

FILED
Court of Appeals
Division II
State of Washington
3/25/2019 4:38 PM

NO. 52837-1

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

STAFFMARK INVESTMENT, LLC,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

ROBERT W. FERGUSON
Attorney General

James P. Mills
Senior Counsel
WSBA No. 36978
Office No. 91040
1250 Pacific Avenue, Suite 105
Tacoma WA 98402
(253) 597-3896

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. COUNTERSTATEMENT OF THE ISSUES2

III. STATEMENT OF FACTS.....2

 A. Temporary Work Presents Unique Dangers to Employees2

 B. Staffmark Leased Employees to Expeditors, But Exercised Significant Control Over Workers Such as Branden Strumsky.....3

 C. Staffmark Shared Supervisory Responsibility of Its Leased Employees With Expeditors Through Its On-Site Manager and Leads6

 D. Strumsky Was Not Properly Trained Before He Was Seriously Injured While Operating a Forklift in Expeditors’ Warehouse Facility.....8

 E. The Department Concluded That Staffmark Had Sufficient Control Over Strumsky to Cite Staffmark as an Employer.....10

 F. After Hearing All The Evidence, the Board Concluded That Staffmark Was a Joint Employer Under the Economic Realities Test12

IV. STANDARD OF REVIEW.....13

V. ARGUMENT13

 A. Holding Primary Employers Who Place Leased Employees on Worksites Responsible When They Have the Right to Control the Employees Furthers WISHA’s Purpose of Protecting Washington Workers.....14

 1. A company may be an employer if it has the right to control the employees.....

2.	Staffmark had the non-delegable duty to take reasonable steps to ensure its employees were protected from the hazard and it failed to take reasonable steps to satisfy its non-delegable duty	
B.	Substantial Evidence Supports the Determination That Staffmark Was an Employer Under the Economic Realities Test.....	22
1.	Substantial evidence supports the finding that Strumsky considered Staffmark his employer.....	23
2.	Substantial evidence supports the Board’s finding that Staffmark paid wages to Strumsky and other Staffmark workers	
3.	Substantial evidence supports the conclusion that Staffmark shared the responsibility to control the workers	
4.	Substantial evidence supports the conclusion that Staffmark had the power to control the workers	
5.	Substantial evidence supports the conclusion that Staffmark had the power to modify the employee’s employment condition at the Expeditors’ facility	
6.	Substantial evidence supports that Staffmark played a role in a Strumsky’s ability to increase his income	
7.	Substantial evidence supports the conclusion that Staffmark played a role in establishing the workers’ wages	
8.	The Board properly weighed all the factors to conclude that Staffmark was an employer.....	
C.	Substantial Evidence Shows Staffmark Knew or Should Have Known That Strumsky Was Operating a Forklift Without Being Trained Because He Operated the Forklift in Plain View.....	35

1. Substantial evidence supports constructive knowledge because Strumsky operated the forklift in plain view
2. Substantial evidence also supports the conclusion that Staffmark failed to exercise reasonable diligence to supervise the worker and inspect the work area.....

VI. CONCLUSION40

TABLE OF AUTHORITIES

Cases

<i>Adkins v. Aluminum Co.</i> , 110 Wn.2d 128, 750 P.2d 1257 (1988).....	16
<i>Afoa v. Port of Seattle</i> , 176 Wn.2d 460, 296 P.3d 800 (2013).....	20
<i>Anfinson v. FedEx Ground Package System, Inc.</i> , 174 Wn.2d 851, 281 P.3d 289 (2012).....	32
<i>BD Roofing, Inc. v. Dep't of Labor & Indus.</i> , 139 Wn. App. 98, 161 P.3d 387 (2007).....	37, 38
<i>Bratton Corp. v. Occupational Safety & Health Rev. Comm'n</i> , 590 F.2d 273 (8th Cir. 1979)	17
<i>D. Harris Masonry v. Dole</i> , 876 F.2d 343 (3rd Cir. 1989)	17
<i>DeTrae Enter. v. Sec'y of Labor</i> , 645 F.2d 103 (2nd Cir. 1981)	17
<i>Dun-Par Eng'rd Form Co. v. Marshall</i> , 676 F.2d 1333 (10th Cir. 1982)	17
<i>Elder Demolition, Inc. v. Dep't of Labor & Indus.</i> , 149 Wn. App. 799, 207 P.3d 453 (2009).....	13
<i>Elec. Smith v. Sec'y of Labor</i> , 666 F.2d 1267 (9th Cir. 1982)	17
<i>Erection Co. v. Dep't of Labor & Indus.</i> , 160 Wn. App. 194, 248 P.3d 1085 (2011).....	36, 37, 40
<i>Frank Coluccio Const. Co. v. Dep't of Labor & Indus.</i> , 181 Wn. App. 25, 329 P.3d 91 (2014).....	13

<i>Goucher v. J.R. Simplot Co.</i> , 104 Wn.2d 662, 709 P.2d 774 (1985).....	20
<i>Havens Steel Co. v. Occupational Safety & Health Rev. Comm'n</i> , 738 F.2d 397 (10th Cir. 1984)	17
<i>In re Skills Res. Training Ctr.</i> , No. 95 W253, 1997 WL 593888 (Wash. Bd. Ind. Ins. App. Aug. 5, 1997)	16, 17
<i>J.E. Dunn Nw., Inc. v. Dep't of Labor & Indus.</i> , 139 Wn. App. 35, 156 P.3d 250 (2007)	13, 36
<i>N & N Contractors, Inc. v. Occupational Safety & Health Rev. Comm'n</i> , 255 F.3d 122 (4th Cir. 2001)	40
<i>Potelco v. Dep't of Labor & Indus.</i> , 191 Wn. App. 9, 361 P.3d 767 (2015).....	passim
<i>Potelco v. Dep't of Labor & Indus.</i> , 194 Wn. App. 428, 377 P.3d 251 (2016).....	22, 37, 39
<i>Pro-Active Home Builders, Inc., v. Dep't of Labor & Indus.</i> , __ Wn. App. 2d __, 432 P.3d 404 (2019).....	38, 39
<i>Sec'y of Labor v. Aerotek</i> , 2018 O.S.H.D. (CCH) P 33663, 2018 WL 2084250, (Occupational Safety & Health Rev. Comm'n Mar. 23, 2018)	18, 20
<i>Sec'y of Labor v. Anastasi Bros. Corp.</i> , 1977-1978 O.S.H.D. (CCH), 1977 WL 7689 (July 7, 1977).....	19
<i>Sec'y of Labor v. Anning-Johnson Co.</i> , 1975-1976 O.S.H.D. (CCH), 1976 WL 5967 (Occupational Safety & Health Rev. Comm'n May 12, 1976)	19
<i>Sec'y of Labor v. Griffin & Brand of McAllen, Inc.</i> , 1978 O.S.H.D. (CCH), 1978 WL 7060 (Occupational Safety Health Rev. Comm'n June 9, 1978)	16

<i>Sec’y of Labor v. Grossman Steel & Aluminum Corp.</i> , 1977-1978 O.S.H.D. (CCH), 1976 WL 5968 (Occupational Safety & Health Rev. Comm’n May 12, 1976)	20
<i>Sec’y of Labor v. N & N Contractors, Inc.</i> , 2000 O.S.H.D. (CCH), 2000 WL 665599, (Occupational Safety & Health Rev. Comm’n May 18, 2000)	21
<i>Sec’y of Labor v. The Barbosa Group, Inc.</i> , 2005 O.S.H.D. (CCH), 2007 WL 962960, (Occupational Safety & Health Rev. Comm’n February 5, 2007)	22
<i>Secretary of Labor v. MLB Industries</i> , 1984-1985 O.S.H.D. (CCH), 1985 WL 44744, (Occupational Safety & Health Rev. Comm’n Oct. 31, 1985).....	24, 25
<i>Stute v. P.B.M.C., Inc.</i> , 114 Wn.2d 454, 788 P.2d 545 (1990).....	18
<i>Universal Const. Co., Inc. v. Occupational Safety & Health Rev. Comm’n</i> , 182 F.3d 726, (10th Cir. 1999)	19
<i>Ward v. Ceco Corp.</i> , 40 Wn. App. 619, 699 P.2d 814 (1985).....	18, 19
<i>Wash. Cedar & Supply Co., Inc. v. Dep’t of Labor & Indus.</i> , 119 Wn. App. 906, 83 P.3d 1012 (2003).....	36

Statutes

RCW 49.17.010	15, 26
RCW 49.17.020	14, 15, 24
RCW 49.17.060	18
RCW 49.17.180	36

Regulations

WAC 296-863-40010..... 11, 13
WAC 296-863-60005..... 11, 13

Other Authorities

*Employment, Hours, and Earnings from the Current Employment
Statistics survey (National),
Bureau of Labor Statistics,
<https://data.bls.gov/timeseries/ces6056132001> (last visited March
21, 2019) 3, 15*

*Legal Protections for Atypical Employees: Employment Law for
Workers Without Workplaces and Employees Without Employers,
27 Berkeley J. Emp. & Labor L. 251, 254-55, 256 (2006)..... 3*

Constitutional Provisions

Wash. Const. Art. II, § 35 15

I. INTRODUCTION

To ensure safe work place practices, employment-staffing companies must be responsible for work place hazards like every other employer in Washington. Staffmark Investment, LLC provided leased workers to a warehouse in Sumner operated by Expeditors International of Washington under a longstanding contract to provide laborers and forklift operators. An untrained Staffmark employee, Branden Strumsky, crushed his foot while improperly operating a forklift at the Expeditors' facility. The Department of Labor & Industries cited both Expeditors and Staffmark for violating the forklift safety rules under the Washington Industrial Health & Safety Act (WISHA) after conducting an investigation.

Although Staffmark leased the workers to the onsite secondary employer, Expeditors, the Board of Industrial Insurance Appeals correctly found that Staffmark was also a responsible employer under the economic realities test because it had had the power to control the workers leased to Expeditors.¹

Substantial evidence in the record supports the Board's findings that Staffmark failed to ensure Strumsky successfully completed an

¹ The Department also cited Expeditors, but it did not appeal the citation. WISHA allows for the Department to cite joint employers.

operator training program before operating a forklift, failed to ensure that Strumsky kept the forklift under control at all times, and knew or should have known about the safety violations. Because substantial evidence supports the Board's findings, this Court should affirm.

II. COUNTERSTATEMENT OF THE ISSUES

1. Both the "primary" employer, who provides employees, and the "secondary" employer, who leases employees, can be held responsible for WISHA violations for leased employees when there are sufficient connections between the primary employer and the worker. Staffmark had an on-site manager, participated in the forklift operator training process, paid the injured worker, and had the right to discipline the worker. Does substantial evidence support that Staffmark was an employer under the economic realities test?
2. At the Board, the Department proves an employer's constructive knowledge about a work place violation if a violation is in plain view. The violation took place in areas of the warehouse that were accessible and visible to Staffmark supervisors. Does substantial evidence support finding that Staffmark had constructive knowledge about the violations?

III. STATEMENT OF FACTS

A. Temporary Work Presents Unique Dangers to Employees

Many firms have departed from a system that offers long-term stable employment and have adopted a model of employment using temporary workers. Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and*

Employees Without Employers, 27 Berkeley J. Emp. & Labor L. 251, 254-55, 256 (2006).²

“Employee leasing” is the type of temporary work at issue here. It consists of employees working for a “leasing firm,” like Staffmark, that supplies a group of workers, typically an entire department, to a “user firm” under a contract. *Id.* at 255-56. Many temporary workers work for leasing firms, which provide paychecks and benefits, but generally work under the work rules and regulations of the company to which they are assigned. *Id.* at 255-56.

In 2019, the Bureau of Labor Statistics reported that over 2.8 million employees worked for temporary-help agencies or contract labor provider firms and another 2.5 million workers were on call to such temporary or contract firms.³

B. Staffmark Leased Employees to Expeditors, But Exercised Significant Control Over Workers Such as Branden Strumsky

² This includes four general labor models: “agency” workers, “in-house temps,” “on call workers,” and “leased” workers. “Agency work” occurs when a temporary work agency dispatches temporary workers from one firm to another for what are usually short-term assignments. *Id.* at 255. The work may be overseen by a supervisor at the job site or by a supervisor at the temporary work agency. *Id.* Some companies also use their own pools of “in-house temps” or “on-call workers” to fill temporary worker positions. *Id.* at 256.

³ *Employment, Hours, and Earnings from the Current Employment Statistics survey (National)*, Bureau of Labor Statistics, <https://data.bls.gov/timeseries/ces6056132001> (last visited March 21, 2019).

Staffmark leased workers to a warehouse in Sumner operated by Expeditors under a longstanding service provider agreement to provide laborers and forklift operators. CP 55, 205-11. Expeditors directly employed a warehouse supervisor and each shift had Expeditor “leads,” but Staffmark leased nearly all laborers and forklift operators for each shift at Expeditors’ 24th Street facility. CP 1088-91, 1174. Staffmark also provided an on-site manager and designated some Staffmark employees as “leads” with supervisory responsibilities. CP 1095, 1188-89, 1192-93.⁴ So both Staffmark and Expeditors maintained on-site supervision through managers (Expeditors’ warehouse manager and Staffmark’s on-site manager), and both Staffmark and Expeditors designated employees as leads for each team. CP 1095, 1088-91, 1174, 1188-89, 1192-93.

As part of its contract, Staffmark charged Expeditors for the employees’ wages, plus a negotiated markup. CP 205-211, 1196-98. Staffmark paid employees, including workers’ compensation insurance and health care benefits. CP 1199. Staffmark passed these costs to Expeditors through the mark-up charge for each employee. CP 1199. Expeditors requested additional labor from Staffmark according to the

⁴ Staffmark calls these managers “quality control personnel.” AB 3.

volume of business, and Staffmark hired additional employees to fill those needs. CP 1097.

Staffmark employees filled two roles for unloading containers and putting away cargo at the 24th Street warehouse—general laborers and forklift operators. CP 921. Under the Staffmark service providers agreement, Expeditors paid Staffmark a 39-percent markup for general laborers, and a 42-percent markup for forklift operators. CP 205-211, 1196-98.

Staffmark hired Strumsky, then leased him to Expeditors as a laborer. CP 1141-42. Andy Johnson, Staffmark's on-site manager, interviewed and hired Strumsky to fill the position at the Expeditors' warehouse where he was injured. CP 1148. Johnson oversaw Staffmark employees at four Expeditors' facilities in Sumner and Kent. CP 1066. He worked at the 24th Street facility on a daily basis and maintained a permanent workstation in the lunchroom. CP 1067-68. Johnson conducted daily walk-arounds of the facility. CP 1068, 1189.

Johnson provided Strumsky's new-hire orientation, which consisted of a "brief walkaround" the warehouse and an explanation of the types of freight that Strumsky would be handling. CP 1149. Johnson also reviewed Staffmark employee timesheets and administered payroll. CP 1067-69.

Johnson had the ultimate authority to discipline or terminate Staffmark employees—including Strumsky—who were not meeting client standards. CP 1072, 1191-92. Johnson also could reassign employees who did not “fit in with [a] particular work group” to another client. CP 1081. On occasion, Johnson would terminate a Staffmark employee for “no-call, no-show” or gross negligence. CP 1073.

C. Staffmark Shared Supervisory Responsibility of Its Leased Employees With Expeditors Through Its On-Site Manager and Leads

Expeditors divided the work into teams of laborers and forklift operators. CP 1115-16. Each team typically consisted of two general laborers and one forklift operator. CP 1115. The laborers worked with a forklift operator to unload goods from the container onto pallets. CP 1152. The loaded pallets were shrink-wrapped, and the forklift operator put the goods away in a designated portion of the facility. CP 1152. The Staffmark leads were general laborers or forklift operators who Staffmark paid a slightly higher wage to take on more responsibilities. CP 1116. If Expeditors needed a Staffmark employee to assume a lead position, Staffmark’s on-site manager arranged for Expeditors to interview prospective leads. CP 1071. Expeditors had the final say in choosing which Staffmark workers became leads, but the leads still reported to Staffmark. *See* CP 1071.

Among other duties, Johnson and the Staffmark leads helped ensure that Staffmark employees followed safety standards. CP 1189, 1192. Johnson attended monthly safety meetings along with Staffmark and Expeditors leads and Expeditors supervisors. CP 1121. And in his daily walk-arounds of the facility, he looked for safety issues and ensured that Staffmark workers wore personal protective equipment, like high-visibility safety vests and safe footwear. CP 1068-69, 1189.

Both an Expeditors lead and a Staffmark lead were assigned to Strumsky's shift. CP 1043, 1115-16. Staffmark leads ensured that their team followed the client's dress code and wore the appropriate protective gear. CP 1192. Both leads were responsible for immediate discipline of Staffmark workers. CP 1096, 1101. Both Staffmark and Expeditors leads referred more serious or on-going issues to Johnson. CP 1096. That is because Staffmark leads could only reassign a Staffmark employee with Johnson's approval. CP 1128-45.

Both Staffmark and Expeditors leads attended daily shift meetings with Expeditors' supervisors to discuss staffing and safety issues and to receive work orders. CP 1051. Johnson often participated in these meetings. CP 1127. The Staffmark lead for the swing shift, Jeffrey Thysell, told Strumsky when to report to work. CP 1115-16. Ricky Maghanoy was the Expeditors lead on shift, who worked with Strumsky.

CP 1043. If Strumsky ever ran late, he would text the Staffmark lead, Thysell. CP 1148. Maghanoy and Thysell distributed the workload among teams before the start of each shift. CP 1117.

D. Strumsky Was Not Properly Trained Before He Was Seriously Injured While Operating a Forklift in Expeditors' Warehouse Facility

On October 1, 2015, Strumsky suffered serious injuries when he lost control of the stand-up forklift he was operating in the 24th Street facility. CP 86, 1142-43. The night that Strumsky was injured, he spent an hour unloading freight from a trailer using a forklift. CP 1152. When he finished, Strumsky drove the forklift 100 feet across the warehouse towards the bathrooms. CP 1153. It was at that point that Strumsky lost control of the forklift, and crushed his left foot against a support beam. CP 1143.

Staffmark concedes that Strumsky was not properly trained before operating the forklift. Opening Brief of Appellant (AB) 4-5; CP 1144. Staffmark and Expeditors shared responsibility for training and certifying forklift operators. CP 1026-29. Staffmark would only assign an employee to a forklift operator position if that employee had experience operating powered industrial trucks. CP 1027. Staffmark verified this experience by providing a written test to prospective forklift trainees. CP 1027-28. After

the worker passed the test, Staffmark would approve the worker for practical training. CP 1098.

Historically, Staffmark's on-site manager or leads administered and scored the test. CP 1074. But Staffmark's staff gave Expeditors a blank copy of the test, and Johnson knew Expeditors' employees provided the test to prospective forklift trainees during the time that Strumsky worked there. CP 1099, 1172-73. After the test, Expeditors provided the practical training on the site-specific equipment. CP 1104. Expeditors would then certify the worker as a forklift operator and notify Staffmark so the worker could receive higher pay. CP 1105.

It is undisputed that neither Staffmark nor Expeditors gave Strumsky the written test or certified him before he began operating a forklift. CP 1143-44; AB 4. The only information he received about forklifts before operating one was (1) an employee handbook that briefly mentioned that a worker should not operate a forklift without Staffmark's permission (an admonition buried in the orientation packet that if the worker is asked to operate a forklift without being trained that he or she should contact Staffmark), and (2) a short video that described general safety topics. CP 1144, 1256. Strumsky testified that he believed he was following the appropriate process for becoming a forklift operator. CP 1143-44, 1146. He had asked Ricky Maghanoy, an Expeditors' Lead,

about becoming a forklift operator. CP 1055. Maghanoy discussed the possibility of training Strumsky with Thysell, the Staffmark lead assigned to Strumsky's shift. CP 1119. And Maghanoy testified that he "asked the supervisors to get the okay" from Steve Tiffany, the Expeditors supervisor, before training Strumsky to drive a forklift. CP 1044. Maghanoy knew that Strumsky was not "signed off completely" because "Staffmark wasn't really following up" when Expeditors asked to train forklift operators. CP 1044.

Maghanoy allowed Strumsky to operate the Expeditors forklifts in five or six sessions over a period of a month. CP 1151. Each session lasted about an hour. CP 1151. While most of the driving took place away from the main work area, the activity was still visible to the other employees in the warehouse. CP 1057. Other forklift operators often drove by the space where Strumsky was operating the forklift. CP 1057. Twice, Strumsky drove in a circle around the other workers. CP 1058.

E. The Department Concluded That Staffmark Had Sufficient Control Over Strumsky to Cite Staffmark as an Employer

Department safety inspector Edgar Alvarez found that Staffmark provided labor for specific roles at the Expeditors facility, and controlled those employees through on-site supervision. CP 947. Because Staffmark had the right to control its employees, Alvarez found Staffmark to be the

primary employer and as such responsible for safety of employees at the Expeditors facility. CP 947.

Staffmark received two serious violations for failing to ensure an employee successfully completed an operator training program before operating Powered Industrial Trucks (PITs) and for failing to ensure that the operator operated PITs according to the manufacturer's instructions by keeping the forklift under control at all times. WAC 296-863-60005; WAC 296-863-40010.

WAC 296-863-60005 requires that employees "successfully complete an operator training program before operating PITs." The operator training program has three components: 1) "[f]ormal instruction such as a lecture and discussion, interactive computer learning, video tapes, and written material;" 2) practical training; and 3) evaluation of the trainee's performance.⁵ WAC 296-863-40010 requires employers to ensure that their employees operate forklifts according to the manufacturer's instructions, follow the driving rules outlined in the regulation, and keep the forklift "under control at all times."

⁵ WAC 296-863-60005. Staffmark has never contended that it met the exception in WAC 296-863-60005(1) that allows a trainee to operate a forklift if the trainee is under direct supervision of the trainer and if "operating the PIT does not endanger the trainee or other employees."

F. After Hearing All the Evidence, the Board Concluded That Staffmark Was A Joint Employer Under the Economic Realities Test

Staffmark appealed to the Board and the Board affirmed the citations. The industrial appeals judge agreed with the Department and concluded that, “[a]fter analyzing the seven factors in the ‘economic realities’ test and considering whether Staffmark had the right to control the workforce at the [Expeditors’ facility,] that both had substantial control over the workforce and work environment involved in the violations at issue.” CP 83. The judge was persuaded that “Staffmark was actively involved at the worksite, interacting with the workforce including looking for safety concerns, and having the ability to terminate Staffmark employees,” and “not merely handling payroll and other administrative tasks[.]” CP 84. The judge recognized that both companies had a significant role in selecting and training forklift drivers.

Staffmark petitioned the Board for review of the proposed decision, but the Board declined and adopted the proposed decision as its final decision. CP 29. On Staffmark’s appeal, the superior court affirmed the Board, determining that substantial evidence supported the Board’s Findings of Fact and Conclusions of Law. CP 3-4, 1452-55. Staffmark appeals.

IV. STANDARD OF REVIEW

In a WISHA appeal, the court reviews a decision by the Board directly based on the record before the agency. *J.E. Dunn Nw., Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 35, 42, 156 P.3d 250 (2007).

The Board's findings of fact are conclusive if substantial evidence supports them. *Elder Demolition, Inc. v. Dep't of Labor & Indus.*, 149 Wn. App. 799, 806, 207 P.3d 453 (2009); RCW 49.17.150(1). Courts view the evidence in the light most favorable to the prevailing party at the Board—here, the Department. *See Frank Coluccio Const. Co. v. Dep't of Labor & Indus.*, 181 Wn. App. 25, 35, 329 P.3d 91 (2014). To protect workers, Washington courts have established a guiding principle of liberal construction for interpreting WISHA and its rules. *See Elder Demolition*, 149 Wn. App. at 806.

V. ARGUMENT

The Department adopted work place safety rules designed to prevent workers from injuring themselves while operating forklifts. These rules require employers to train workers before they operate forklifts and to ensure that workers safely operate forklifts at all times. WAC 296-863-60005; WAC 296-863-40010. Although Staffmark leased the injured worker to Expeditors, WISHA places responsibility on primary employers

who lease their workers to on-site employers if they are “employer[s]” as defined by RCW 49.17.020. So the Department properly cited it.

Staffmark’s challenge fails for two reasons. First, substantial evidence supports the Board’s determination that Staffmark was a responsible employer. In cases of potential joint employer liability, such as employing leased workers, the economic realities test determines whether one or more employers should be liable for a safety violation. Substantial evidence supports the conclusion that Staffmark is an employer under the economic realities test because:

- Staffmark had the right to control its employees at Expeditors’ warehouse;
- it exercised control over the worksite through its on-site manager and leads;
- it controlled the workers’ written forklift training program;
- it paid employees wages and workers’ employment taxes;
- its employees considered themselves Staffmark employees;
- it had the power to discipline the employees; and
- it has remedies under its agreement with Expeditors to ensure that untrained employees did not operate forklifts.

Second, under case law governing constructive knowledge, substantial evidence supports that Staffmark knew about the hazard because Strumsky operated in plain view of other workers in the work area.

A. Holding Primary Employers Who Place Leased Employees on Worksites Responsible When They Have the Right to Control

the Employees Furthers WISHA's Purpose of Protecting Washington Workers

The purpose of WISHA is to “assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington” RCW 49.17.010. This direction reinforces the state’s interest in creating a safe work place as provided by the State Constitution. *See* Wash. Const. Art. II, § 35 (mandating that the Legislature must pass laws to protect people working in dangerous employment conditions). And it dovetails with RCW 49.17.010’s requirement for WISHA laws to “equal or exceed” the standards prescribed by the Occupational Safety and Health Act (OSHA). *See also* RCW 49.17.050(2). To ensure safe work place practices, employment-staffing companies must be responsible for work place hazards when they are employers under the economic realities test.

1. A company may be an employer if it has the right to control the employees

The key question here is whether Staffmark was an employer under WISHA. RCW 49.17.020(4) defines an “employer” as: any firm that “engages in any business, industry, profession, or activity in this state and employs one or more employees” The fact-finder—the Board—weighs seven non-exclusive factors—called the economic realities test—

that determines whether an entity is an employer. The test requires the

Board to analyze:

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

Potelco v. Dep't of Labor & Indus., 191 Wn. App. 9, 31, 361 P.3d 767

(2015); *In re Skills Res. Training Ctr.*, No. 95 W253, 1997 WL 593888,

*4 (Wash. Bd. Ind. Ins. App. Aug. 5, 1997)); *Sec'y of Labor v. Griffin &*

Brand of McAllen, Inc., 1978 O.S.H.D. (CCH), 1978 WL 7060, *2

(Occupational Safety Health Rev. Comm'n June 9, 1978). These seven

factors are not all-inclusive, though special attention is given to the control

factors. *See Potelco*, 191 Wn. App. at 31.⁶ Although Staffmark suggests

that there can be only one employer, the *Potelco* Court recognized that

⁶ The federal Occupational Safety and Health Review Commission, the federal equivalent to the Board, has emphasized that the term "employer" is not limited to common law employment relationships, but is to be broadly construed in light of both the statutory purpose of OSHA, and the economic realities of the relationship. Mark A. Rothstein, *Occupational Safety and Health Law*, § 2.3 (2015 ed.). Washington courts consider OSHA decisions interpreting WISHA. *Adkins v. Aluminum Co.*, 110 Wn.2d 128, 147, 750 P.2d 1257 (1988).

two employers may be held responsible under the economic realities test.

AB 15; *see Potelco*, 191 Wn. App. at 33.

The Board of Industrial Insurance Appeals applies its analysis from *Skills Resource*, as well as the analysis from *Potelco*. *See* CP 81. *Skills Resource* correctly identifies the test to be applied and recognizes that the key factors relate to the right to control the workforce. 1997 WL 593888 at *2, *4. Although the Board says that it is a test to determine “who controls the workplace,” it makes clear that the Board really focuses its analysis on who controls the worker. 1997 WL 593888, at *2, *4, *5. To extent that *Skills Resource* suggests that the leasing employer must control the workplace to be an “employer,” its holding is inconsistent with the long line of federal cases that affirm that an employer does not have to establish control over the workplace or the hazard to be held responsible for workplace safety. *See D. Harris Masonry v. Dole*, 876 F.2d 343, 345 (3rd Cir. 1989); *Havens Steel Co. v. Occupational Safety & Health Rev. Comm’n*, 738 F.2d 397, 400-01 (10th Cir. 1984), *Dun-Par Eng’rd Form Co. v. Marshall*, 676 F.2d 1333, 1336 (10th Cir. 1982); *Elec. Smith v. Sec’y of Labor*, 666 F.2d 1267, 1270 (9th Cir. 1982); *DeTrae Enter. v. Sec’y of Labor*, 645 F.2d 103, 104 (2nd Cir. 1981); *Bratton Corp. v. Occupational Safety & Health Rev. Comm’n*, 590 F.2d 273, 275-76 (8th Cir. 1979).

The three control factors—who is responsible for controlling the employee’s activities, who has the power to control the employee, and who has the power to fire the employee or to modify the employee’s employment condition—relate to who controls the *employees*, not the hazard as Staffmark mistakenly asserts. AB 9. This focus on the control elements is consistent with the non-delegable duty all employers have to ensure the safety of their workers. *See Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 460, 788 P.2d 545 (1990).

2. Staffmark had the non-delegable duty to take reasonable steps to ensure its employees were protected from the hazard and it failed to take reasonable steps to satisfy its non-delegable duty

All employers have a non-delegable duty to protect their employees under both WISHA and OSHA. RCW 49.17.060; *see Ward v. Ceco Corp.*, 40 Wn. App. 619, 628, 699 P.2d 814 (1985); *see Sec’y of Labor v. Aerotek*, 2018 O.S.H.D. (CCH) P 33663, 2018 WL 2084250, *5 (Occupational Safety & Health Rev. Comm’n Mar. 23, 2018) (“Even though it is a temporary agency, Respondent nonetheless has a statutory obligation to ensure the safety of its employees.”).⁷ Staffmark’s claim that it did not create the hazard, control the hazard, or have any responsibility

⁷ The Court of Appeals recently affirmed this non-delegable duty in an unpublished decision. *See North Coast Iron Corp. v. Dep’t of Labor & Indus.*, No. 76847-6-I, 2018 WL 3738251, *7 (Wash. Ct. App. August 6, 2018) (unpublished) (RCW 49.17.060 “does not allow an employer to pass off its site safety duties to others.”).

to correct the hazard is unsupported by the facts here. AB 9, 17. But even if true, these assertions do not relieve Staffmark of its non-delegable duty to ensure that its employees are protected from the hazard. Staffmark is wrong that it needs to have created or controlled the hazard to be deemed an employer. AB 9.

Under both state and federal law, a business may be an employer if it has the means to assure that other employers fulfill their obligations with respect to employee safety. *See Ward*, 40 Wn. App. at 628; *Universal Const. Co., Inc. v. Occupational Safety & Health Rev. Comm'n*, 182 F.3d 726, 731 (10th Cir. 1999). An employer that either knows or should have known about a violation of an OSHA standard has a duty to protect its employees, even if it did not create the violation and has no control over it. *Sec'y of Labor v. Anning-Johnson Co.*, 1975-1976 O.S.H.D. (CCH), 1976 WL 5967, *5 (Occupational Safety & Health Rev. Comm'n May 12, 1976).

Worksites frequently have multiple employers, including non-exposing employers who do not create or control the hazard. *E.g., Sec'y of Labor v. Anastasi Bros. Corp.*, 1977-1978 O.S.H.D. (CCH), 1977 WL 7689, *1 (July 7, 1977). Even if an employer does not control the hazard, a non-exposing employer must: (1) ask the creating or controlling employer to correct the hazard; (2) inform its employees of the hazard;

and (3) take reasonable steps to ensure correction of the hazard. *Aerotek*, 2018 WL 2084250, at *5; *Sec’y of Labor v. Grossman Steel & Aluminum Corp.*, 1977-1978 O.S.H.D. (CCH), 1976 WL 5968, *4 (Occupational Safety & Health Rev. Comm’n May 12, 1976). If the non-exposing employer has authority to correct the hazard, it must do so. Otherwise, it must take reasonable steps to ensure its employees are otherwise protected from the hazard.”⁸ Here, Staffmark failed to ask Expeditors to correct the hazard, failed to adequately inform its employees of the hazard, and failed to take alternative protective measures. *See Grossman Steel*, 1976 WL 5968, at *4.

Staffmark sought to delegate part of its non-delegable duty to Expeditors to train employees to safely operate forklifts, but it made no attempt to ensure that the client was living up to that responsibility. At a minimum there was a gap: Expeditors’ employees did not understand the process and did not understand what Staffmark employees needed to do to become forklift drivers. But it was not just Expeditors’ employees that did

⁸ Finding Staffmark liable under joint employer liability also has parallels with multi-employer worksite liability where the courts have interpreted WISHA liberally to provide wide protection to workers. Under multi-employer worksite liability, employers have a specific duty to comply with WISHA regulations, which extends “to all employees who may be harmed by an employer’s violation of the WISHA regulations.” *Afoa v. Port of Seattle*, 176 Wn.2d 460, 471, 296 P.3d 800 (2013) (quoting *Stute*, 114 Wn.2d at 460); *see also Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 671, 709 P.2d 774 (1985). This line of cases shows that Washington courts broadly apply the protections of WISHA to workers. Holding Staffmark responsible as an employer under the economic realities test furthers the preventive purpose of the Act.

not understand the process. Strumsky testified that he believed he was following the process because orientation materials only told him to speak with a supervisor before operating a forklift. *See* CP 1146.

Staffmark has supplied no evidence to show that it took the steps necessary to ensure the protection of its employees from operating forklifts without training. Staffmark could have, but did not, create a process to ensure that both Staffmark and Expeditors employees were aware of the training necessary for employees before they operated forklifts. The host employer (Expeditors) may also have responsibility for implementing safety and health protections, but if the primary employer (Staffmark) takes no steps to review whether the host's responsibilities are being met it is not meeting its responsibility to provide a workplace free of recognized hazards. *See Sec'y of Labor v. N & N Contractors, Inc.*, 2000 O.S.H.D. (CCH), 2000 WL 665599, *6 (Occupational Safety & Health Rev. Comm'n May 18, 2000).

Staffmark suggests that it informed Strumsky not to operate forklifts unless he had taken the written test and was certified and authorized by both Staffmark and Expeditors. AB 6. This reargues the facts of the case and is unsupported by the record. Strumsky testified that he received the employee guide, but did not recall reading the section that Staffmark cites. CP 1144. He testified that he watched a short video when

he began working for Staffmark, which touched on general forklift safety.

CP 1145-46. Strumsky believed he had followed Staffmark protocol by first talking to Ricky Maghanoy, who oversaw his daily work activities, because that was what he recalled from the video. CP 1144-45.

Staffmark failed to ensure that workers like Strumsky understood the process for forklift certification and so failed to protect him from the hazards of operating forklifts improperly. Staffmark's arguments on the other hand would allow an employer to contract out of responsibility for work place safety for worksites it controls. *See Sec'y of Labor v. The Barbosa Group, Inc.*, 2005 O.S.H.D. (CCH), 2007 WL 962960, *3 (Occupational Safety & Health Rev. Comm'n February 5, 2007) (cannot contract safety to third party). Staffmark created the hazards and should be held responsible for creating an unsafe work place.

B. Substantial Evidence Supports the Determination That Staffmark Was an Employer Under the Economic Realities Test

Staffmark concedes that the Board was correct when it used the economic realities test to determine whether Staffmark was an employer, but reargues the evidence supporting the Board's findings on the factors. AB 12. But courts do not reweigh the evidence on appeal even if the court might have resolved factual disputes differently. *Potelco v. Dep't of Labor & Indus.*, 194 Wn. App. 428, 434, 377 P.3d 251 (2016). When looking at

the evidence in the light most favorable to the Department, the Board's findings support the Board's conclusion that Staffmark is an employer as provided by RCW 49.17.020.

1. Substantial evidence supports the finding that Strumsky considered Staffmark his employer

The first factor—who the workers consider their employer—weighs in favor of finding Staffmark was Strumsky's employer. *Potelco*, 191 Wn. App. at 31. The Board found that Strumsky considered Staffmark his employer. CP 70 (FF 4). Staffmark's claim that "Strumsky unequivocally testified that Maghanoy was in charge of his department and oversaw his work" is wrong. AB 13. Rather, Strumsky testified that if he had problems he "always went and talked to [the Expeditors lead], but that he went to Staffmark lead for "scheduling issues" and that the Staffmark lead would actively help make work assignments with the Expeditors lead at the beginning of every shift. CP 1142, 1161-62.

More to the point, Staffmark hired Strumsky, and Staffmark leased Strumsky to Expeditors as a laborer. CP 1097-99. Staffmark's on-site manager interviewed him on-site and hired Strumsky specifically to work in Expeditors' 24th Street warehouse. CP 1141-42. When Strumsky was hired, Staffmark's on-site manager walked him around the facility and introduced him to his work tasks. CP 1149. Although Expeditors also had a significant role in Strumsky's employment, that is immaterial because

both Staffmark and Expeditors can be employers under the economic realities test. *See Potelco*, 191 Wn. App. at 33. And that is what the Board concluded. CP 85 (FF 3). A reasonable fact-finder could conclude that the first factor supports finding that Staffmark is an employer under RCW 49.17.020(4), as the Board did here.

2. Substantial evidence supports the Board's finding that Staffmark paid wages to Strumsky and other Staffmark workers

The second element of the economic realities test—who pays the worker's wages—likewise weighs in favor of the Board's determination that Staffmark was Strumsky's employer. *Potelco*, 191 Wn. App. at 31. The Board found that Staffmark was responsible for paying the workers' wages and then passing on those costs to Expeditors. CP 69-70 (FF 2, 3). Substantial evidence supports this conclusion because it is undisputed that both Staffmark and Expeditors had a role in paying wages. Staffmark paid the employees' wages, as well as employment taxes and workplace benefits. CP 1199. These costs were passed on to Expeditors through a mark-up charge for each employee, but Staffmark paid the employees. CP 1196, 1199.

Staffmark cites *Secretary of Labor v. MLB Industries*, 1984-1985 O.S.H.D. (CCH), 1985 WL 44744, *4 (Occupational Safety & Health Rev. Comm'n Oct. 31, 1985), for the proposition that, when a labor

leasing company receives payment for the wages from the company to which it leases workers, it cannot be held responsible under the second factor. AB 14. In *MLB Industries*, the federal review commission found that an employer who leased employees to a contractor under an emergency contract was not responsible for the workplace violations to which the employees were exposed. *Id.* at *5-6. This case does not apply for two reasons. First, the employment relationship there was markedly different than the case here: the putative MLB employees were dispatched from the union hall for an “emergency” on a specific construction project, and MLB made the arrangement with the owner and general contractor for the construction project on short notice because MLB already had a contract with the union. *Id.* at *1, *6. In contrast, Staffmark had a longstanding wage relationship with the employees who worked at the 24th Street facility—the workers received payment for wages and benefits from Staffmark for years in some instances. *E.g.*, CP 81. Second, the federal review commission gave this factor little consideration because they did not consider it to “directly relate[] to the issue of control[.]” *MLB Industries*, 1985 WL 44744, at *4.

Staffmark’s claim, that *MLB Industries* suggests that when any labor leasing company receives payment for the wages from the company to which it leases workers it cannot be held responsible under this factor,

is an overly broad reading of *MLB*'s analysis. AB 14. All staffing firms pass the cost of workers onto the companies to whom they provide workers. That is the business model of staffing firms. To read *MLB* so broadly would mean that no staffing company could be held responsible for the workers it provides under this factor. Washington law does not support such a proposition and it does not further WISHA's underlying purpose to protect workers. RCW 49.17.010.

It is true that Expeditors had some control of raises because it had a role in determining who would become a lead or a forklift operator—the two ways to get a raise. See CP 1070-71, 1105, 1119. But Staffmark's staff also participated in selecting who would be leads and forklift operators, because they would set up the interview. See CP 1119, 1070-71.

Staffmark claims that the "factor undoubtedly weighs in favor of Expeditors as being the employer." AB 15. Staffmark makes two missteps here. First, it admittedly asks this Court to reweigh this factor. Second, Staffmark suggests that there can be only one employer. But this Court does not reweigh the evidence and courts have already recognized that two employers may be held responsible under the economic realities test. See *Potelco*, 191 Wn. App. at 33. The Court should reject Staffmark's faulty analysis about the second factor.

3. Substantial evidence supports the conclusion that Staffmark shared the responsibility to control the workers

The third factor of the economic realities test—who has the responsibility to control the workers—also weighs in favor of the Board’s determination. *Potelco*, 191 Wn. App. at 31. The Board found Staffmark and Expeditors both had the responsibility to control the workers. *See* CP 69-70 (FF 3).⁹ There is no requirement under the economic realities test to show “substantial control over the worksite” to establish that the primary employer has the responsibility to control workers. AB 15; *see Potelco*, 191 Wn. App. at 31-32. Nor is there any requirement to show that Staffmark created, controlled, or had the responsibility to correct the hazard to meet this element. *Contra* AB 17. This element focuses on who has the “the right” to direct and control workers’ duties. *See Potelco*, 191 Wn. App. at 32-33.

In any case, Staffmark’s claim that it had “little to no control over the worksite” and the workers is unsupported. AB 15. Strumsky reported to both Thysell, the Staffmark swing shift lead, and Maghanoy, the Expeditors lead, and ultimately to Johnson, the Staffmark on-site manager.

⁹ Staffmark’s assertion that “[t]he key question under the ‘Economic Realities’ test is who controlled the workers” misstates *Potelco*. AB 15. The *Potelco* Court said the “the key question is whether the employer has the *right* to control the worker,” which goes to the fourth element. 191 Wn. App. at 31 (emphasis added); *see* Part V.B.4 *infra*.

Thysell was responsible for calling Strumsky and letting him know when to report to work. CP 114, 1118. At the shift meetings, Expeditors' supervisors would work "hand in hand with the leads" to distribute the night's workload and both Staffmarks' and Expeditors' leads collaborated to assign work orders to various teams. CP 1110, 1115, 1117. Both leads participated in the monthly safety meetings and daily shift meetings. CP 1110, 1118. Thysell and Maghanoy consulted each other when determining which general laborers were eligible to be trained as forklift operators. CP 1119, 1162. They had specifically discussed the possibility of training Strumsky to become a forklift operator before he began training. CP 1119. It is undisputed that Staffmark had a responsibility to help train Staffmark employees by administering the written test. AB 4. So, once Staffmark knew Strumsky was being considered for training, it had the responsibility to ensure he was properly certified before the training began.

While Maghanoy oversaw Strumsky's day-to-day activities, Thysell often assigned Strumsky the evening's work load. CP 1114, 1052. Maghanoy would go to Thysell to help him address concerns if people were not getting along or "[they were] not doing what [they were] told or if [they were] not following procedures and stuff like that." CP 1046. Substantial evidence supports the Board's finding that "[b]oth companies

provided substantial control of the work at the Expeditors' 24th Street Sumner Facility[.]” CP 85-86 (FF 3).

4. Substantial evidence supports the conclusion that Staffmark had the power to control the workers

The fourth factor—who has the power to control the workers—supports the Board’s findings. *Potelco*, 191 Wn. App. at 31. The Board found Staffmark had the power to control its workers because it had leads and managers on-site and both Staffmark and Expeditors could discipline workers. CP 69-70 (FF 3). While Staffmark preferred to consult with the client before taking disciplinary action against an employee, Staffmark retained the authority to discipline or terminate an employee because Johnson had the ultimate authority to discipline or terminate Staffmark employees who were not meeting client standards. CP 1072-73, 1192-93. Johnson also could reassign employees who did not “fit in with [a] particular work group” to another client. CP 1081.

Staffmark agrees that both Staffmark and Expeditors could discipline Strumsky, yet still asks this Court to reweigh the evidence to determine that Expeditors should be held solely responsible. AB 18. Staffmark’s criticism of the Board’s analysis of this factor is misplaced. AB 19-20. The Board correctly evaluated the facts to find that Staffmark had a substantial role in the forklift training process and promoting a laborer to a forklift position. Indeed, Staffmark’s vice president conceded

that the process between Staffmark and Expeditors had broken down because there was a gap in the process. CP 1201-04; CP 84; *see also* CP 1044 (“Staffmark wasn’t really following up on the people when we asked for drivers and stuff.”). But the fact that Staffmark did not wield its authority to train Strumsky does not mean it did not have both the responsibility and the power to do so in the first instance.

Staffmark argues that the Board erred in assessing this factor because Expeditors’ and Staffmark’s employees failed to follow the forklift training process to which both parties agreed. AB 19-20. But this does not show “that Staffmark had no control over Expeditors and its facility or knowledge of its actions[;]” it shows only that Staffmark failed to exercise the right to control its employees that substantial evidence shows it had. AB 20. Failure to do a duty does not relieve an employer of its obligations—otherwise an employer could defeat a finding of employer-employee relationship by malfeasance. The Court should reject Staffmark’s attempt to second-guess the Board’s weighing of the right to control element.

5. Substantial evidence supports the conclusion that Staffmark had the power to modify the employee’s employment condition at the Expeditors’ facility

The fifth factor—whether the alleged employer can hire, fire, or modify the employment condition of the workers—also weighs in favor of

finding Staffmark was Strumsky's employer. *Potelco*, 191 Wn. App. at 31.

The Board found that Staffmark had such power. CP 84-85. While Staffmark argues that Expeditors had this power, Staffmark again misses the point. This factor does not require Staffmark to have exclusive control over hiring, firing, or modifying the employment contract. In any event, Staffmark concedes that "Expeditors could not fire Staffmark's workers, they could [only] request they not come back." AB 20. That is not the same as firing an employee as Staffmark suggests. If Expeditors asked a leased employee not to return, Staffmark could reassign the worker elsewhere. *See* CP 1072. While Staffmark would often defer to Expeditors' preference about whether to terminate an individual, it had the power to determine which leased workers to hire for the jobsite and the ability to remove its workers from a client's jobsite. CP 1072-73.

Staffmark also had the power to modify the employee's employment condition at the facility itself. CP 1081. Staffmark had the power to modify the employee's employment condition through its initial jobsite walk-through at the client's jobsite and daily walk arounds. CP 1068.¹⁰ Staffmark's on-shift lead would ensure that Staffmark employees complied with Staffmark's PPE requirements and Expeditor's lead

¹⁰ Staffmark performed this initial visit to determine the client's needs and to identify any visual or obvious safety hazards. CP 1067-69.

testified that the Staffmark’s lead could send Staffmark employees home without Expeditor’s approval. CP 1061. The Board considered this factor and rejected Staffmark’s requested approach after weighing the evidence. CP 83, 84, 86.

6. Substantial evidence supports that Staffmark played a role in a Strumsky’s ability to increase his income

The six factor asks whether “the workers’ ability to increase their income depends on efficiency rather than initiative, judgment, and foresight.” *Potelco*, 191 Wn. App. at 31.¹¹ The Board found that both Staffmark and Expeditors controlled who would become a forklift operator—one of the primary ways of getting a raise. CP 84. Staffmark seeks to repurpose this element into another question of control. AB 20-21. But Staffmark’s claim that only Expeditors could choose whether an employee would be promoted to forklift is unsupported. Staffmark concedes it conducted the initial testing to determine whether a worker could become a forklift operator. AB 4. A reasonable factfinder could conclude that Staffmark’s initial negotiation of wages, along with its

¹¹ This element included in the *Skills* analysis is derived from federal case law applying common law principles to assess whether a worker is an employee. See 1997 WL 593888, at *4 (citing *Sec’y of Labor v. Union Drilling*, O.S.H.R.C.A.L.J., 1994 WL 86002, *4 (Occupational Safety & Health Rev. Comm’n Mar. 11, 1994)). This “opportunity for profit or loss” element is a better fit to determine whether a worker is an employee, who is covered by worker protection laws, or an independent contractor, and who is not. *Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 871-72, 281 P.3d 289 (2012).

responsibility to test individuals before they could become forklift operators showed that Staffmark had a role in determining a worker's ability to increase the worker's income. The Board concluded that the "income of the workers was based on a negotiated Service Provider Agreement." CP 84. This is supported by substantial evidence and dispenses with this element to the extent that it applies here.

7. Substantial evidence supports the conclusion that Staffmark played a role in establishing the workers' wages

The seventh element is how the workers' wages are established. *Potelco*, 191 Wn. App. at 31. The Board found that the workers' wages were established based on the companies' negotiated service providers' agreement. CP 69-70 (FF 3). As discussed above, Staffmark concedes that wages were set by a standard contract negotiated between Staffmark and Expeditors, so its claim that this factor exclusively establishes that Expeditors was the employer is unsupported. *Contra* AB 21.

Staffmark paid its workers a wage rate established by contract and then charged Expeditors the wage rate plus a markup. CP 1195-96. Both parties negotiated the markup before they signed the service provider's agreement. CP 1196. Staffmark pays its leads a higher wage rate, which is also passed along to Expeditors. It is not entirely accurate to say that "employees knew or *seemed to know* that in order to get a raise approved

they needed to go through Expeditors management.” AB 21 (emphasis added). Rather, the Staffmark lead and Expeditors lead had a collaborative relationship in helping choose who might be next to get forklift training (the typical way to get a raise). *See* CP 1119. Both Expeditors and Staffmark were also involved in determining who would be a Staffmark lead (another way to get a raise). CP 1074. Substantial evidence also supports the Board’s conclusion that “the employees’ wages were established based on the companies negotiated Service Provider Agreement.” CP 85 (FF 3).

8. The Board properly weighed all the factors to conclude that Staffmark was an employer

Taken as a whole, the economic realities test favors a finding that Staffmark is a joint employer and as such should be held responsible for ensuring the workplace safety of its employees.

Staffmark had the right, responsibility, and power to control Staffmark employees at Expeditors’ facility, including Strumsky. Staffmark paid employees’ wages, administered benefits, and provided PPE. CP 1067-69, 1153-54. Staffmark provided many levels of on-site supervision through shift leads and the on-site manager, Andy Johnson. CP 1095, 1188-89, 1192-93. Among other duties, the on-site Staffmark manager and the Staffmark leads helped ensure that Staffmark employees followed safety standards. CP 1189, 1192. Although Staffmark shared

some supervisory responsibilities with Expeditors employees, Staffmark maintained the ultimate authority to discipline or terminate Staffmark employees—including Strumsky—who were not meeting client standards. CP 1072, 1191-92. Both Staffmark’s and Expeditors’ leads attended daily shift meetings with Expeditors’ supervisors to discuss staffing and safety issues and to receive work orders. CP 1051. And both Staffmark and Expeditors shared responsibility for training and certifying forklift operators. CP 1026-29.

WISHA’s underlying purpose and case law support that Staffmark should be responsible for failing to take reasonable steps to ensure its workers’ safety.

C. Substantial Evidence Shows Staffmark Knew or Should Have Known That Strumsky Was Operating A Forklift Without Being Trained Because He Operated the Forklift in Plain View

Once an employer relationship is established, the Department bears the initial burden of proving these elements:

(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 condition; (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.

J.E. Dunn NW, Inc., 139 Wn. App. at 44-45 (internal quotation omitted).

Staffmark limits its challenge to the fourth element—knowledge—for

each violation. Thus, none of the other prima facie elements are at issue in this appeal.¹²

Staffmark's claim that the Board's decision lacks substantial evidence is unsupported and this Court should reject Staffmark's request to reweigh the evidence supporting the knowledge element. AB at 22-25. To prove the knowledge element for a serious violation at the Board, the Department need only show that the employer knew or, through exercising reasonable diligence, could have known, about the violative condition. RCW 49.17.180; *Wash. Cedar & Supply Co., Inc. v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 914, 83 P.3d 1012 (2003). Reasonable diligence involves several factors, including "an employer's obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence." *Erection Co. v. Dep't of Labor & Indus.*, 160 Wn. App. 194, 206-07, 248 P.3d 1085 (2011) (quotation omitted). Additionally, the Department may show knowledge at the Board in at least two other ways: by establishing that the

¹² Under RCW 49.17.180(6), "[A] serious violation shall be deemed to exist in a workplace if there is a substantial probability that death or serious physical harm could result from a condition which exists...unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." Here, the conditions for both citation items was the lack of completed training before Strumsky operated a forklift and operating the forklift improperly as a result. CP 70. Serious physical harm resulted when Brandon Strumsky crushed his foot between the forklift he was operating and a support beam. CP 1143.

violative condition was in plain view or by showing that the employer failed to exercise reasonable diligence.

1. Substantial evidence supports constructive knowledge because Strumsky operated the forklift in plain view

Substantial evidence supports the Board's conclusion that Staffmark had at least constructive knowledge that Strumsky operated a forklift without proper training because the trainings took place in plain view and Staffmark could have discovered this behavior by reasonable diligence. *See Potelco, Inc.*, 194 Wn. App. at 440; *Erection Co.*, 160 Wn. App. at 207; *BD Roofing, Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 98, 110, 161 P.3d 387 (2007).

Constructive knowledge is established if a violation is readily observable or in a conspicuous location in the area of the employer's crews—in "plain view." *BD Roofing, Inc.*, 139 Wn. App. at 109; *see Erection Co.*, 160 Wn. App. at 207. When a violation is in the open and the violation is visible to any bystander, an employer has constructive knowledge of that violation. *Potelco, Inc.*, 194 Wn. App. at 440. Likewise, failure to maintain control of the vehicle at all times was readily visible.

In one plain view case, this Court concluded that a utility contractor knew or should have known of a violative condition because a single violation occurred in an area where any bystander could have observed it. *Potelco, Inc.*, 194 Wn. App. at 440. Here, Strumsky was

trained in an open warehouse where it was possible for other employees and supervisors to see him operate the forklift without proper training. In the month leading up to the accident, Strumsky operated the forklift “five or six times.” CP 1150. Like *Potelco*, anyone in the work area could have observed this violation. 194 Wash. App. at 440. Each session was “[a]bout an hour.” CP 1151. The Staffmark lead, Thysell, discussed the possibility of training Strumsky with Maghanoy. CP 1119. So Staffmark knew that he might be participating in training. Indeed, when Strumsky was asked if he believed whether Staffmark lead Thysell saw him he said, “Yeah. Yeah. He was on the forklift pretty much the whole day. I mean, it would be kind of shocking if he didn’t see me.” CP 1147.

The frequency and duration of the training sessions shows Staffmark could have known of the hazard with reasonable diligence, but it was unnecessary to establish that Strumsky was operating it multiple times or for lengthy durations to establish knowledge under the plain view case law. *Pro-Active Home Builders, Inc., v. Dep’t of Labor & Indus.*, ___ Wn. App. 2d ___, 432 P.3d 404, 409 (2019); *see also BD Roofing, Inc.*, 139 Wn. App. at 109. And Staffmark’s claim to the contrary is without support.

None of the negligence tort cases cited by Staffmark support its claim that riding a forklift multiple times, and for lengthy periods of time,

fails to amount to a duration sufficient for constructive knowledge under a substantial evidence review in a WISHA case. This is because no Washington court has imported the “reasonable amount of time” standard to WISHA cases. To the contrary, Washington courts have concluded that a *single* event of short duration is enough to show constructive knowledge to prove a serious WISHA violation. *See Pro-Active*, 432 P.3d at 409 (declining to consider duration as an element in establishing constructive knowledge); *see Potelco, Inc.*, 194 Wn. App. at 440 (single violative event visible to a bystander sufficient to establish knowledge); *see also BD Roofing, Inc.*, 139 Wn. App. at 110 (Department inspector saw roofing violation for short duration when drove by site).

2. Substantial evidence also supports the conclusion that Staffmark failed to exercise reasonable diligence to supervise the worker and inspect the work area

Substantial evidence supports the Board’s conclusion that Staffmark had knowledge because it could have discovered the violation if it had exercised reasonable diligence. Reasonable diligence includes the duty to adequately supervise employees. *See N & N Contractors, Inc. v. Occupational Safety & Health Rev. Comm’n*, 255 F.3d 122, 127 (4th Cir. 2001). Reasonable diligence also includes the employer’s obligation to inspect the work area. *Erection Co.*, 160 Wn. App. at 206-07.

Staffmark failed to exercise reasonable diligence to ensure its forklift policy was followed because there was an incentive for Expeditors to undermine Staffmark's forklift training policy. Forklift operators not only receive a higher wage, but Staffmark charged a higher markup for them. *See* CP 205-211, 1196-98. And Staffmark knew that Expeditors' supervisors had an incentive to work around the Staffmark protocol when there is a need to hire more forklift operators. Staffmark also gave Expeditors a blank copy of the written test and believed that Expeditors had administered it without Staffmark employees being present. CP 1074. This placed Staffmark on notice that reasonable diligence was necessary to ensure that Expeditors followed the training protocols to which the parties agreed. It is these shared training protocols, among other evidence, that show Staffmark was also a primary employer responsible for safety at the Sumner facility.

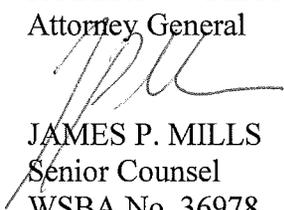
VI. CONCLUSION

Substantial evidence shows that Staffmark is an employer under the economic realities test because it had the right to control employees on-site, it exercised control over the worksite through its on-site manager and "leads," and it has remedies under its agreement with Expeditors to ensure that untrained employees did not operate forklifts. Employer

knowledge is supported through constructive knowledge. The citation should be affirmed.

RESPECTFULLY SUBMITTED this 25th day of March, 2019.

ROBERT W. FERGUSON
Attorney General



JAMES P. MILLS
Senior Counsel
WSBA No. 36978
Office No. 91040
1250 Pacific Avenue, Suite 105
Tacoma WA 98402
(253) 597-3896

PROOF OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that the document, to which this proof of service is attached, was delivered as follows:

Original via E-filing to:

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402
Coa2filings@courts.wa.gov

Via US Mail to:

Aaron K. Owada
Owada Law, PC
975 Carpenter Road NE, Suite 204
Lacey, WA 98516-5560
aaron.owada@owadalaw.net
Attorney for Staffmark

DATED this 25th day of March, 2019, at Tacoma, WA.



MELANIE PENNINGTON,
Legal Assistant

ATTORNEY GENERAL OF WASHINGTON - TACOMA LNI

March 25, 2019 - 4:38 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52837-1
Appellate Court Case Title: Staffmark Investment LLC, Appellant v. Dept. of L & I, Respondent
Superior Court Case Number: 18-2-04557-1

The following documents have been uploaded:

- 528371_Briefs_20190325163745D2027000_6300.pdf
This File Contains:
Briefs - Respondents
The Original File Name was StaffmarkBriefRespondent_Final.pdf

A copy of the uploaded files will be sent to:

- Sean.Walsh@owadalaw.net
- aaron.owada@owadalaw.net
- richard.skeen@owadalaw.net

Comments:

Sender Name: Melanie Pennington - Email: melaniep2@atg.wa.gov

Filing on Behalf of: James P Mills - Email: jamesm7@atg.wa.gov (Alternate Email: LITacCal@atg.wa.gov)

Address:
PO Box 2317
Tacoma, WA, 98401
Phone: (253) 593-5243

Note: The Filing Id is 20190325163745D2027000