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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.

REPLY BRIEF OF APPELLANT STAFFMARK INVESTMENT, LLC

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I. INTRODUCTION

Under both WISHA and Federal OSHA, all employers have an obligation to provide their workers a safe work environment. RCW 49.17.060. Accordingly, the question of whether an entity is liable is crucial. In circumstances where more than one employer may be responsible for the health and safety of workers, State and Federal law has long recognized that in leased employee situations, the test for liability is whether the entity has control of the worker and the worksite. The control test for liability derives from the "economic realities" test adopted by both federal and Washington courts, as well as, administrative tribunals. *See, e.g., Potelco, Inc. v. Dept' of labor and Indus.,* 191 Wn. App. 9, 30-31, 361 P.3d 767 (2015); *Secretary of Labor v. MLB Industries,* OSHRC Docket No. 83-0231; *In re Skills resource Training Center*, BIIA Dec. 95 W253 (1997).

The Department asks the Court to abandon well-established case law that specified when an employer was liable for violations of WISHA in leased employment situations, and instead dismisses the element of control over the workers and the worksite. Given the below, the Court should reverse the Board's Decision and Order and vacate the citation issued against Staffmark because it fulfilled its non-delegable duty to take reasonable steps to ensure its employees were protected from hazards; it was not a joint employer under the economic realities test at Expeditors' facility it lacked substantial control over the workers and the worksite; and it lacked knowledge of the violative conduct.

II. REPLY TO THE DEPARTMENT'S ARGUMENTS

A. Staffmark satisfied its non-delegable duty to take reasonable steps to ensure its employees were protected from hazards.

All employers have a non-delegable duty to protect their employees under WISHA per RCW 49.17.060. Despite the Department's arguments, Staffmark did not seek to delegate part of its non-delegable duty to Expeditors to train its employees to safely operate forklifts and ensure its employees' safety. 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).

The contractual agreement between Staffmark and Expeditors unequivocally states that 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). Significantly, Expeditors drafted the contract and did not negotiate over any of its terms. (Tr. 6/2/17, p. 31, line 23 – p. 32, line 19).

Moreover, Staffmark took precautions to ensure that its employees were made aware of the forklift training procedures. For example, Brandon Strumsky, the injured worker, was given a copy of the Staffmark Employee Handbook, which he took home and read. (Tr. 6/1/17, p. 60, line 13 – p. 61, line 17; Exhibit 5). 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 indisputably states:

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

However, despite what Staffmark taught Mr. Strumsky on multiple occasions, he asked Ricky Maghanoy, an Expeditors lead, to train him to become a forklift driver, in direct contrast to Staffmark's communicated policies. (Tr. 5/31/17, p. 30, lines 3-4). 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). Mr. Maghanoy, however, never told anyone at Staffmark that he was training Mr. Strumsky on the forklift. (Tr. 5/31/17, p. 152, lines 6 – 9). Unfortunately, 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).

Furthermore, Mr. Strumsky's training sessions occurred away from where people worked and were for short durations; therefore, Staffmark did not have an opportunity to learn of this training through observation. (Tr. 5/31/17, p. 143, lines 4-17; p. 143, line 24 – p. 144, line 5; Tr. 66, lines 15 – 24). Thus, although Staffmark had employees on site looking for safety concerns, it was unable to observe Mr. Strumsky's training sessions. Clearly, Staffmark had no knowledge of Mr. Strumsky's trainings or Expeditors' failure to abide by their own contractual terms, and Staffmark satisfied its non-delegable duty to take reasonable steps to ensure its employees were protected from hazards.

B. Staffmark is not a joint employer under the economic realities test at Expeditors' facility because substantial evidence does not support a finding that it had substantial control over the workers and the worksite.

Contrary to the Department's assertions, the evidence clearly establishes that the Board's determination that Staffmark was a joint employer under the "economic realities" test is not supported by substantial evidence and, as a result, the Board's Decision and Order must be reversed.

When there is a WISHA violation involving leased or temporary employees, the Board uses the "economic realities" test to determine which employer should be issued the citation. *Potelco v. Dep't of Labor and Indus.*, 191 Wn. App. 9, 30, 361 P.3d 767 (2015); see also *Secretary of Labor v. Union Drilling*, 16 OSHC 1741, 1742 (1994). The "economic realities" test requires an analysis of: 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*, 191 Wn. App. at 31. The employer, for purposes of a WISHA citation, is the employer with control over the work site. *In re Skills Resource Training Center,* BIIA Dec., 95 W253 (1997). Both employers cannot be cited unless they each have substantial control over the workers and the work environment. *Id.* In this case, the Department issued separate citations to Staffmark and Expeditors for the same forklift incident involving Mr. Strumsky.

Overall, 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 the requisite "substantial control over the workers and the works environment." (CABR 60-61).

First, although the leased employees, including Mr. Strumsky, were hired by Staffmark, Expeditors controlled the leased employees by overseeing the facility and the leased employees' work. (Tr. 6/1/17, p. 63, lines 21 – 23; p. 74, lines 6 – 8). For instance, the leased employees took their instructions from Expeditors; the leased employees' tasks were determined by Expeditors; the leased workers would seek guidance and promotions from Expeditors; and the leased employees were supervised by Expeditors. Whereas, Mr. Strumsky testified 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). Thus, Expeditors was the employer in charge of, and controlled, the leased workers.

Second, Expeditors was ultimately paying for the employees' labor. 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 the leased employees went to Expeditors for a raise; the leased employees were told they received a raise from Expeditors; and the leased employees received performance reviews from Expeditors. (Tr. 5/31/17, p. 112, line 15 – p. 113, line 4; p. 159, lines 14 – 22; p. 178, lines 8 –19). Given the above, Staffmark was merely acting as a "conduit for labor," as Expeditors was ultimately paying for the leased employee's labor. *See Secretary of Labor v. MLB Industries,* OSHRC Docket No. 83-0231.

Third, the record establishes that Staffmark lacked "substantial control" over the leased workers and the Expeditors facility, especially during the swing shift. The Department's factual analysis fails to consider the amount of control exerted during the time when Mr. Strumsky's incident occurred, the swing shift. Specifically, after 4:00 p.m., when Mr. Strumsky's alleged violative condition occurred, there was no Staffmark management on-site, only "leads." (Tr. 6/1/17, p. 43, lines 10 – 14; p. 72, line 5 – p. 73, line 12). 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).

However, Mr. Theysell, the Staffmark lead at the time of Mr. Strumsky's alleged violative conduct, confirmed 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, which is the same primary duty as other qualified leased employees. (Tr. 5/31/17, p. 150, lines 17 – 25; Tr. 6/1/17, p. 9, lines 23 – 24; p. 40, lines 5 – 23). Mr. Theysell's testimony is in accord with Mr. Strumsky's testimony, which indicated he only reported to Mr. Theysell for scheduling matters and everything else of substance went through Mr. Maghoney, an Expeditors' lead; as well as Mr. Maghanoy's testimony, who testified that it was his duty 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; Tr. 6/1/17, p. 77, lines 1 – 15; Exhibit 11, p. 115).

Fourth, contrary to the Department's assertions, Expeditors retained the control to discipline Staffmark employees, including the ability to determine whether a leased employee could complete the workday at

Expeditors' facility and whether a leased employee could even continue working at Expeditors' 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). Therefore, the Department's assertion that Staffmark retained the ultimate authority to discipline or terminate an employee is misplaced.

Furthermore, the Board and Department incorrectly determined that Staffmark had a substantial role in the forklift training process and promoting a laborer to a forklift position. It is undisputed that Expeditors failed to follow the forklift training process by allowing Mr. Strumsky to undergo hands on training without passing the written examination. This demonstrates that Staffmark had no control over the jobsite.

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). 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, a Staffmark lead, saw him operating a forklift. (Tr. 6/1/17, p. 73, lines 24 – p. 74, line 2). Staffmark had no knowledge that Expeditors was training Mr. Strumsky to use a forklift, which was done in contrast to the Agreement.

Fifth, the Department incorrectly states that Staffmark had the power to determine which leased workers for hire for the jobsite and the ability to

remove its workers from the jobsite. Expeditors could request that a leased employee not continue working at its facility. (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). Moreover, 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). Further, the power to modify the employee's ability to become certified to operate a forklift also lied with Expeditors. (Tr. 5/31/17, p. 139, lines 8 – 15; p. 152, lines 6 – 15). Therefore, although Staffmark did an initial jobsite walk-through and ensured its employees wore PPE, it was Expeditors who had the power to hire, fire, and control the leased employees' worksite conditions.

Sixth, the Department fails to mention that 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). Additionally, the other way to increase pay would be to go from being a general laborer to a forklift operator, which was also controlled by Expeditors. (Tr. 5/31/17, p. 123, lines 1 – 15; p. 169, line 20 – p. 170, line 6; p. 159, line 23 – p. 160, line 1; Tr. 6/1/17, p. 21, lines 9 – 17).

Finally, 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). It was Expeditors who paid the leased employees'

wages. For the above reasons, the Board's determination that Staffmark was a joint employer at Expeditors' facility is not supported by substantial evidence.

C. Staffmark Did Not Know Or Should Have Known That Mr. Strumsky Was Operating A Forklift Without Being Trained.

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.

The Board erred in determining that Staffmark had constructive knowledge of Mr. Strumsky's alleged violative conduct because the violations were not readily observable, in a conspicuous area, or in the presence of Staffmark's crews. The Department and the Board's analysis also fails to consider whether the violative conduct existed for a sufficient period for it be identified, and whether Pro-Active failed to exercise reasonable diligence in discovering the violative conduct. *See Latshaw Drilling and Exploration, LLC,* 26 BNA OSHC 1307 (No. 15-1561) (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); *see also Texas ACA, Inc.,* 17 BNA OSHC 1048 (No. 91-3467) (determining the Employer's duty is to take reasonably diligent measures to inspect its worksite and discover hazardous conditions; so long as the Employer has done so, it is not in violation simply because it has not detected or become aware of every instance of a hazard).

Here, there was no one from Staffmark with authority on site who could have witness Mr. Strumsky operating a forklift. The testimony was that Mr. Maghanoy trained Mr. Strumsky three or four times on driving the fork lift alone, away from people or containers. (Tr. 5/31/17, p. 143 lines 14-17). Each time was for about 30 to 45 minutes. The first time was in a bay. Tr. 5/31/17, p. 43 line 24 – p. 144, line 5). The bay is on the side away from

where people are working. (Tr. 5/31/17, p. 153 lines 13-18). Twice was out in the general warehouse. He only drove the forklift once to unload a trailer. This was on the night of the accident and was for only approximately 30 minutes. (Tr. 5/31/17, p. 144 line 7 – p. 145, line 9).

Additionally, 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 follow arounds were in a circle around the groups, away from other workers. (Tr. 5/31/17, p. 154 lines 16-22). Mr. Strumsky even testified that no one from Staffmark saw him operating the forklift. (Tr. 6/1/17, p. 62, lines 13-15). Operating towards the end of the shift in areas away from a lot of people, designed to come in contact with as little people as possible, for safety purposes, is the exact opposite of a condition designed to demonstrate constructive knowledge.

The Board and Department further incorrectly state that a Staffmark lead was aware that Mr. Strumsky was being trained as a forklift driver. Mr. Theysell did not play a role in the training of Mr. Strumsky. (Tr. 5/31/17, p. 152, lines 16-21; Tr. 6/1/17, p. 34, line L23 – p. 35, line 1). Furthermore, Mr. Thysell testified that 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 determination that Staffmark had constructive knowledge is not supported by substantial evidence in the record.

III. CONCLUSION

Given the above, Staffmark respectfully requests the Court reverses the Board's Decision and Order and vacate the Citation in its entirety because Staffmark was not an "employer" for the purposes of WISHA under the economic realities test. 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 it was not in "plain view." 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 24th day of April 2019.

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CERTIFICATE OF SERVICE

I certify that on April 24, 2019, I caused the original and copy of the ***Employer's/Appellant's Reply 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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