right to control the worker. See *Potelco, Inc.,* 191 Wn. App. 30-31*; see also Secretary of Labor v. Vergona Crane,* 15 OSHC 1782, 1784 (1992). Indeed, the "economic realities" test factors are used as a guide to determining control over the worker and the work environment. *See In re Ever-Green Tree Care, Inc.,* Dkt No. 15 W1079 (2018) (determining that no economic realities test factor is more important than the other, and that the analytical framework does not have to be complete in order to determine employer control and, thus, liability for worker safety at a work site).

1. Who the workers consider their employer?

In considering who the workers consider to be their employer, the Court looks at who is in charge of the worker. *Potelco*, 191 Wn. App. 31 (determining that when Labor Ready workers and the foreman said that Potelco was in charge of the workers, this factor weighed in favor of finding that Potelco was the employer).

Here, Mr. Strumsky unequivocally testified that Mr. Maghoney was in charge of his department and oversaw his work. (Tr. 6/1/17, p. 63, lines 21 – 23; p. 74, lines 6 – 8). Indeed, Mr. Strumsky asked Mr. Maghoney to train him on the forklift because he was the person that Mr. Strumsky always talked to, he was the head of Mr. Strumsky's department, and he believed that Mr. Mahoney would have a say in whether he could be trained. (Tr. 6/1/17, p. 74, line 19 – p. 75, line 3). Mr. Strumsky confirmed that he only went to Mr. Theysell, Staffmark's swing shift lead, for mere scheduling issues. (Tr. 6/1/17, p. 64, lines 2 – 13).

While the temporary workers were technically Staffmark's, the employees took their instructions from Expeditors, would seek guidance from Expeditors leads, and asked Expeditors management for promotions and raises. Additionally, Expeditors determined the workers' tasks, instructed the workers on their tasks, and supervised the workers performing their tasks. Clearly, the employees' actions lead to the sole conclusion that they considered Expeditors, not Staffmark, to be their employer.

2. Who pays the workers' wages?

OSHA has held that paying the workers' wages has some bearing on the employment relationship; however, it is not directly related to the issue of control and should normally be accorded less emphasis in determining the employment relationship for purposes of citation. *Secretary of Labor v. MLB Industries,* OSHRC Docket No. 83-0231. In *MLB,* the Commission found that the supplier of the temporary employees by paying the employees' wages was merely acting as a "conduit for labor," and paying the employees' wages was a mere technicality, as the secondary employer ultimately was paying for the employee's labor. *MLB Industries, supra,* 12 OSCH at 1529.

The contract between Staffmark and Expeditors contained the pricing for the labor. (Tr. 6/2/17, p. 11, lines 1 – 6). Staffmark took the costs of staffing a business, added a profit margin, and passed the costs directly to Expeditors. That is, although Staffmark paid the workers' wages, unemployment insurance, and worker's comp insurance, these items were included in the mark-up pricing and billed directly to Expeditors. (Tr. 6/2/17, p. 16, lines 3 – 15; p. 37, lines 2 – 18).

The control that Expeditors had over a worker's wages is evident by the fact that Staffmark's workers went to Expeditors for a raise, and Expeditors also told workers that they received a raise. (Tr. 5/31/17, p. 112, line 22 – p. 113, line 4; p. 159, lines 14 – 22; p. 178, lines 8 –19). In fact, Expeditors had

to approve any increases in pay given to Staffmark's workers. (Tr. 5/31/17, p. 159, lines 20 – 22; p. 178, lines 16 – 19). Performance reviews of Staffmark employees were also given by Expeditors. (Tr. 5/31/17, p. 112, lines 15 – 21).

Without doubt, Expeditors not only agreed on Staffmark's workers' wages and raises, but it also billed and paid for their work. As such, this factor undoubtedly weighs in favor of Expeditors as being the employer.

3. Who has the responsibility to control the workers?

The key question under the "Economic Realities" test is who controlled the workers. *Potelco*, 191 Wn. App. at 32; *Skills Res. Training Ctr* at 4; *Vergona Crane*, 15 OSHC at 1784. The Board has held that in joint employer work sites, citations of both employers are only appropriate if they share substantial control over the worksite. *Skills Res. Training Ctr* at 4

The facts here demonstrate that Staffmark had little to no control over the worksite. After 4:00 p.m., when the alleged violative condition occurred, there was no Staffmark management on-site. (Tr. 6/1/17, p. 43, lines 10 – 14). The only "management" referenced in the Board's Decision during swing shift were "leads." (Tr. 5/31/17, p. 72, line 5 – p. 73, line 12). Significantly, CSHO Alvarez never asked anyone at Staffmark what the duties of a lead were. (Tr 5/31/17, p. 53, line 30 – p. 57, line 18). CSHO Alvarez even acknowledged that Mr. Maghanoy was the person in charge of training Mr. Strumsky, as expeditors provided the forklift training. (Tr. 5/31/17, p. 30, lines 24 – 25).

The lead at the time of the Mr. Strumsky's incident was Mr. Theysell. (Tr. 5/31/17, p. 150, lines 17 – 25; Tr. 6/1/17, p. 9, lines 23 – 24). Mr. Theysell testified that his primary duty as a lead was merely scheduling, and his primary duty during his shift was operating a forklift and putting away product. (Tr. 6/1/17, p. 40, lines 5 – 23). He would not give the workers much direction during his shift, as he "would go off doing [his] own thing." (Tr. 6/1/17, p. 31, lines 1 – 16; p. 42, line 25 – p. 43, line 2). Similarly, Mr. Johnson, Staffmark's onsite manager, testified that he did not supervise workers on the floor; his role was to merely ensure that Expeditors' staffing requirements were met. (Tr. 5/31/17, p. 163, lines 16 – 18; p. 176, line 23 – p. 177, line 1). Mr. Johnson's time was limited at the facility, however, because he alternated his time between four facilities. (Tr. 5/31/17, p. 19 – 25).

Likewise, Mr. Strumsky testified that he only reported to Mr. Theysell for scheduling matters; everything else of substance went through Mr. Maghoney, an Expeditor's lead. (Tr. 6/1/17, p. 77, lines 1 – 15). Mr. Maghanoy testified that his duties were to "distribute the work load and keep an eye on everybody, make sure everything gets done." (Tr. 5/31/17, p. 138, lines 11 – 12). Expeditors leads also had the authority to send Staffmark workers home from a shift and discipline Staffmark workers. (Tr. 5/31/17, p. 157, lines 7 – 11; Tr. 6/1/17, p. 17, lines 17 – 20). Moreover, Staffmark leads did not have the authority to send people home by themselves; they had to get approval from

Expeditors prior to sending anyone home. (Tr. 6/1/17, p. 40, line 5 – p. 41, line 10).

The Department's file even acknowledges Expeditors' control on the floor stating:

> Secondary employer (Expeditors) have control over all the employees in the warehouse, day and swing shift, having supervisors-leads in the warehouse to provide training, direction and to oversee all employees. (Exhibit 11, p. 115)

The Department's file also acknowledges that Staffmark's lead supervisors report to and receive work instructions from Expeditor's lead supervisors, and Expeditors determined whether a worker could continue working at the facility. (Tr. 5/31/17, p. 177, line 22 – p. 178, line 4; Tr. 6/1/17, p. 17, line 24 – p. 18; (Tr. 6/1/17, p. 40, line 5 – p. 41, line 10). Exhibit 11, p. 115)

Given the above, it is undisputed that Staffmark had no control, authority, or supervision over the jobsite during the swing shift, nor did Staffmark create the hazard, control the hazard, or have the responsibility to correct the hazard during the swing shift. As such, the Department's Citation stating that Staffmark is an "employer" under WISHA in this matter was issued in error.

///

4. Whether the alleged employer has the power to control the workers?

Although the record establishes that both Staffmark and Expeditors may some disciplinary authority, it was far from equal. Expeditors had the power to discipline Staffmark employees, including sending them home from their shift, and Expeditors also determined whether a worker could continue working at the facility. (Tr. 5/31/17, p. 177, line 22 – p. 178, line 4; Tr. 6/1/17, p. 17, line 24 – p. 18, line 2; p. 44, line L15 – p. 17, line 4; Tr. 5/31/17 p. 147, lines 8 – 14; Tr. 6/1/17, p. 44, line 15 – p. 45, line 14). Expeditors leads further had the authority to send Staffmark employees home from a shift. (Tr. 5/31/17, p. 157, lines 7 – 11). In sum, Expeditors controlled Staffmark's employees at the facility.

In contrast, Staffmark leads could not send its workers home without approval from an Expeditors lead. (Tr. 6/1/17, p. 40, line 5 – p. 41, line 10). As Mr. Thysell explained, he did not have the power to send a Staffmark worker home because as a Staffmark lead, he was basically a scheduler; Expeditors' leads had that authority. (Tr. 6/1/17, p. 41, lines 5 – 10). Additionally, Staffmark would not terminate an employee without Expeditors approval because, as Mr. Johnson explained, "in the end, the employee is working for Expeditors. So, if Expeditors is happy with them, they continue to work for them." (Tr. 5/31/17, p. 177, line 22 – p. 178, line 4).

Additionally, the work was directed by Expeditors. (Tr. 5/31/17, p. 138, lines 10 – 13; p. 178, lines 20 – 22; Tr. 6/2/17, p. 77, lines 1 – 5). While Staffmark leads may have assisted in the work assignments, Expeditors leads had the primary responsibility for assigning the work assignments. (Tr. 5/31/17, p. 157, lines 17 – 24). Indeed, Mr. Strumsky testified that his work was directed by Maghanoy, and no one from Staffmark would provide direction to him once he was in his department. (Tr. 6/1/17, p. 77, lines 1 – 7). Expeditors also had to approve Staffmark employees' requests for vacation/time off from work. (Tr. 6/2/17, p. 25, lines 11 – 16). Expeditors also determined when they would train somebody for their forklift certification. (Tr. 5/31/17, p. 139, lines 8 – 15; p. 152, lines 6 – 15).

In the Proposed Decision and Order the IAJ erred in opining that both Staffmark and Expeditors had a substantial role in a worker becoming a forklift driver by stating:

> I found particularly significant that both Staffmark and Expeditors had substantial roles before a worker could become a forklift driver. Per agreement of the companies, Staffmark took the initial assessment step of having the worker take a written test, and if a passing grade was received, then the worker was permitted to start forklift training with Expeditors who administered the performance evaluation. In Mr. Strumsky's case that process apparently was not followed.
> (CABR, p. 59, lines 11-18).

As the IAJ correctly points out, the process was not followed in this instance. The fact that the process was not followed is one of the reasons the citation was issued. The fact that Expeditors did not follow the process and bypassed Staffmark's role in the process demonstrates that Staffmark had no control over Expeditors and its facility or knowledge of its actions.

5. Whether the alleged employer has the power to hire, fire or modify the employment condition of the workers?

Here, although Expeditors could not fire Staffmark's workers, they could request they not come back, which was the same as firing. (Tr. 5/31/17, p. 147, lines 8 – 14; p. 156, lines 21 – 25; Tr. 6/1/17, p. 17, line 24 – p. 18, line 2; p. 44, line 15 – p. 45, line 14). Staffmark also would not terminate any employees at the facility without asking Expeditors first. (Tr. 5/31/17, p. 177, lines 2 – 24; p. 178, lines 2 – 4). Expeditors also determined when they would train somebody for their forklift certification. (Tr. 5/31/17, p. 139, lines 8 – 15; p. 152, lines 6 – 15). This factor weighs in favor of Expeditors as controlling the employment conditions of the temporary workers.

6. Whether the worker's ability to increase their income depends on efficiency rather than initiative, judgment, and foresight;

To obtain any raise without a promotion, Staffmark employees would have to get approval from Expeditors, as Staffmark could not give employees a raise without Expeditor's approval. (Tr. 5/31/17, p. 159, lines 14-22; p. 178,

lines 8-19; Tr. 6/1/17, p. 21 line18 – p. 22, line 8; and Tr. 6/1/17, p. 39, line 16 – p. 40, line 4).

The other way to increase pay would be to go from being a general laborer to a forklift operator. (Tr. 5/31/17, p. 159, line 23 – p. 160, line 1; Tr. 6/1/17, p. 21, lines 9 – 17). This would require initial testing from Staffmark then training and testing from Expeditors. (Tr. 5/31/17, p. 123, lines 1 – 15; p. 169, line 20 – p. 170, line 6). This factor exclusively establishes that Expeditors was the employer.

7. How the worker's wages are established?

The employees' wages were set by a standard form contract between Staffmark and Expeditors. Although Staffmark paid the employee's wages, unemployment insurance and worker's comp insurance, this was included in the mark-up pricing and billed to Expeditors. (Tr. 6/2/17, p. 16, lines 3 – 15; p. 37, lines 2 – 18). The employees knew or seemed to know that in order to get a raise approved they needed to go through Expeditors management. See Tr. 5/31/17, p. 159, lines 14-22; Tr. 6/1/17, p. 21, lines 18 – p. 22, lines 8). This factor exclusively establishes that Expeditors was the employer.

Overall, Expeditors directed the workers, supervised the workers, provided the forklifts to the workers, released workers from the facility, and retained complete control over the facility. Therefore, Staffmark was not an

"employer" for purposes of WISHA as cited by the Department, and, accordingly, the Citation should be vacated in its entirety.

C. Staffmark did not have knowledge of the violative acts.

The Board erred in determining Staffmark had constructive knowledge of any violative conduct; therefore, the Board's decision lacks substantial evidence in the record and must be reversed. To prove a violation, the Department must prove that the Employer had actual or constructive knowledge of the violation's existence. RCW 49.17.180(6); *see also BD Roofing, Inc. Dep't of Labor & Indus.*, 139 Wn. App. 98, 108, 161 P.3d 387 (2007) (determining that constructive knowledge is sufficient).

An Employer who could not have known of the violation by exercising reasonable diligence does not have constructive knowledge of the violation. *See Erection Co. Dep't of Labor & Indus.*, 160 Wn. App. 194, 206-07, 248 P.3d 1085 (2011). 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. *Id.*

Constructive knowledge of a violative condition may be demonstrated by the Department in numerous ways, including evidence showing that the violative condition was readily observable or in a conspicuous location in the area of the employer's crews. *Id.* at 207.

Frist, there has been no testimony that anyone from Staffmark had actual knowledge of the violative condition. In fact, CSHO Alvarez could not identify anyone from Staffmark that had knowledge of the forklift training Expeditors provided to Mr. Strumsky. (Tr. 5/31/17, p. 73, lines 4 – 12). As such, the record cannot support a finding that Staffmark had actual knowledge of the violations.

Next, the Board erred in determining that Staffmark had constructive knowledge that Mr. Strumsky was operating a forklift in plain view on numerous occasions. (CABR 43). Mr. Strumsky testified that he never operated a forklift before 7:00 pm, the timeframe in which Mr. Johnson was on site. Indeed, Staffmark had no management on-site after 4:00 p.m. Moreover, although Mr. Strumsky would occasionally see Staffmark leads, they were always busy and focused on their own tasks. (Tr. 6/1/17, p. 76, lines 10 – 19). Thus, based on Strumsky's own testimony, there is no basis for Staffmark to have had constructive knowledge of the violative conduct.

Furthermore, contrary to the Board's Decision, Mr. Strumsky's operation of a forklift was not in plain view and readily observable in a conspicuous location. Here, the uncontested testimony established the Expeditors' forklift training of Mr. Strumsky took place at night, after the on-site manager was gone, towards the end of the shift, on 4 occasions for short periods of time. There has been no testimony that anyone from Staffmark, let alone anyone with

management authority, saw or had the ability to see Mr. Strumsky training on the forklift.

What is known, however, is that neither Mr. Strumsky nor Expeditors informed Staffmark that Mr. Strumsky was being trained on the forklift, which was in violation of the contract and the employee procedures. (See, e.g., Tr. 5/31/17, p. 140, lines 10 – 17; p. 152, lines 6 – 21; Tr. 6/1/1, p. 34, line 23 – p. 35, line 1; Exhibit 1; Exhibit 4; Exhibit 6).

In the civil arena, Courts have consistently held that in order to have constructive knowledge, a condition had to occur for a reasonable amount of time. See *Iwai v. State,* 129 Wn.2d 84, 92, 915, P.2d 1089 (1996); *Geise v. Lee,* 84 Wn.2d 866, 871, 529 P.2d 1054 (1975); *Wiltse v. Albertson's Inc.*, 116 Wn.2d 452, 453, 805 P.2d 793 (1991); *Kennett v. Federici,* 200 Wash 156, 164, 93 P.2d 333 (1939). The testimony here is that the training took place at the end of the shift on 4 occasions for less than an hour, after management had left, away from busy areas, while other associates where busy working at the end of the night. There was no one with authority on site who could have witness the violative conduct, and the Department presented no evidence of the condition occurring for a reasonable amount of time in a conspicuous and open place for constructive knowledge to occur. *See Latshaw Drilling and Exploration, LLC,* 2006 WL 6472835 (No. 15-1561, 2016) (determining that considering the length of time and visibility help to decipher whether an

Employer had the opportunity to observe the condition, and, thus, provide context for applying the reasonable diligence factors).

That is, Mr. Maghanoy trained Mr. Strumsky on a forklift three or four times, away from people or containers. (Tr. 5/31/17, p. 143, lines 14 – 17). Each training was for only 30 to 45 minutes toward the end of the shift when there was less work and more forklifts available. Significantly, Mr. Strumsky never trained at the beginning of his shift, and he unequivocally testified that no one from Staffmark saw him operating the forklift. (Tr. 6/1/17, p. 62, lines 13 – 15). Indeed, Mr. Theysell played no in the training of Strumsky, and he did not know that Strumsky was undergoing forklift training. (Tr. 6/1/17, p. 42, lines 13 – 24).

For the above reasons, the Board's decision that Staffmark had constructive knowledge of the forklift violations is not supported by substantial evidence in the record.

VI. CONCLUSION

Staffmark respectfully requests the Court to reverse the Board's Decision and Order and vacate the Citation in its entirety because Staffmark was not an "employer" for the purposes of WISHA, as it lacked sufficient control over the workers and the worksite, and it did not create or control the violative conduct. Additionally, even if Staffmark is found to be an "employer" for the purposes of WISHA, the Board erred in determining that Staffmark had constructive knowledge of the violative condition because the

violative conduct occurred for short periods of time and was away from where workers customarily performed work. For these reasons, the Board's affirmation of the Citation is not supported by the record and, accordingly, the Citation must be vacated in its entirety.

Respectfully submitted this 21st day of January 2019.

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CERTIFICATE OF SERVICE

I certify that on January 21, 2019, I caused the original and copy of the Employer's/Appellant's Opening Brief to be filed via Electronic Filing, with the Court of Appeals, Division II and that I further served a true and correct copy of same, on:

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