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State of Washington
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NO. 54578-1-II

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

HAMILTON CONSTRUCTION CO.

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF
THE STATE OF WASHINGTON,

Respondent.

**CORRECTED OPENING BRIEF OF APPELLANT
HAMILTON CONSTRUCTION CO.**

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I. INTRODUCTION

In April 2015 a catastrophic accident occurred at a construction project in Bonney Lake, Pierce County. The Department cited the Employer with three serious violations on October 8, 2015 under Citation & Notice No. 317936026.

Administrative Hearings were held before the Board of Industrial Insurance Appeals in August 2016. The Board issued a Proposed Decision & Order on October 3, 2017 which vacated all of the citations against Hamilton. The Department filed a Petition for Review which the Board denied on December 5, 2017.

The Department filed an appeal to the Pierce County Superior Court. The Superior Court affirmed the Board's decision that vacated Item 1-1, the safe place violation (WAC 296-155-040), but remanded the matter to the Board to determine whether American Concrete Company¹ violated WAC 296-155-775(15) (Item 1-2), WAC 296-155-035(8), and WAC 296-155-775(1) (a provision not specifically cited by the Department).

On remand, the Board added an alleged violation relating to WAC 296-155-775(1) as Item "1-1a", Decision on Remand, page 2, lines 3-4 and reversed its prior decision by affirming Items 1-2 and 1-3, and further finding a violation of 1-1a. However, in doing so, it reduced the monetary penalty to \$100 for each of the serious violations after holding that the Department failed to present any evidence on the monetary penalty calculation. Both the Department and the Employer appealed to Superior Court.

The Superior Court concluded that the Board erred in Finding of Fact No. 3 which found that there was "insufficient evidence in the record to support a finding that Hamilton Construction Co. employees 'were aware of the demolition plan created by Staton Construction and performed saw cutting activities consistent with the plan.'" The Superior Court affirmed the Board's Decision regarding all other Findings of Fact made by the Board, but reversed the penalty calculation of

¹ American Concrete Company is a subdivision of Hamilton

\$100 for Item Nos. 1-1a, 1-2 and 1-3 by concluding that the Board erred as a matter of law and remanded the matter to the Board to recalculate the penalty for each Item. The Employer filed this appeal to the Court of Appeals.

II. ASSIGNMENT OF ERROR

Employer respectfully asserts that the Board erred as follows:

1. Employer excepts to and assigns error to the Board's Findings of Fact Numbers 2, 4 through 7; and 9 through 11 of the Decision and Order on Remand from the Superior Court dated December 3, 2018.
2. Employer excepts to and assigns error to Conclusions of Law Numbers 3 through 6; of the Decision and Order on Remand from the Superior Court dated December 3, 2018.and,
3. Employer excepts to and assigns error to the Board's finding that, "Staton hired Hamilton as the concrete cutting subcontractor for the job." of the Decision and Order on Remand from the Superior Court dated December 3, 2018 at page 2, line 35.
4. Employer excepts to and assigns error all evidentiary rulings adverse to Employer.
5. The Board erred by not making any specific findings that Hamilton was not an Employer for purposes of the Washington Industrial Safety and Health Act.
6. The Board erred by not making any specific findings that Hamilton was not responsible for the development of an inadequate demolition plan.
7. The Board erred by not making any specific findings that Hamilton did not have any control over the operations or employees at the Bonney Lake project.
8. The Superior Court erred by affirming Citation Items 1-1a, 1-2 and 1-3 and reversing the Board's decision regarding penalty calculations to the extent that penalties were even appropriate where the underlying penalty citations were not established.²

² The Employer stipulated at the Board that it would not contest the penalty calculations if the Department established the underlying violations.

III. ISSUES

- A. Where the uncontroverted testimony was that the Demolition Plan created by McGee Engineering was wrong, and that the incorrect plan was followed, did the Superior Court err by concluding that Finding of Fact No. 3 was not supported by substantial evidence in the record?**
- B. Where it was undisputed that American Concrete had no authority over the cutting operation, was there was substantial evidence in the record to establish that American Concrete was a demolition “subcontractor” or an “Employer” that, as a matter of law, had responsibility over demolition activities for purposes of the Washington Industrial Safety and Health Act, Ch. 49.17 RCW?**
- C. Was there substantial evidence in the record to establish that American Concrete had either actual or constructive knowledge of the alleged violations on April 13, 2015 as required by RCW” 49.17.180(6)?**
- D. Was there substantial evidence in the record to establish that American Concrete failed to exercise due diligence such that it should have known that the saw cutting operations were not in compliance with the general duty to provide a safe and healthful work site?**
- E. Was there substantial evidence in the record to establish that American Concrete had actual or constructive knowledge that the demolition plan prepared for Staton was inadequate or that it should not have been followed?**

IV. STATEMENT OF FACTS

On April 13, 2015, Staton Construction contacted American Concrete, a company owned by Hamilton Construction³ and based in Oregon, requesting a concrete saw and operator. Apart from knowing that Staton needed to remove 110 feet of concrete bridge rail for a construction project in Bonney Lake, Garrick knew nothing about the project. Garrick at page 15, lines 16 – 18. The City of Bonney Lake contracted WHH Nisqually as the General Contractor to modify and/or repair the SR 410 Bridge, which was an overpass over another road. WHH Nisqually hired a number of subcontractors, including Staton Companies, the demolition subcontractor.

³ Hamilton Construction and American Concrete will be used interchangeably.

Board Decision and Order on Remand, page 2.⁴ Rick Garrick, the dispatcher for Hamilton⁵ who received the call, testified that the only information he needed to dispatch workers and equipment was to know what needed to be cut. Garrick at page 10, lines 2 – 4. Based on the description provided by Staton but not knowing any details of the project, Garrick dispatched two employees, a journey level concrete saw cutter and an apprentice vacuum operator.

When Garrick dispatched the workers, Rich Dugan and Donald Corkhill, Garrick did not even know the address where the work was to be performed. Garrick at page 16, lines 4 – 6. He did not dispatch an American Concrete supervisor as he was informed that the cutter and apprentice would work directly under the direction and control of Staton. Garrick at page 17, 1 – 6. Mr. Garrick understood that Dugan (the saw cutter) and Corkhill (the apprentice) would receive specific instructions from Staton's on site supervisor. As is typical in the industry, American Concrete cutters worked directly under the direction of the contractor who hired them. Garrick at page 17, lines 11 – 16. Because it was not their project, nor did they have any knowledge of it, American Concrete was not asked to prepare a Demolition Plan.

The only information that Dugan, the saw cut operator, received when he was initially dispatched was that they were going to remove a concrete bridge rail. Without told where to go, Dugan assumed that they would be working at the SR 520 project in Seattle because they had worked at that project before. Dugan at page 87, lines 16 – 23.

On the way up from Oregon, Dugan and Corkhill were getting gas at a Pacific Pride gas station on I-5 near exit 70 when they ran into Morgan Marney, a foreman for Staton. At the gas station, Dugan and Corkhill learned for the first time that the location that they would be

⁴ The Board Decision and Order on Remand from Superior Court dated December 3, 2018.

working at was in Bonney Lake, a different location than the SR-520 project where they thought they would be working. Corkhill at page 48, line 10 – page 49, line 4. They had never been to the Bonney Lake site before, did not know what the project would be like, and had no knowledge of what would be involved. Corkhill at page 49, lines 8 – 23.

After Dugan learned that he needed to go to the Bonney Lake project and not the SR 520 bridge project, he too did not have any details about the job. Dugan at page 89, lines 6 – 12.

Dugan and Corkhill went to the Bonney Lake project the next day. Corkhill at page 31, line 14. Mr. Corkhill had been working for American Concrete for about two months, but this was his first day he worked on a curb saw job. As Corkhill was not qualified to operate the curb saw cutter, he prepared the vac truck until Dugan was ready to start the cutting operation. Corkhill at page 35, lines 7 – 17. Corkhill understood his job would be to vacuum up slurry behind the curb saw and that Dugan operate the curb saw. Corkhill at page 32, lines 10 – 23.

Before the sawing operation began Corkhill saw an engineering survey that was sitting on the fender of the trailer. However, he did not read it himself. Corkhill at page 32, line 24 – page 33, line 15. He believed the papers belonged to Morgan Marney. Corkhill at page 50, lines 12 – 18.

Dugan, however, testified that he looked at schematic diagrams but not the demolition plans that were sitting on the fender of the trailer to Dugan. Dugan at page 65, lines 11 – 15. Specifically, he and Marney looked at the as-builts for the bridge to locate where the steel was at the back of the rail. Dugan at page 65, lines 14 – 15. In Finding of Fact No. 3, the Board found that:

“The employees of Hamilton Construction, Co. were aware of the demolition plan created by Staton Construction Co. and performed saw cutting operations consistent with the plan.”

Based on the demolition plans, Mr. Dugan and Mr. Marney decided how the cuts would be made. Mr. Dugan made the cuts as directed by Mr. Marney. Dugan at page 98, line 25 – page 99, line 8. Mr. Dugan considered Mr. Marney to be the person in charge of the cutting operations. Dugan at page 110, lines 7 – 9.

The Board found at page 3, lines 4-6 that, “Mr. Marney was in charge of the operation, including the Hamilton employees and employees of other contractors who were on site. There was no Hamilton supervisor on site.”

Vincent McClure testified that he is a PhD in structural engineering. McClure at page 23, lines 8 – 11. He had worked on demolition plans, both as a designer and supervisor. McClure at page 29, lines 13 – 16. Dr. McClure has also worked with saw cutters. McClure at page 30, lines 7 – 9. Dr. McClure testified that when working with contractors, the most important thing is for them to understand the sequence. McClure at page 32, lines 1 – 3. For concrete cutters, Dr. McClure described them as laborers with fancy equipment. McClure at page 32, lines 9 – 10.

To support his expert opinions, Dr. McClure reviewed all of the photographs that were available, the police reports, interviews that were taken by the police department, design drawings prepared for the bridge by WSDOT, the Demolition Plan prepared by McGee Engineering of Olympia, and the Demolition Plan drawings prepared by the Staton Company and stamped by Mr. McCaw on the plan. The drawings were prepared by Mr. Carlton. However, because he was an engineer in training and not an RPE, Mr. McCaw, a Registered Professional Engineer (RPE), reviewed, approved, and stamped the drawings and the Demolition Plan. McClure at page 40, lines 1 – 25.

The Demolition Plans were dated December 19, 2013 and approved by WSDOT on December 28, 2013. McClure at page 42, line 24 – page 43, line 2. Based on the sequence of making the horizontal cuts first, and then making the vertical cuts, Dr. McClure testified that the sequence as directed by Mr. Marney were followed on the day of the incident and that Mr. Dugan followed the Demolition Plans approved by WSDOT. McClure at page 66, line 23 – page 67, line 7. However, the demolition plan submitted to WSDOT was insufficient because it was wrong and did not conform to the actual site conditions. As explained by Dr. McClure, the Demolition Plans were based on incorrect drawings that did not represent the concrete barriers at Bonney Lake. McClure at page 67, lines 8 – 13. Moreover, even if it were correct, the description of the sequence was inadequate because it was ambiguous. McClure at page 67, lines 15 – 24.

Dr. McClure testified that the design engineer and the general contractor are the two persons responsible to determine whether the barrier needed to be braced or secured. McClure at page 68, lines 14 – 24. With regards to the saw cutter, Dr. McClure testified that it is typically not the saw cutter's responsibility to take or have any responsibility for shoring or bracing on a project of this type. McClure at page 68, line 25 – page 69, line 3. This is because the saw cutter is a hired hand whose function is to come in and cut where he is directed to cut. McClure at page 69, lines 4 – 13. The Department presented no factual witness to dispute the standard industry practice that the saw cutter has no responsibility to determine whether shoring or bracing is needed, or if the Demolition Plan is adequate.

American Concrete was never requested to prepare a Demolition Plan for this project, nor did it have any responsibility to develop one. Dugan at page 99, lines 11 – 17. As found by the

Board, the Demolition Plan was to have been prepared by Staton. Decision and Order at page 3, line 4.

Based on the Demolition Plans that Marney reviewed and discussed with Dugan, Marney directed the cutting sequence as follows: make horizontal cuts for the full length of the bridge, and then use a flat saw to make a vertical cut, use the excavator with an opposable thumb to remove the piece⁶. Once the vertical cut was made to free a piece of the barrier from the rest of the barrier, the excavator would grab the piece and carry it off the bridge. Dugan at page 101, lines 9 – 18.

Following the cutting sequence that Marney approved, Dugan made the first and second passes were with a 20-inch blade for the length of the bridge. The first pass was about four inches deep into the concrete barrier and the second pass was about 7 – 8 inches deep. Dugan at page 67, lines 2 – 7. Nothing unusual happened during the first two cuts. Dugan at page 67, lines 12 – 13.

After Mr. Dugan made two horizontal passes with the first blade, they switched blades and started to make the third pass. Corkhill at page 53, lines 20 – 23. Mr. Corkhill did not have any concerns that the concrete barrier would fail or fall over the edge. In fact, he couldn't have imagined that it would fall over the rail. Corkhill at page 54, lines 6 – 16. Mr. Corkhill testified that after making the passes the concrete barrier appeared to be completely stable.

After making the first two passes, Mr. Dugan switched blades and used a 30-inch blade to start the third pass. Dugan at page 68, lines 18 – 24. He started to make his third cut. At about

⁶ Staton was the contractor that ordered the excavator. Staton received a willful violation from the Department because it did not ensure that an excavator with an opposable thumb was obtained as directed by the Demolition Plans.

50 feet into the third pass, Dugan noticed that the slurry was going through the cut line. He stopped cutting to evaluate the situation. Dugan at page 71, lines 6 – 10.

At about two-thirds of the third pass, Mr. Corkhill stopped Dugan to tell him that he had seen the rail move and settled down and lean inwards to the center of the bridge. Dugan at page 71, lines 17 – 25. Morgan Marney was present and, in a position, to see the cutting operation during all of the passes. Marney discussed the rail settling in with Dugan but did not voice any concerns or direct Dugan to stop cutting. Dugan continued with the cutting operation. Dugan at pages 92 – 96.

During the cutting operation, there were other employers besides American Concrete working on the bridge deck. The excavator operator was a union operator and was not an employee of American Concrete. Corkhill at page 50, line 19 – page 51, line 4.

There were also flaggers at the jobsite who were not hired by American Concrete. Mr. Corkhill and Mr. Dugan did not have any interaction with the flaggers, nor did they provide any direction or supervision to the flaggers. Corkhill at page 51, lines 7 – 25; Dugan at page 99, lines 18 – 25.

Shelby King was a flagger at the Bonney Lake project. King at page 138, lines 8 – 10. Her supervisor, Carla Vandiver was the Traffic Control Supervisor at the project. King at page 138, lines 19 – 22. On the day of the incident, they were waiting for Morgan Marney to give them instructions as to when to start flagging. It was their understanding that before they started to make vertical cuts, the excavator would hold on to the concrete barrier pieces, and then they would start flagging. King at page 139, lines 11 – 19. Because they had not seen the excavator being used, they believed it was safe for them to walk under the bridge. King at page 139, line 23 – page 140, line 4. Based on the sequence of cutting, they believed it would be safe to walk

under the bridge until the excavator started to remove pieces of the rail. King at page 140, line 24 – page 141, line 2. When they were walking under the bridge, they believed that they were in compliance with the instructions they received from Morgan Marney. King at page 141, line 24 – page 141, line 9. The flaggers continued to wait for the call from Marney, but the call was never made. Decision and Order, page 3, lines 36-38.

While they were waiting for instructions from Morgan Marney, the flaggers were about 50 feet away from the bridge. King at page 142, lines 16 – 19. There was no evidence in the record that demonstrates that Dugan or Corkhill actually saw the flaggers below or knew where they were standing while waiting for instructions from Marney.

Because the Demolition Plans developed by McGee Engineering and approved by WSDOT were not correct, just as Dugan was completing the third horizontal pass, the concrete rail failed and fell off the bridge onto the roadway below.

The Department cited Hamilton with three serious violations⁷:

Item 1-1	WAC 296-155-040(1)	Serious	\$4,900
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The employer did not provide employees a workplace free from recognized hazards that are causing, or are likely to cause, serious injury or death. The employer did not ensure that each employee involved in the demolition of the concrete barrier at Hwy 410 overpass at Angeline Road East, Bonney Lake, WA was provided with a workplace free from recognized hazards in the following instances:

Instance 1: 296-155-775(15) Employer carried on demolition operation of concrete barrier at Hwy 410 overpass at Angeline Road East, Bonney Lake, WA without following procedures in the demolition plan.

Instance 2: 296-155-775-4 Federal and state codes, safety standards, rules, regulations, and ordinances governing any and all phases of demolition work were observed at all times in that ANSI A10/6-2006 (Safety and Health Program requirements for Demolition Operations) was not observed. All employees of the demolition firm shall be informed of

⁷ The Citation & Notice against Hamilton is contained at CABR 27-31.

the elements of the demolition plan so that they may conduct work activity in a safe manner.

Item 1-2 WAC 296-155-775(15) Serious \$4,900.00

The employer did not ensure that workers carrying on a demolition operation prevented exposure to danger to persons working on a lower level. In that the demolition of the concrete barrier at Hwy 410 overpass at Angeline Road East, Bonney Lake, WA was carried on while two workers were stationed on the road immediately below the work being done and three workers were on the lower level containment area.

Item 1-3 WAC 296-155-035(8) Serious \$4,900.00

The employer did not ensure that the concrete barrier of approximately 110 feet long at Hwy 410 overpass at Angeline Rd. E. Bonney Lake WA, was secured or braced to prevent collapse or failure, during the cutting of the concrete barrier.

V. ARGUMENT

A. **The purpose of WISHA/OSHA is to require employers to take preventable measures to protect workers; it has never been designed to guarantee that no hazardous conduct or injuries will occur.**

WISHA is codified in Ch. 49.17 RCW and is based on the Federal Occupational Safety and Health Act (“OSHA”) of 1970. Washington is known as a “State Plan” state because it applied for and received authority from the US Department of Labor to enact and enforce its own OSHA program, so long as it was as effective as, if not more effective, than the federal act. RCW 49.17.010. This section provides:

Therefore, in the public interest for the welfare of the people of the state of Washington and in order to assure, *insofar as may reasonably be possible*, safe and healthful working conditions for every man and woman working in the state of Washington, the legislature in the exercise of its police power, and in keeping with the mandates of Article II, section 35 of the state Constitution, declares its purpose by the provisions of this chapter to create, maintain, continue, and enhance the industrial safety and health program of the state, which program shall equal or exceed the standards prescribed by the Occupational Safety and Health Act of 1970 (Public Law 91-596, 84 Stat. 1590).

RCW 49.17.010 is consistent with its federal counterpart in that Congress enacted the Occupational Safety and Health Act of 1970 (“OSH Act”) to “establish[] a comprehensive

regulatory scheme designed ‘to assure *so far as possible* . . . safe and healthful working conditions’ for ‘every working man and woman in the Nation.’” *Martin v. OSHRC*, 499 U.S. 144, 147 (1991) (quoting 29 U.S.C. § 651(b)).

It is well recognized that the intent to promote worker safety is not absolute and does not create strict liability against employers. In H. Rept. No. 91-1291 at 21-22, it is noted that the Committee's intent that an employer exercise care to furnish a safe and healthful place to work and to provide safe tools and equipment. Moreover, the Committee declared that this is not a vague duty but is protection of the worker from *preventable* dangers. (Emphasis added).

A majority of the federal circuits have adopted this legislative intent or a similar one. *See, e. g., National Steel & Shipbuilding Co. v. OSHRC*, 607 F.2d 311, 313-16 (9th Cir. 1979); *Georgia Electric Co. v. Marshall*, 595 F.2d 309, 317-19 (5th Cir. 1979); *Kent Nowlin Constr. Co. v. OSHRC*, 593 F.2d 368, 372 (10th Cir. 1979); *Empire-Detroit Steel v. OSHRC*, 579 F.2d 378, 384-85 (6th Cir. 1978); *Intercounty Constr. Co. v. OSHRC*, 522 F.2d 777, 779-81 (4th Cir. 1975), cert. denied, 423 U.S. 1072, 96 S. Ct. 854, 47 L.Ed.2d 82 (1976); *F. X. Messina Constr. Corp. v. OSHRC*, 505 F.2d 701, 702 (1st Cir. 1974).

The Act imposes on employers an obligation to suppress hazardous employee conduct that is predictable and, therefore, feasibly preventable. It does not impose strict liability; namely, it does not impose liability for the failure to prevent employee conduct which is "idiosyncratic," or "implausible in motive." Moreover, a violation does not equate with accident or injury. This civil legislation, enacted in the exercise of the commerce power, is regulatory and preventive, not punitive or compensatory.

An employer's implied obligation to suppress preventable employee hazards can take on the quality of a legal duty if formulated in terms of what a reasonably prudent employer would do in the premises, as proved by competent evidence such as the testimony of experts. The burden is on the Secretary to prove this "reasonable man" standard of employer conduct; and in the absence of such evidence the citation must be dismissed even where, it may seem, the employee misconduct was probably feasibly preventable. This must be so because, otherwise, an employer

would be deprived of notice of the nature of the breach of duty with which he is charged, and the right to cross-examine the witnesses against him and to offer rebuttal evidence, and because otherwise a decision could be entered against him based on sheer speculation by the Commission or the Commission judge, instead of being based on findings of fact, supported, in turn, by substantial evidence, after a hearing.

Thus, while OSHA/WISHA must be liberally construed to promote worker safety, it is well-settled that OSHA and WISHA do not impose strict liability on employers for safety violations. *In re: Obayashi Corp.*, BIIA Dkt. No. 07 W2003 (2009); *Horne Plumbing and Heating Company v. OSAHRC*, 528 F.2d 564 (5th Cir. 1976); *Brennan v. OSAHRC and Hanovia Lamp Division, Canrad Precision Industries*, 502 F.2d 946 (3d Cir. 1974); *REA Express, Inc. v. Brennan*, 495 F.2d 822 (2d Cir. 1974); *Secretary v. Engineers Construction, Incorporated*, 20 OSAHRC 348 (1975).

Indeed, in drafting the OSH Act, “Congress quite clearly did not intend...to impose strict liability: the duty was to be an achievable one.” *W.G. Yates & Son v. Occupational Safety & HLT*, 459 F.3d 604 at 605 (5th Cir. 2006) (Citing to *Horne Plumbing & Heating Co.* 528 F.2d at 568).

If a strict liability standard were applicable, employers would have little incentive to take any steps to address safety because they would be cited regardless of the efforts undertaken to promote worker safety. Instead, non-compliance with a rule is not only a factual matter the Department must establish, but the Department is also required to demonstrate exposure to a serious hazard and employer knowledge of the violation. RCW 49.17.180(6), *see* Section B below.

B. The Department bears the burden of proving all elements required by RCW 49.17.180(6).

The Department bears the initial burden to prove a violation. WAC 263-12-115(2)(b); *Mowat Constr.*, 148 Wn. App. at 924. Moreover, the Department must establish that Hamilton is an employer for which it has jurisdiction to cite. 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).

C. In WISHA appeals the Court must adopt as conclusive all of the findings made by the Board if there is substantial evidence in the record to support the findings.

The standard of review under WISHA is set forth in RCW 49.17.150(1). In a WISHA appeal, the courts directly review the Board's decision based on the record before the agency. *See J.E. Dunn Northwest., Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 35, 42, 156 P.3d 250 (2007). The Court reviews the findings of fact to determine whether they are supported by substantial evidence. *Mowat Constr. Co. v. Dep't of Labor & Indus.*, 148 Wn. App. 920, 925, 201 P.3d 407 (2009). Evidence is substantial if it is sufficient to convince a fair-minded person of the truth of the declared premise. *Id.* The Board's findings of fact are conclusive if they are supported by substantial evidence when viewed in light of the record as a whole. RCW 49.17.150; *Mowat Constr.*, 148 Wn. App. At 925.

The Court views the evidence and its reasonable inferences in the light most favorable to the prevailing party. *Erection Co. v. Dep't of Labor & Indus.*, 160 Wn. App. 194, 202, 248 P.3d 1085 (2011). When undertaking substantial evidence review, the reviewing court does not re-weight the evidence or re-balance competing testimony presented to the factfinder. *Fox v. Dep't of Ret. Sys.*, 154 Wn. App. 517, 527, 225 P.3d 1018 (2009). Nor does the Court substitute its judgment for that of the trial court, even if it might have resolved the factual dispute differently. *Nguyen v. City of Seattle*,

179 Wn. App. 155, 163, 317 P.3d 518 (2014). If substantial evidence supports the Board’s findings, the Court then reviews whether the findings support the conclusion of law. *Erection Co.*, 160 Wn. App. at 202.

However, statutory interpretations for questions of law are reviewed by the appellate courts de novo. *See Dep’t of Labor & Indus. v. Gongyin*, 154 Wn.2d 38, 44, 109 P.3d 816 (2005). An appellate court’s prime construction objective is to “carry out the legislature’s intent.” *See Department of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). To discern legislative intent, courts will look to the statute as a whole. *See The Quadrant Corporation v. Growth Management Hearings Board*, 154 Wn.2d 224, 239, 110 P.3d 1132 (2005).

For the reasons set forth below, there was substantial evidence in the record to support Finding of Fact No. 3, but there was not substantial evidence in the record to support, as a matter of law, that American Concrete committed any serious violation.

The testimony from Dr. McClure more than establishes that McGee Engineering created a Demolition Plan, complete with an RPE stamp of approval, for the SR 410 Bridge project in Bonney Lake. It was approved by WSDOT. The testimony from Dugan and Corkhill allowed Dr. McClure to provide his expert opinion that the saw cutting operations followed the deficient Demolition Plan. There was more than substantial evidence in the record to support Finding of Fact No. 3.

D. There is no substantial evidence in the record to support the Board’s legal conclusion that Hamilton was a “subcontractor” at the Bonney Lake jobsite; as a matter of law, American Concrete was not an “Employer” for purposes of WISHA given its complete lack of control over the demolition operation.

At page 2, line 35, and throughout the Decision and Order on Remand, the Board held that “Staton hired Hamilton as the concrete cutting *subcontractor* for the job.” (Emphasis added). There is no evidence in the record to support the Board’s conclusion that Hamilton was in fact a “subcontractor”. As the Board correctly noted, there was no written contract. The only evidence in the record was that Staton had called to request American Concrete to send a concrete saw and a cutter to cut 110 feet of bridge. Garrick at page 15, lines 16 – 18.

The undisputed testimony from Dugan, the saw cutter, was that they worked under the

direction and control of Staton as Mr. Morgan Marney was in control of the cutting operation. Dugan at page 110, lines 7–9. More importantly, the Board made the same finding of fact. Decision and Order, page 3. There was no evidence that American Concrete was an independent contractor that had any ability to control the means and methods of operation or its employees Dugan and Corkhill.

The Court should conclude that there is no substantial evidence in the record to support the Board's conclusion that Hamilton was a subcontractor at the project.

Federal OSHA caselaw and Washington State caselaw does not support the Department's assertion that American Concrete is an "Employer" for the purposes of WISHA because it lacked control over the Bonney Lake jobsite, and it did not create or control the hazard at the jobsite. Therefore, the Board's Decision and Order affirming the Citation against American Concrete is not supported by substantial evidence and the applicable law.

Following the Congressional intent to require employers to take reasonable steps to promote worker safety as opposed to strict liability, 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).⁸ 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 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

⁸ The Board has also addressed this issue in *In Re: LaborWorks* [add both LaborWorks, 1st Tradesmen, 1st Staffmark] and *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. In the OSHRC cases, the Commission held that the temporary staffing agencies exercised sufficient control to be an employer for purposes of the Occupational Safety and Health Act.

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).

Here, the Board's decision affirming the Citation against American Concrete is not supported by substantial evidence and the applicable law. American Concrete cannot be cited as an "employer," as it had no control, authority, or supervision over the Bonney Lake jobsite, nor did it create the hazard, control the hazard, or have the responsibility to correct the hazard at the Bonney Lake jobsite. That is, the Board specifically found that Staton had complete control over the Hamilton employees as well as the other contractors at the Bonney Lake jobsite. Because American Concrete had no control over the means and methods of the work, the performance of how the work was to be conducted, and the excavator that would be used, American Concrete had no ability to abate the specific hazards created by Staton. The Board's own conclusion was that Staton was to obtain the demolition plan and had control over the excavator operator.

The Board's Decision and Order ignores a fundamental concept of American jurisprudence and attempts to hold American Concrete liable for acts it did not commit and had no opportunity to control or prevent. There is "no logical connection between the issue of whether an entity is an 'employer' under the WISHA, and whether that entity is liable for a workplace safety violation at a worksite where they cannot exercise control," the logical connection is articulated by the *MLB* decision which held that, "***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.***" In other words, OSHA is based on the premise that citations should be issued to entities that have control over the environment and the ability to correct a hazard but fail to do so. If that entity can abate the hazard and doesn't, then it is appropriate to cite that entity for failing to protect its workers.

Under the Board's Decision and Order, if a worker is exposed to a serious hazard, regardless of who created the hazard, Hamilton should be cited for a hazard that it did not create or have the ability to fix or prevent. The Board's Decision is that American Concrete should now pay a monetary penalty because its workers following the direction and control of Staton caused the collapse and exposed the flaggers to hazards not under the control or direction of American Concrete. American Concrete had no supervisory control over the flaggers and did not give any instructions on where to stand or be during the cutting operations. The Department's argument in essence creates strict liability for American Concrete.

American Concrete is not properly cited under the Borrowed Servant Doctrine, in that its employees were under the direction and control of Staton Construction, an upper tiered subcontractor that hired the saw cutter and the equipment. As the undisputed testimony of Rick Garrick demonstrates, there was a complete relinquishment of site supervision and control by American Concrete to Morgan Marney, the site superintendent for Staton. Because American Concrete had no site supervision and merely provided the equipment and workers at Staton's disposal, American Concrete is not an employer responsible for the incident that took place. *Nyman, v. Macrae Brothers Construction Company, et al.*, 69 Wn.2d 285(1966).

As set forth in *Nyman Brothers*, Nyman, was an employee of the Seaborn Pile Driving Company at the time of a personal-injury accident. Seaborn Pile Driving Company had leased, on an hourly basis, from Macrae Brothers Construction Company/Mobile Crane Company a large crane, together with an operator and an oiler. The crane was utilized to provide the power for operating a pile driving machine which consisted of pile driving leads, hammer, and related equipment. Seaborn Company's foreman on the job signaled Mobile Crane Company's operator, to commence work by "picking up the hammer" that was attached to the crane. The operator pulled the wrong lever, consequently, a cable, attached to the crane boom and a large piling, became taut.

The piling then swung down the slope on which it had been lying and struck the plaintiff, causing a severe leg injury.

Addressing the status of the operator provided by Mobil Crane to Seaborn Pile Driving Company the *Nyman* Court stated the following:

The following factors are indicative of his "loaned servant status": (1) Bickler was expected not only to give the results called for by his temporary employer, the Seaborn Pile Driving Company; he was expected to use the crane in the manner desired by that company; (2) it was specifically requested that Bickler, personally, work as the operator of the crane during the negotiation of the lease agreement; (3) Mobile Crane Company had relinquished all right to control Bickler in his operation of the machine at the Seaborn Pile Driving Company construction site; and (4) Seaborn Pile Driving Company exercised that right of control by giving specific orders to Bickler, which he obeyed. It is admittedly true that a continuance of the general employment is generally indicated where, as here, the rented instrumentality is of considerable value, and where the general employer would expect the employee to protect his interests in the use of the instrumentality (69 Wn.2d at 287).

This standard was reiterated by the Washington Court of Appeals in 2002 in *Brown v Labor Ready Northwest, Inc.*, 113 Wn. App. 643. In that case, Brown was a long-term employee of CMI, a lumber distribution center. Henson was employed by Labor Ready Northwest, Inc., which is a national provider of temporary manual labor employees. CMI arranged for Labor Ready to dispatch a worker, Henson, to CMI's facility and bill CMI according to hours worked and type of work performed.

Brown and Henson were working in the yard, readying bundles of lumber for cutting. Henson had a 40-foot bundle of lumber on his forklift, and Brown was trying to manually push the bundle flat, off edge, so it could be more easily cut. Brown alleges Henson improperly handled the forklift, and the bundle became unstable and fell on Brown's legs. Henson then mistakenly accelerated the forklift forward and pinned Brown between two bundles.

On these facts following *Nyman, v. Macrae Brothers Construction Company, et al.*, (69 Wn.2d 285 (1966)) the court held for CMI.

The court discussed only evidence pertaining to control. Consent was never mentioned:

(1) [The crane operator] was expected not only to give the results called for by his temporary employer, the Seaborn Pile Driving Company; he was expected to use the crane in the manner desired by that company; (2) it was specifically requested that [the crane operator], personally, work as the operator of the crane during the negotiation of the lease agreement; (3) Mobile Crane Company had relinquished all right to control [the crane operator] in his operation of the machine at the Seaborn Pile Driving Company construction site; and (4) Seaborn Pile Driving Company exercised that right of control by giving specific orders to [the crane operator], which he obeyed.

The evidence here is essentially identical, except that two additional indicia of CMI's control pertain. The machinery that caused injury belonged not to Labor Ready, but to CMI. Further, Henson was sent not to perform a single specific transaction at the behest of his general employer, but to do the work asked of him by CMI. CMI directed him to use the forklift, and CMI told him what to do with it. Labor Ready had no right to control his operation of the machine, and indeed was not present at the worksite.

The Board's conclusion that the borrowed servant doctrine is not applicable because it derives from personal injury cases is hardly persuasive or consistent with established legal principles. The Department has developed a precedent of citing general contractors for safety violations committed by its subcontractors deriving from personal injury cases. *Stute v. PBMC*. *Stute* and its progeny all involve personal injuries arising from an injury to a subcontractor employee because of a WISHA violation.

Even if the Court does not adopt the borrowed servant doctrine, American Concrete does not meet the multi-employer worksite case law concept definition of an Exposing, Creating, Controlling or Correcting Employer. Both the Board and OSHA Review Commission have adopted the multi-employer worksite where an employer has no employees exposed to a hazard, it can nevertheless be cited if it had control over the worksite (i.e. *Stute*), created the hazard, or failed to correct a hazard it was responsible to correct. See *Magnusson Klemencic Associates "MKA"*, Docket No. 07-W0157

(2009) and *Martinez Melgoza v. Dept. of Labor & Industries*, 125 Wn.App. 843, rev. denied (155 Wn.2d 1015) (2005).

Regardless of the multi-employer worksite analysis or borrowed servant doctrine, American Concrete did not have control over the Bonney Lake jobsite, nor did it create any hazard, nor was it hired to abate any hazards. Accordingly, Hamilton cannot be cited for Item 1-2 involving the flaggers.

E. The Department failed to establish the “knowledge” component as required by RCW 49.17.180(6).

Washington State was granted authority by the federal government to administer the Occupational Safety and Health Act as a state plan administration. As such, the Washington State Department of Labor & Industries has statutory authority to issue a serious citation and levy a monetary penalty for serious violations of a WISHA safety or health code. However, the ability to issue a serious citation is not without limit. Not only must the Department establish that an employee was exposed to a serious hazard (one that could cause serious bodily injury or death), the Department must also establish that the cited employer either knew, or should have known of the presence of the violation. In relevant part, RCW 49.17.180(6) declares:

(6) For the purposes of this section, a serious violation shall be deemed to exist in a work place if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use in such work place, unless the employer did not, and could not with the *exercise of reasonable diligence, know of the presence of the violation*.

(Emphasis added).

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). Federal case law is similar to RCW 49.17.180(6).

In order to prove that an employer violated an OSHA standard, the Secretary must prove that (1) the standard applies to the working conditions cited; (2) the terms of the standard were not met; (3) employees were exposed or had access to the violative conditions; and (4) the employer either knew of the violative conditions or could have known with the exercise of reasonable diligence. *Gary Concrete Prods., Inc.*, 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD. In a significant decision, the Board held in *Olympia Glass Company*, 95 W0455, that the Department bears the burden of proof in WISHA cases. The Board declared:

[I]n appeals filed under the Washington Industrial Safety and Health Act (WISHA), it is the Department who has the burden of proving both the existence of a violation and the appropriateness of the resulting penalty. WAC 296-12-115(2)(b). An employer is not required to prove the Department acted arbitrarily in order to prevail in an appeal. **Our decision on appeal must determine whether there is sufficient evidence in the record to affirm the Department's citation and the resulting penalty.**

Under federal law, 29 USC 666(k) requires the Secretary of Labor is required to prove the employer had either actual or constructive knowledge of the violation in order to establish a violation. In almost exactly the same language as its state counterpart, 29 USC 666(k) declares:

(k) Determination of serious violation

For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment **unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.**

In interpreting WISHA regulations in the absence of state decisions, Washington courts look to the federal Occupational and Health Administration (OSHA) regulations and consistent federal decisions. *WA Cedar & Supply Co., Inc. v. State of WA Dept. of Labor & Industries*, 137 Wash.App. 592, 604 (2007). *Inland Foundry Co. v. State of WA Dept. of Labor & Industries*, 106 Wash.App.333, 427 (2001).

Proving employer knowledge is a strict obligation of the Department as part of its *prima facie* case. *Brock v. L.E. Myers Co.*, 818 F.2d 1270 (6th Cir.) cert. denied, 484 U.S. 989 (1987). See, also,

Kerns Bros. Tree Serv., 18 BNA OSHC 2064, 2067, 2000 CCH OSHD ¶ 32, 053, p.48,003 (No. 96-1719, 2000) (Secretary bears burden of proof on actual or constructive knowledge). The Review Commission and courts have consistently held that knowledge is an essential element of the Secretary's burden of proof. See *Secretary of Labor v. Milliken & Co.*, 14 BNA OSHC 2079, 2080, 2082-2084 (Rev. Comm. 1991) *affirmed sub nom, Secretary of Labor v. OSHRC and Milliken & Co.*, 947 F.2d 1483, 1484 (11th Cir. 1991), *Secretary of Labor v. General Electric Company*, 9 BNA OSHC 1722, 1728 (Rev. Comm. 1981). This obligation cannot be ignored or shifted away from the Department.⁹

In *Trinity Industries, Inc. v. Occupational Safety and Health Review Commission*, 206 F.3d 539, (5th Cir. 2000), the Fifth Circuit of the US Court of Appeals held that under 29 USC 666(k), the Secretary has the initial burden of proving all prima facie elements. With regards to the requisite element of knowledge, the court held at page 542:

“To prove the knowledge element of its burden, the Secretary must show that the employer knew of, or with exercise of reasonable diligence could have known of the non-complying condition.”

In *Trinity*, the Secretary alleged that a contaminant was above the Permissible Exposure Levels. However, because the employer demonstrated that it had made measurements and determined that the concentration was not excessive, the burden was on the Secretary to show that

⁹ The Department of Labor & Industries' administrative code regarding its burden of proof in WISHA cases is consistent with the above cited federal case law.

WAC 263-12-115 “Procedures at hearings” provides that, “In all appeals subject to the provisions of the Washington Industrial Safety and Health Act, the Department shall initially introduce all evidence in its case-in-chief.” *In re Savage Enterprises, Inc.*, BIIA Docket No. 86-W053 (1988) concerned a Corrective Notice of Redetermination that alleged a serious violation of WAC 296-62-07517 and declared that “[t]he Department of Labor and Industries has the burden of establishing all of the elements necessary to prove a violation of the cited standard. WAC 263-12-115(2)(b).”

the employer's failure to discover the excessive concentration resulted from a failure to exercise reasonable diligence.

To impute knowledge to an employer of an alleged hazard, the hazard must be specifically known to the employer—"it is not enough to find that a condition contravening that standard existed in the employer's workplace. In federal OSHA cases, the Secretary must also prove that the employer either knew or could have known with the exercise of reasonable diligence of the **noncomplying condition**." (emphasis added) *Dunlop v. Rockwell International*, 540 F.2d 1283 [4 OSHC 1606] (6th Cir. 1976); *Alsea Lumber Co.*, 511 F.2d 1139 [2 OSHC 1649] (9th Cir. 1975); *Prestressed Systems, Inc.*, OSHRC Docket No. 16147 [9 OSHC 1864]; *Scheel Construction Co.*, 76 OSAHRC 138/B6, 4 BNA OSHC 1825.

Under agency laws, the knowledge and actions of those in supervisory position can be imputed to their employers. However, ***knowledge is not automatically imputed to the Employer*** as the Secretary seeking to impute a supervisor's acts or omissions must show that the supervisor's conduct was reasonably foreseeable and thus preventable by the employer. *Brennan v. Occupational Safety and Health Review Commission*, 511 F.2d 1139 (9th Cir. 1975). The Ninth Circuit has expressly held:

"A serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." *Id.* at 1142.

"A demented, suicidal, or willfully reckless employee may on occasion circumvent the best conceived and most vigorously enforced system regime... Congress intended to require elimination only of preventable hazards." *Id.* at 1145.

In *Pennsylvania. Power & Light Co. v. Occupational Safety & Health Review Commission*, 737 F.2d 350 (3rd Cir. 1982), the Court held:

“The prevailing view among the circuits is that the employer’s knowledge or ability to discover a violation is an element of the Secretary’s case-in-chief.” *Id.* at 358.

“The participation of the company’s own supervisory personnel may be evidence that an employer could have foreseen and prevented a violation through the exercise of reasonable diligence, but it will not, standing alone, end the inquiry into foreseeability.” *Id.* at 358.

“Employers should be encouraged to develop work rules that will reasonably respond to their particular working conditions and safety needs. An employer’s safety rules should be evaluated with that end in mind, and not with the myopic view toward literal conformance with OSHA regulations.” *Id.* at 358.

Finally, in *W.G. Yates & Sons Construction Co., v. Occupational Safety & Health Review Commission*, 459 F.3d 604, 609 (5th Cir. 2006), the Court held:

“A supervisor’s knowledge of his own rogue conduct cannot be imputed to the employer; and consequently, the element of employer knowledge must be established, not vicariously through the violator’s knowledge, but by either the employer’s actual knowledge, or by its constructive knowledge based on the fact that the employer could, under the circumstances of the case, foresee the unsafe conduct of the supervisor.”

When the OSHA Act was legislated, such strict liability upon the employers was specifically rejected and denounced by Congress:

- *Horne Plumbing and Heating Company v. OSAHRC*, 528 F.2d 564, 571 (5th Cir. 1976) (“[I]t was error to find Horne liable on an imputation theory for the unforeseeable, implausible, and therefore unpreventable acts of his employees. A contrary holding would not further the policies of the Act, and it would result in the imposition of a standard virtually indistinguishable from one of **strict or absolute liability, which Congress, through section 17(k), specifically eschewed.**”)
- *Ocean Electric Corporation v. Secretary of Labor*, 594 F.2d 396 (4th Cir. 1979) (“[I]mputation of a supervisor’s acts to the Company in each instance would frustrate the goals behind the Act. As the Commission correctly stated: ‘Such a holding would also not tend to promote the achievement of safer work places. **If employers are told that they are liable for violations regardless of the degree of their efforts to comply, it can only tend to discourage such efforts**’”).

Simply, our Board has concluded that an employer should not be held *strictly liable* for a safety violation if the violation could only have been discovered by exercising absolute vigilance of the worker and worksite. *In re: Obayashi Corp.*, Dkt. No. 07 W2003 (June 10, 2009) (citing *Sec’y of Labor v. Precision Concrete Constr.*, 19 (BNA) O.S.H. Cas. 1404, 2001 WL 422968 (O.S.H.R.C.) (emphasis added)). In *Obayashi Corp.*, an employer was not held strictly liable for an employee’s failure to perform his duties. Dkt. No. 07 W2003 at 6. An employee was assigned to inspect the

worksite before operating a locomotive. *Id.* The employee failed to do so, which attributed to the accidental death of a passenger on the locomotive. *Id.* The Board declined to hold the employer liable for the employee's failure to complete the inspection of the day of the accident. The Board cited to a federal OSHA case, *Precision Concrete Constr.*, in its decision that an employer should not be strictly liable for an employee's oversights. *See* 2001 WL 422968.

In *Precision*, an OSHA Compliance Officer was assigned to inspect the employer's worksite after an employee died from a concrete bucket that unexpectedly dropped on him. *Id.* From the inspection, the employer was cited for a serious violation by allowing its employees to work under an elevated concrete bucket. *Id.* The employees were assigned to stand in a designated safe area away from the elevated bucket that was located fifteen feet behind the foreman. *Id.* at *2. On the day of the accident, the bucket "boomed back" and instead of going to the front or to the left of the foremen as it had on previous occasions, it traveled over the foreman and struck and killed one of the employees standing in the designated safe area. *Id.* The Commission held that the cited OSHA standard applied, however, the Secretary of Labor (hereinafter "Secretary") needed to establish the employer's *knowledge* of the employee's exposure to hazard before the employer could be cited for the violation. *See Id.* at *4 (emphasis added). In order to establish this knowledge, the Secretary had to show that the employer "knew of, or with exercise of reasonable diligence could have known, of the noncomplying condition."

In our present case, the Department offered no evidence that American Concrete had knowledge of the alleged violative condition or practice. It was uncontroverted that when Staton first contacted American Concrete, no details of the project were provided. In fact, nobody from American Concrete knew any specifics of the job until Dugan and Corkhill arrived at the jobsite and were informed by Morgan Marney of the details as to what was needed. Moreover, it was uncontroverted that Dugan and Corkhill were working under the direction of Staton.

The Department presented no evidence that American Concrete either knew of the violation or failed to exercise due diligence as required by RCW 49.17.180(6). As set forth below, American Concrete had no knowledge that that Demolition Plan was deficient, nor could it reasonably have known that it was deficient.

E. The Department failed to establish that a demolition plan had not been developed or that American Concrete failed to secure or brace the concrete barrier.

The IAJ correctly found that the demolition plan and structural drawings for the project were prepared by McGee Engineering of Olympia, and the demolition plan drawings were prepared by the Staton Company. PD& O at page 7, lines 1 – 4. The IAJ further found that the American Concrete employees (Dugan and Corkhill) became aware of the demolition plan, however insufficient it may now be viewed, and proceeded in a manner consistent with the demolition plans. The Board also found in Finding of Fact No. 3 that the diagrams did not accurately depict the bridge deck at the time the work was to be performed and that there were important differences between the bridge deck depicted and the bridge deck at the time the demolition was being performed.

WAC 296-155-775(1) does not require that all persons involved in the demolition actually see the demolition plan. This WAC provides:

Prior to permitting employees to start demolition operations, you must make an engineering survey, by a competent person, of the structure to determine structural integrity and the possibility of unplanned collapse of any portion of the structure. You must similarly check adjacent structures where employees may be exposed. You must have in writing, evidence that such a survey has been performed.

In Item 1-1, Instance 1, as originally cited, the Department alleged that:

Instance 1: 296-155-775(1) Employer carried on demolition operation of concrete barrier at Hwy 410 overpass at Angeline Road East, Bonney Lake, WA without following procedures in the demolition plan.

In affirming Item 1-1a, in Finding of Fact No. 4 the Board held that an engineering survey of the structural integrity of the bridge was not presented, implying that it was not shown, to Mr. Dugan. The cited regulation, however, does not require that the actual engineering survey be shown to all workers involved in the demolition. Rather, as testified by Dr. McClure, the

demolition workers must understand the demolition sequence and understand the plan designed by a competent person. In this case, the Board specifically found that the American Concrete employees were aware of the demolition plan created by Staton and followed the plan.

The tragedy was not the result of not having a plan, or not following the plan. Rather the tragedy resulted when the workers followed a faulty plan designed by an engineer in training who used the wrong drawings when he created the demolition plan. Affirming Item 1-1a squarely and incorrectly places fault on American Concrete. Staton was in control of the cutting operations and had obtained a demolition plan that had the stamp of approval from an engineer. It shared that plan with Dugan and went over the sequence set forth in the demolition plan. Both Mr. Marney and Mr. Dugan followed the sequence directed by the demolition plan. This is the standard industry practice as testified by Dr. McClure. American Concrete cannot be faulted for not knowing that the demolition plan was in error. It had neither the expertise nor any involvement in the process of obtaining or developing the demolition plan. Construction workers should, as a matter of social policy, be allowed to rely on RPE stamped plans.

For Item 1-2, the Board erred because American Concrete had no employees exposed to the hazard below, nor did it create any hazard or have control over the flaggers below. The hazard created by the collapse was solely the result of a deficient demolition plan. Moreover, it was undisputed that American Concrete did not control the flaggers. American Concrete also had no knowledge that the flaggers were working underneath the bridge structure where cutting operations were taking place. To hold otherwise would to impose a strict liability standard to American Concrete.

For Item 1-3, concrete portion was not secured because the sequencing of the demolition plan was inadequate and Staton did not have an excavator with an opposable thumb. Again,

American Concrete was not aware, nor did it create the deficient demolition plan. To hold otherwise would to impose a strict liability standard to American Concrete.

As the demolition plan called for the excavator to hold the individual pieces in place when the vertical cuts were to be made, according to the plan the rail did not need to be braced during the third pass. Given the dimensions of the bridge and the size of the equipment needed, once the curb saw made its horizontal passes, it would be replaced with the smaller vertical saw which allowed room for the excavator with an opposable thumb to hold the rail in place while the individual pieces were cut. American Concrete was not responsible for obtaining either the excavator or the operator. As Staton was responsible for obtaining the excavator with an opposable thumb, Staton received a serious willful citation from the Department.

None of the contractors involved in the demolition operation had any knowledge that the bridge rail would fail before making the vertical cuts because of the faulty Demolition Plan. Because Dugan was aware of the demolition plan, and his activities were in conformance with the demolition plan, the Department failed to establish that there was no plan or that Hamilton failed to follow the demolition plan. The unfortunate reality in this tragic case is that unbeknownst to American Concrete, the demolition plan was grossly insufficient.

To hold that a violation existed merely because the rail fell over would incorrectly impose strict liability, a standard that has never been adopted by this Board, nor intended by Congress.

V. CONCLUSION

For all of the above stated reasons, this Court should reverse the Board's Decision & Order on remand and vacate the citations against American Concrete.

American Concrete is not an employer under the Act because it did not control the jobsite or its operations. The American Concrete employees worked directly under the control of Staton, the demolition contractor that was in charge of the concrete cutting operation.

Unbeknownst to either Staton or American Concrete, the engineer who prepared the demolition plan made a grave error and did not prepare an adequate plan. The bridge collapse and hazards created were all a result of the faulty demolition plan. There is no substantial evidence in the record to support any finding that American Concrete either knew that the demolition plan was wrong, or that it failed to exercise due diligence. Finally, American Concrete did not know, and had no control over the flaggers at the jobsite.

The citations against American Concrete must be vacated.

RESPECTFULLY SUBMITTED this 6th day of July, 2020.

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CERTIFICATE OF SERVICE

I certify that on July 6, 2020, I caused the original and copy of the **Employer's/Appellant's Corrected 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 to the below recipients:

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