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NO. 54578-1-II

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

HAMILTON CONSTRUCTION CO.

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR & INDUSTRIES**

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I. INTRODUCTION

When a concrete barrier falls from a bridge endangering workers below (and crushing motorists traveling underneath), the contractor responsible for operating the heavy machinery that cut the barrier off the bridge cannot escape a worker safety citation by claiming that it was simply there to do as it was told. All employers must adhere to workplace safety regulations. Employers cannot purposefully ignore regulations and then allege that the issue is beyond the scope of their intended work.

The Board of Industrial Insurance Appeals correctly found that Hamilton Construction Co. violated worker safety laws by failing to ensure an engineering survey existed, operating a curb saw while flaggers walked below the bridge, and cutting the barrier away from the bridge deck without securing or bracing it. This Court should affirm the violations.

II. ISSUES

1. Did the Board correctly find Hamilton is an employer when Hamilton sent workers to a jobsite with specialized heavy equipment and with an agreement to perform concrete cutting work?
2. Does substantial evidence support the Board's finding that Hamilton had knowledge of the violations when the violations were in plain view?

III. STATEMENT OF THE CASE

A. **Hamilton Cut the Bridge Barrier, Which Collapsed Onto Traffic Below, Endangering Workers and Killing Motorists Driving Below**

1. **Subcontractor Hamilton dispatched two employees to cut a bridge barrier**

In 2015, demolition contractor Staton Companies, retained to demolish an overpass bridge in Bonney Lake, hired Hamilton to remove a barrier on the edge of a bridge that overlooked a roadway below.

Administrative Record (AR) 347-48, 441.¹ The job was contingent on Hamilton providing a large curb saw and vacuum truck. AR 446.

Hamilton's two-person crew specialized in saw cutting, grinding, and surface type work. AR 404. Crews like this one do specialized "selective cutting as directed." AR 404. They work on different job sites doing concrete cutting as a subcontractor. AR 404-05, 448-49.

Hamilton's dispatcher sent two Hamilton employees, operator Richard Dugan and apprentice Donald Corkhill, AR 379, 397, to the jobsite after learning what Hamilton needed to cut. AR 440-41. The dispatcher created a work order for the project after determining that Hamilton needed to cut a 110-foot bridge barrier, requiring a curb saw and

¹ The Department uses "Hamilton" to refer to both Hamilton Construction Company and its wholly-owned subsidiary, American Concrete Company. AR 396; Appellant's Brief (AB) 1 n.1, 3 n.3.

vacuum truck. AR 446-47. He did not testify that the employees he sent were no longer Hamilton employees. AR 438-450. He did not testify that Hamilton did not pay the workers. AR 438-450. In short, other than stating that the upper tier contractor provides direction and instruction to the concrete cutting crews, AR 447-48, he provided no testimony that Hamilton had divorced its relationship to the workers when they were on the bridge barrier job. AR 438-450.

Dugan and Corkhill operated the curb saw to cut through concrete and rebar that attached a 110-foot long bridge barrier to the bridge. AR 358. They brought the curb saw with them from their base in Oregon. AR 331-32; AR 411-12. Staton was not allowed to use the curb saw. AR 351.

2. Hamilton did not ensure an engineering survey existed before conducting the demolition

Before starting the demolition, Hamilton failed to obtain an engineering survey or ensure that someone else had. AR 315-16, 349, 397-98. Neither Corkhill nor Dugan reviewed any engineering survey before cutting the barrier away from the bridge. AR 315-16, 349. Eric Hill, manager of Hamilton's concrete sawing subsidiary, American Concrete, admitted Hamilton did not make an engineering survey of the structure before allowing Corkhill and Dugan to begin demolition. AR 397-98.

The only things Dugan looked at before starting work were the “as-builts”—he did not look at the rest of the documents in the folder. AR 348-49, 373. “As-builts” only show how the bridge was built and where the rebar should be located; they are not engineering surveys. AR 348-49.

3. Hamilton did not ensure the bridge was secured or braced during demolition

Hamilton failed to secure or brace the barrier to prevent collapse. AR 330, 368. Both Corkhill and Dugan admitted the barrier was never braced or secured while they cut. AR 330, 368.

Dugan and Corkhill made three horizontal passes with the curb saw along the length of the bridge. AR 327-28. Morgan Marney (the foreperson from Staton) watched from nearby. AR 351, 377. He was not allowed to use the curb saw. AR 351. Halfway through the third pass, Corkhill noticed that slurry was seeping onto the containment area: the wooden walkway used to access the outside of the bridge. AR 328, 337. Dugan and Corkhill stopped the saw so Corkhill could clean up the containment area. AR 328. Because they were “losing slurry out of the backside, [Dugan and Corkhill] dropped [their] cut back a little bit and continued to cut.” AR 354. They intended to cut through the rebar but to leave a little bit of concrete uncut to contain the slurry. AR 391.

After Corkhill finished mopping up the containment area, “the barrier rail settled back in on the bridge deck.” AR 328, 339-41. At that point, they were about two-thirds of the way through the third cut. AR 354. Corkhill stopped Dugan and told him that he saw the barrier move. AR 354. Dugan stopped the curb saw, looked at the barrier, and told Corkhill that it is typical that a barrier will settle during demolition. AR 354-55. Corkhill, Dugan, and Marney looked at the barrier, discussed it, and decided to keep cutting. AR 355, 329.

While continuing the third cut, the barrier fell off the bridge deck, taking the containment area with it. AR 329, 546-550. The bridge barrier fell onto a vehicle, killing three people travelling below the bridge. AR 11 (FF 7), 276, 546-550.

4. Hamilton cut the barrier while flaggers walked under the overpass

The barrier fell shortly after flaggers Carla Vandiver and Shelby King walked underneath the bridge. AR 296, 307, 420. Vandiver walked below the bridge “several times” during the cutting. AR 296, 307. King walked under the bridge four or more times during the cutting and the barrier fell “relatively soon . . . [w]ithin a matter of minutes” after she had last walked under the bridge. AR 420.

The Department conducted an inspection and cited Hamilton for failing to ensure that the jobsite was free from recognized hazards, carrying out a demolition while workers below were exposed to danger, and failing to secure or brace the traffic barrier. AR 223-25. The Department assessed a penalty of \$4,900 for each item, leading to a \$14,700 penalty. AR 223.

B. The Board Affirmed the Violations

At first, the Board vacated all the citations because the Department failed to enter the cited regulations into evidence. AR 31-41. The superior court reversed and remanded. AR 14-18. On remand, the Board affirmed all three citations. AR 4-12. The Board found Hamilton permitted its workers to carry on a demolition operation that exposed persons working below to danger and that Hamilton knew or should have known that this could lead to a substantial probability of death or serious physical harm. AR 11 (FF 9). It found Hamilton did not ensure that the bridge was secured or braced to prevent collapse, and Hamilton knew or should have known that this could lead to a substantial probability of death or serious physical harm. AR 11 (FF 10). And it found Hamilton did not make available to employees an engineering survey of the bridge, and Hamilton knew or should have known that this could lead to a substantial probability of death or serious physical harm. AR 11 (FF 11). The Board decided it

could not determine the gravity of the violations, so it reduced the total penalty from \$14,700 to \$300. AR 11-12 (CL 2-6).

On both parties' cross-appeals, the superior court affirmed the citation but modified the Board's penalty calculation and one finding of fact. CP 704-07. The superior court found substantial evidence did not support the Board's Finding of Fact 3 because 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.'" CP 705 (FF 1.8). The superior court remanded so the parties could "present additional testimony, evidence, and argument strictly regarding" adjustments to the gravity-based penalties. CP 707 (CL 2.12). Hamilton stipulated not to contest the Department's penalty calculations if the violations are affirmed, AB 2 n.2, and now presents no argument on the penalty issue. Hamilton appeals. CP 708-09.

IV. STANDARD OF REVIEW

Appellate courts directly review the Board's decisions in Washington Industrial Safety and Health Act cases under the substantial evidence standard of review. RCW 49.17.150; *Mowat Constr. Co. v. Dep't of Labor & Indus.*, 148 Wn. App. 920, 925, 201 P.3d 407 (2009). On substantial evidence review, courts review the evidence 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).

“The Washington State Constitution mandates protection of workers at a construction work site.” *Bayley Constr. v. Dep't of Labor & Indus.*, 10 Wn. App. 2d 768, 781, 450 P.3d 647 (2019) (citing Wash. Const. art. II, § 35), *review denied*, 195 Wn.2d 1004 (2020). To protect workers, the courts liberally construe WISHA to achieve the purpose of providing safe working conditions for Washington workers. *See Bayley Constr.*, 10 Wn. App. 2d at 781; *Elder Demolition, Inc. v. Dep't of Labor & Indus.*, 149 Wn. App. 799, 806, 207 P.3d 453 (2009); RCW 49.17.010 (WISHA’s purpose is to assure “safe and healthful working conditions for every man and woman working in the state of Washington.”).

Washington courts have granted substantial deference to the Department’s interpretation of WISHA and the rules promulgated under it. *J & S Servs., Inc. v. Dep't of Labor & Indus.*, 142 Wn. App. 502, 506-08, 174 P.3d 1190 (2007).

The elements of a serious WISHA violation are that (1) the cited standard applies; (2) the employer did not meet the standard; (3) the employer exposed the employees to, or the employees 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.” *Wash. Cedar & Supply Co., Inc. v. Dep’t of Labor & Indus.*, 119 Wn. App. 906, 914, 83 P.3d 1012 (2003) (citations omitted). The only elements at issue now are whether the cited standards apply to Hamilton (*i.e.*, Hamilton is an employer under WISHA) and whether Hamilton knew or could have known of the violations.²

V. ARGUMENT

A. **Hamilton Is a Controlling, Creating, and Exposing Employer and Is Liable Under WISHA**

All employers in Washington are required to comply with WISHA rules, even if they choose not to look into what those rules are. Employers are responsible for their omissions just as much as their commissions. Hamilton’s argument that it can send workers to a jobsite with specialized heavy equipment and get paid (and pay workers) to do so without being considered an employer lacks legal and logical support. Hamilton workers dispatched to the jobsite were employed and dispatched by Hamilton, and Hamilton did not show otherwise. It has the burden to show that it is not an employer. *See In re Cascade Structural Solutions LLC*, No. 15 W1136, 2016 WL 7493891, *4 (Wash. Bd. Indus. Ins. App. Nov. 10, 2016) (citing

² Hamilton stipulated to the exposure element and the substantial probability of death or serious physical harm during hearings at the Board. AR 121, 140-41.

Mark A. Rothstein, *Occ. Safety & Health L.*, § 2:9, at 30-31 (2016 ed.)) (observing that the employer bore “the burden of proving that it was exempt from WISHA”).

The Board correctly found that Hamilton was the employer and also found that the employees at issue were Hamilton’s employees. AR 8-11 (FF 3-7, 9, 11). The term employee means an employee of an employer. RCW 49.17.020(5). An employer under WISHA is “any . . . business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees or who contracts with one or more persons, the essence of which is the personal labor of such person or persons.” RCW 49.17.020(4). When Washington courts interpret WISHA’s definition of an employer, they recognize its broad scope: “Any entity that engages in any business and employs one or more employees is an employer for WISHA purposes.” *Martinez Melgoza & Assocs. Inc. v. Dep’t of Labor & Indus.*, 125 Wn. App. 843, 848, 106 P.3d 776 (2005).

As an employer, Hamilton had to comply with WISHA both to protect its employees and other employees on the jobsite (like the flaggers working below the bridge). All employers must comply with WISHA, regardless of whose workers would be at risk. *See* RCW 49.17.060; *see Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 673, 709 P.2d 774 (1985);

Ward v. Ceco Corp., 40 Wn. App. 619, 625-26, 699 P.2d 814 (1985)
(subcontractor owes employees of another employer the same duty owed to its own employees, “where the subcontractor created the dangerous condition within the work place.”).

On a multi-employer worksite, an employer may be liable if it is “a creating, exposing, correcting, or controlling employer.” *See Martinez Melgoza*, 125 Wn. App. at 850. In *Martinez Melgoza*, a consulting company violated WISHA because the company exercised control over the worksite by acting on the work site. *Id.* at 850-53. This case also recognized that the employer may be a creating or exposing employer. *Id.* at 850; *see also Ward v. Ceco Corp.*, 40 Wn. App. 619, 624, 699 P.2d 814 (1985) (company liable if it created or controlled hazard).

Hamilton argues that it did not control the work, so it should escape liability. AB 2, 15-19, 21. Even if that were true (it is not), Hamilton is not only a controlling employer, it is a creating employer and an exposing employer. It created the hazard by acting on the job site in an unsafe manner. And under the non-controlling employer doctrine (also known as the *Anning-Johnson* doctrine), liability is imposed on employers who do not control the hazard but expose workers to harm. *Sec’y of Labor v. Anning-Johnson Co.*, 4 O.S.H. Cas. (BNA) 1193, 1976 WL 5967, *5 (Occup. Safety & Health Rev. Comm’n May 12, 1976); *see D. Harris*

Masonry Contracting, Inc. v. Dole, 876 F.2d 343, 345-46 (3rd Cir. 1989) (affirming citation because masonry subcontractor could have, as the non-controlling non-creating subcontractor, acted to protect workers from hazard).³ This doctrine applies here because Hamilton exposed its employees and other employees to hazardous conditions.

B. Substantial Evidence Shows That Hamilton Is an Employer Under WISHA

Substantial evidence shows Hamilton is an employer under any of the creating, exposing, and controlling theories. Hamilton argues that it did not create any hazard. AB 22. It is wrong. By its omissions, Hamilton created the hazards associated with not ensuring that an engineering survey existed, not ensuring no workers were working below, and not ensuring that the barrier was secured or braced during demolition.

Similarly, Hamilton is an exposing employer in that it cut the barrier off the bridge, exposing its own workers and the flaggers to the hazards associated with failing to have an engineering survey in writing, failing to ensure no one was working below, and failing to ensure that the structure being demolished was properly secured or braced. *See Martinez*

³ *See also Havens Steel Co. v. Occ. 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); *Elect. Smith, Inc. v. Sec'y of Labor*, 666 F.2d 1267, 1271-72 (9th Cir. 1982); *DeTrae Enter. v. Sec'y of Labor*, 645 F.2d 103, 104 (2d Cir. 1981); *Bratton Corp. v. Occ. Safety & Health Rev. Comm'n*, 590 F.2d 273, 276 (8th Cir. 1979); Mark A. Rothstein, *Occ. Safety & Health L.* § 7.7 (2020).

Melgoza, 125 Wn. App. at 850. And Hamilton had the power to abate these violations by simply complying with the regulations. *See id.* at 850.

Hamilton was a controlling employer because it had control over how it performed its job: “the method of doing the work and enforcing safety standards.” *See Martinez Melgoza*, 125 Wn. App. at 853. Hamilton controlled the work when it dispatched workers to cut concrete after determining what they needed to cut and sent them to the jobsite with the appropriate heavy equipment. AR 440-41. That another contractor onsite was in charge of the entire demolition job does not take away Hamilton’s control over the concrete cutting operation. Contractors and subcontractors coordinate job assignments at worksites and this does not change who is the employer.

Hamilton’s actions with the curb saw show its control. Hamilton did the demolition work using heavy machinery that it brought to the jobsite. AR 411-12. Only Hamilton could operate the saw. AR 351. Dugan and Corkhill stopped the curb saw once, AR 328, 339, modified the depth of the cut, and continued to cut. AR 354. When the barrier settled onto the bridge deck, they stopped the saw a second time, looked at the barrier, and Dugan told Corkhill that settling was typical during demolition. AR 354-55. This shows Hamilton’s journey-level worker exercised expertise in the concrete cutting operation.

Corkhill, Dugan, and Marney looked at the barrier, discussed it, and decided to proceed with the cut. AR 329, 355. The journey and apprentice level Hamilton workers were involved in the decision-making with the Staton supervisor. This shows that Hamilton was a typical specialty sub-contractor hired to perform specialized work at a large construction site.⁴

Hamilton's uncited contention that Staton, the upper-tier contractor, "had complete control over the Hamilton employees" lacks support in the record. AB 18. Although Staton was using Hamilton as part of its demolition plan, Hamilton was using its own equipment and applying its own expertise to the job, and had control over the concrete cutting process. And nothing prevented Hamilton from ensuring there was an engineering survey before dispatching the workers and equipment to the job, or checking to make sure flaggers were out of the way before turning on the saw, or ensuring that the barrier was secured or braced

⁴ Given the expertise needed to operate the saw, this Court should reject Hamilton's suggestion that their workers were "laborers with fancy equipment." AB 6. In any event, even if they were just "laborers with fancy equipment," Hamilton is their employer. As much as Hamilton suggests its workers were not engaged in demolition, but merely hired labor, the law states otherwise. WAC 296-155-005 applies all the standards in WAC 296-155 to Hamilton's demolition work: "The standards included in this chapter apply throughout the state of Washington, to any and all work places subject to the Washington Industrial Safety and Health Act (chapter 49.17 RCW), where construction, alteration, [and] demolition . . . is performed. These standards are minimum safety requirements with which all industries must comply when engaged in the above listed types of work."

before making the first, second, and third cuts. All employers involved in a demolition must follow the WISHA demolition rules. WAC 296-155-005.

The Board correctly found Hamilton was an employer who failed to follow WISHA rules.

C. Hamilton Seeks to Apply Legal Standards That Don't Apply

Hamilton asks this Court to use legal standards that don't apply. The Court should reject Hamilton's first argument that it is not a "subcontractor" and that Staton directly employed its workers. AB 15-16. The Board correctly found Hamilton was a subcontractor when it found that Staton "hired Hamilton Construction Co. (American Concrete Company) as the concrete cutting subcontractor for the job." AR 10 (FF 2). It is a well-accepted model on a multi-employer jobsite for upper tier contractors to use lower tier subcontractors (with their equipment and staff) for work and under this model, they do not hire the subcontractor employees as their own employees. Upper tier contractors do not want to be responsible for all the responsibilities of employers: workers' compensation, unemployment insurance, overtime, and other regulatory responsibilities. It would make no sense for them to bring on two workers hired for a day's work as employees. And Hamilton was providing heavy

equipment consistent with the actions of subcontractors that work on job sites every day.

Just because another contractor onsite was in charge of the entire demolition job does not mean a subcontractor is not an employer. A holding that because contractors and subcontractors coordinate job assignments at worksites, the subcontractor is not an employer would have far reaching consequences and threaten the safety of workers who should be able to rely on their employers being held responsible for ensuring their safety. It would contravene the constitutional and statutory responsibilities imposed by WISHA to hold subcontractors untouchable by important safety protections. Wash. Const. art. II, § 35; RCW 49.17.010.

Hamilton argues that it was not a subcontractor because “there was no written contract.” AB 15. But contract law establishes that for most agreements, a contract need not be in writing. *See, e.g., Saluteen-Maschersky v. Countrywide Funding Corp.*, 105 Wn. App. 846, 851-52, 22 P.3d 804 (2001). Hamilton admits to the evidence of a relationship between the two companies that shows a subcontractor relationship: “Staton had called to request American Concrete to send a concrete saw and a cutter to cut 110 feet of bridge.” AB 15.⁵

⁵ There were actually a series of text messages between the dispatcher and a Staton employee that led to Hamilton dispatching workers and equipment for this job. AR 441, 446-47.

Hamilton points to dispatcher Rick Garrick's testimony to argue that "there was a complete relinquishment of site supervision and control by American Concrete to Morgan Marney, the site superintendent for Staton." AB 19. But Garrick admitted he dispatched an operator and an apprentice to operate a Hamilton concrete saw after being contacted by Staton Companies about the job. AR 440-41. He needed to know what needed to be cut to dispatch the workers. AR 440-41. Then he prepared a work order to dispatch the workers and the equipment to the job site. AR 447. It was the Hamilton dispatcher that was contacted, not the workers directly. There is no evidence that there was a complete relinquishment of control by Hamilton because the workers were dispatched by Hamilton workers, used Hamilton equipment, and had control over how they performed the job.

And showing the independence of Hamilton, Hamilton employee Dugan testified that Staton was not allowed to use the curb saw. AR 351. Nothing establishes that Hamilton divorced its relationship to the workers. The only thing established is that Hamilton acted in a manner consistent with a lower tier subcontractor, using its equipment and expertise to perform specialized work for the upper tier contractor that retained it.

Second, the Court should reject Hamilton's argument that the economic realities test applies. AB 17. If there is uncertainty about who

employs a worker, the Board applies the “economic realities” test to determine which employer is responsible for WISHA violations. *Potelco Inc. v. Dep’t of Labor & Indus.*, 191 Wn. App. 9, 30-31, 361 P.3d 767 (2015).⁶ Hamilton’s argument that the Board should have applied the economic realities test, AB 17-18, misses the mark because the test applies when it is unclear whether a worker has been misclassified as an independent contractor or when it is unclear which company employs the workers engaging in the violative conduct. There is no evidence that any other entity but Hamilton employed Duggan and Corkhill. So the Board did not apply the economic realities factors because it did not need to.

And Hamilton does not even attempt to argue all the factors of the test, focusing only on the control factors. AB 17-18.⁷ Passing treatment of

⁶ There are seven factors to the “economic realities” test:

- 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.

⁷ This distinguishes this case from *Department of Labor & Industries v. Tradesmen International, LLC*, No. 79634-8-I (Wash. Ct. App. Aug. 17, 2020), review pending (Sept. 16, 2020), in which the parties argued the elements of the test. But more importantly, nothing in *Tradesmen* changes the long-established rule that every employer on a worksite, including subcontractors, are responsible for WISHA safety. Nor does it suggest that the ordinary hiring of subcontractors on a jobsite is subject to the economic realities test. Nothing under WISHA supports such a reach.

any issue does not warrant review. *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998). Hamilton cites *Secretary of Labor v. MLB Industries*, 12 O.S.H. Cas. (BNA) 1525, 1985 WL 44744 (Occup. Safety & Health Rev. Comm'n Oct. 31, 1985), and *In re Skills Resource Training Center*, No. 95 W 253, 1997 WL 593888 (Wash. Bd. Indus. Ins. App. Aug. 5, 1997), for the proposition that an employer without substantial control over a worksite is not accountable for the hazards. AB 17. Not only are these inapt cases, but factually here Hamilton had control over its work and was also a creating and exposing employer.

But even a cursory analysis of the facts under the economic realities test shows that Hamilton was the employer under it as well. *See Potelco*, 191 Wn. App. at 31 (setting out the seven-factor test). For example, both Corkhill and Dugan testified that they considered American Concrete, which is owned by Hamilton, to be their employer. AR 314, 347. It was, after all, Hamilton that had the power to dispatch the workers. And Hamilton controlled the work processes and only it could use the equipment. AR 351. Hamilton employee Dugan testified that Staton was not allowed to use the curb saw, the specialty equipment necessary to cut the barrier off the bridge. AR 351. There is no evidence that Staton paid the employees or complied with any other statutory mandates such as paying workers' compensation or

unemployment compensation.⁸ There is no evidence that Staton could dispatch the Hamilton workers to other jobs.

Hamilton argues that it cannot be “liable for acts it did not commit and had no opportunity to control or prevent.” AB 18. In essence, it suggests it had no control and couldn’t be liable because it couldn’t abate the hazards. But it could. Hamilton argues it “did not commit” the violations, AB 18, but the violations themselves are acts of omission, not commission: it did not ensure a written engineering survey existed (and if it did not exist, it did not leave the job site); it did not ensure no one was working below during demolition; and it did not ensure the structure was braced or secured. It could have done all of these things, which means it could have abated the hazards.⁹

⁸ Even if Hamilton showed that Staton was an employer that does not mean that Hamilton was not also an employer as there may be more than one employer. *Potelco*, 191 Wn. App. at 30.

⁹ Federal courts routinely enforce OSHA citations against non-controlling subcontractors that fail to abate hazards when there are ways for them to do so. *See, e.g., Havens Steel*, 738 F.2d at 400-01 (upholding subcontractor’s citation when it “did not show that it attempted to get the general contractor or [another contractor] to abate the hazardous condition”); *Dun-Par Eng’rd Form*, 676 F.2d at 1336 (upholding subcontractor’s citation when it “did not make a reasonable effort to have the general contractor correct the situation” and instead acquiesced to general contractor’s timetable to abate the hazard when it raised the issue); *Elect. Smith*, 666 F.2d at 1271-72 (finding subcontractor proved *Anning-Johnson* affirmative defense because it repeatedly made complaints about the hazardous conditions to the general contractor, directed workers to remain away from the hazardous areas as much as possible, and installed a plywood barrier); *DeTrae Enter.*, 645 F.2d at 104 (upholding citation against subcontractor even though it “neither created nor controlled the hazardous conditions”); *Bratton Corp.*, 590 F.2d at 276 (upholding citation against “subcontractor whose employees were exposed to hazards created or controlled by the general contractor.”).

Finally, the Board correctly rejected Hamilton's attempt to import the borrowed servant doctrine from personal injury cases into WISHA. AR 8-9, 19-21. The borrowed servant defense is a legal fiction that expands the concept of respondeat superior to render a borrowing employer vicariously liable to third parties for a borrowed worker's tortious acts committed within the scope of employment (and thereby insulate the lending employer). *Stocker v. Shell Oil Co.*, 105 Wn.2d 546, 548, 716 P.2d 306 (1986). The Board rejected importing this legal fiction into WISHA, stating that it has "not found any safety and health cases in this state that apply [the borrowed servant] doctrine in a manner to shift all responsibility for safety violations from one employer in a multi-employer worksite to another." AR 8-9.

Contesting the Board's analysis, Hamilton argues that the Court has used cases like *Stute v. P.B.M.C.*, which are personal injury cases, to develop the law. AB 21. But these cases follow WISHA principles to develop the law in personal injury cases when it is necessary to determine whether a particular entity owes a duty to another, which is different from importing common law principles into WISHA. *See Stute v. P.B.M.C.*, 114 Wn.2d 454, 456, 788 P.2d 545 (1990) (holding "the general contractor has a duty to comply with all pertinent safety regulations with respect to every employee on the job site.").

In fact, the borrowed servant defense’s insulating effect conflicts with WISHA’s longstanding rule that all employers have a non-delegable duty to provide a safe and healthful workplace. *Ward*, 40 Wn. App. at 628-29. An employer cannot delegate this “affirmative duty” to another entity to relieve the employer of its duty to follow WISHA. *Id.* “This is true no matter how carefully the person or agency to whom the duty is attempted to be delegated is selected or how competent or reputable he or it may be[.]” *Id.* at 629 (internal quotations omitted). The borrowed servant doctrine has no place in WISHA because its protection of the lending employer conflicts with established WISHA case law.¹⁰

The Board correctly rejected Hamilton’s theories that it argues take it outside the statutory definition of an employer. This Court should reject them as well.

D. Substantial Evidence Supports That Hamilton Had Knowledge of the Violative Conditions

Substantial evidence supports the Board’s findings that Hamilton knew or should have known of the violative conditions. AR 11 (FF 9, 10, 11). Knowledge may be actual or constructive. *Pro-Active Home Builders, Inc. v. Dep’t of Labor & Indus.*, 7 Wn. App. 2d 10, 18, 465 P.3d 375

¹⁰ The Board’s refusal to import the borrowed servant doctrine into WISHA follows the approach nationwide: “The [Occupational Safety and Health Review] Commission and courts have refused to apply the agency concept of ‘borrowed servant’ to transfer liability to the secondary employer.” Rothstein, *Occ. Safety & Health L.*, § 7:4.

(2018) (citing *W. Oilfields Supply v. Dep't of Labor & Indus.*, 1 Wn. App. 2d 892, 903, 408 P.3d 711 (2017)). Constructive knowledge of a violation occurs when, with the exercise of reasonable diligence, the employer could have known about the hazard. RCW 49.17.180(6); *Erection Co.*, 160 Wn. App. at 202-03.

Under WISHA, “if the law imposes responsibility when the employer ‘could . . . with the exercise of reasonable diligence, know’ of a risk—and it is shown that the employer could, with the exercise of reasonable diligence have known of a *particular* risk—then the employer ‘should’ know of that particular risk.” *Erection Co.*, 160 Wn. App. at 205. “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.* at 206-07 (internal quotations and citations omitted).

Here there is both actual and constructive knowledge. The finding of actual and constructive knowledge does not equate to strict liability, as Hamilton contends. AB 26-27, 30; *Potelco*, 191 Wn. App. at 33-34. In *Potelco*, the court rejected an argument that constructive knowledge created strict liability. 191 Wn. App. at 33-34. With the Department having to prove the five elements of a WISHA citation, there is no strict liability. *Id.* at 34; *Wash. Cedar & Supply Co.*, 119 Wn. App. at 914.

The Board found the Department proved citation item 1-1a because the facts showed Hamilton violated WAC 296-155-775(1). AR 8, 11 (FF 11). That regulation requires that “[p]rior to permitting employees to start demolition operations, [an employer] 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.” WAC 296-155-775(1). It also requires employers to “check adjacent structures where employees may be exposed” and to “have in writing, evidence that such a survey has been performed.” WAC 296-155-775(1).¹¹

Hamilton had actual and constructive knowledge that it did not ensure an engineering survey was completed because Hamilton did not have an engineering survey done or even check to make sure someone else had an engineering survey done. AR 315-16, 349, 397-98. In fact, it ignored the requirement because the dispatcher testified that all Hamilton needs to know before sending workers to a jobsite is what needed to be cut. AB 4; AR 440-41. The only things Dugan looked at before operating the curb saw were the “as-builts.” AR 348-49.

¹¹ Hamilton cites the way citation item 1-1 was “originally cited” but the Board—upon remand—amended this citation item to allege different violative conduct (the citation item was relabeled as “1-1a”). AB 28; AR 14-18.

The undisputed facts show that no one from Hamilton had “in writing, evidence that [an engineering] survey has been performed.” WAC 296-155-775(1). Had it exercised reasonable diligence and asked about the survey, it could have walked off the job if none was provided. Substantial evidence supports the finding that Hamilton knew about the engineering survey violation.

The Board found the Department proved citation item 1-2 because the facts showed Hamilton violated WAC 296-155-775(15). AR 11 (FF 9). That regulation states that employers “must not permit workers to carry on a demolition operation which will expose persons working on a lower level to danger.” WAC 296-155-775(15). It is implausible that Hamilton did not actually know that there were workers below the bridge deck. But in any event, constructive knowledge occurs when a violation is in plain view. *Pro-Active Home Builders*, 7 Wn. App. 2d at 18-19 (citing *Erection Co.*, 160 Wn. App. at 207) (constructive knowledge exists when the violation is “readily observable or in a conspicuous location”); *BD Roofing, Inc. v. Dep’t of Labor & Indus.*, 139 Wn. App. 98, 109-10, 161 P.3d 387 (2007) (constructive knowledge exists when violations are “easily observable”). Following the well-accepted plain view principle does not create strict liability, contrary to Hamilton’s contention. AB 29-30.

Here, the flaggers were walking under the bridge in plain view while Hamilton workers operated the curb saw. Vandiver walked underneath the bridge “several times” while the saw cutting occurred. AR 296, 307. King walked under the bridge four or more times while the cutting occurred and the barrier fell “[w]ithin a matter of minutes” after King had last walked under the bridge. AR 420. Hamilton permitted workers to carry out demolition of the traffic barrier on the bridge deck while flaggers on a lower level were exposed to danger. *See* WAC 296-155-775(15). Substantial evidence supports the Board’s finding that Hamilton knew about the violation because the flaggers working below were in plain view. As discussed above, subcontractors have duties to other contractors on the site. *Ward*, 40 Wn. App. at 626.

The Board found the Department proved citation item 1-3 because the facts showed Hamilton violated WAC 296-155-035(8). AR 11 (FF 10). That regulation states, “[a]s construction progresses, you must secure or brace the component parts of structures to prevent collapse or failure.” WAC 296-155-035(8). Construction includes “any part of . . . demolition, and dismantling, of . . . structures and all operations in connection therewith.” WAC 296-155-012.

While Hamilton contends that the bridge was not secured or braced “because the sequencing of the demolition plan was inadequate and Staton

did not have an excavator with an opposable thumb,” AB 29, that does not alleviate Hamilton of its individual responsibility to ensure that when it demolishes a structure, that structure is secured or braced. WAC 296-155-035(8); WAC 296-155-012. Doing so does not “impose a strict liability standard,” as Hamilton contends. AB 30. So long as the Department proves an employer had actual or constructive knowledge of a violation, it is not held strictly liable. *Potelco*, 191 Wn. App. at 33-34. Hamilton never looked at a demolition plan or an engineering survey, AR 10 (FF 3, 4), so it really does not matter whether the plan was inadequate or the excavator should have been used. Hamilton had to ensure it did not demolish an unbraced or unsecured structure. It failed in that responsibility, so the Board upheld the violation.

Again, it is inconceivable that Hamilton did not have actual or constructive knowledge that the bridge was not secured or braced to prevent collapse because it was easily observable that it was not. They saw the bridge barrier move. AR 354-55. Both Hamilton employees who performed the work testified that at no time did anyone secure or brace the bridge barrier while they cut it away from the bridge deck. AR 330, 368. Thus, because the lack of securing or bracing was easily observable, the Board correctly found Hamilton knew about this violation.

Hamilton's reliance on federal case law on the knowledge element is misplaced. AB 23-27. When Washington law provides controlling precedent on a WISHA issue, courts need not address federal cases cited for arguments against that precedent. *Express Constr. Co. v. Dep't of Labor & Indus.*, 151 Wn. App. 589, 599 n.8, 215 P.3d 951 (2009).

Hamilton conflates the fatal accident that resulted from a series of safety and health failures with the basis for the citation. AB 29-30. The basis of the citation is Hamilton's failure to comply with three regulatory requirements imposed on it by its statutory duty as an employer. *See* RCW 49.17.020(4). The Department did not need to prove that those violations caused the barrier collapse because it is not that an accident occurred that drives the citation. Indeed, the Department need not prove a hazard when citing an employer for violating a WISHA rule. This is because an employer arguing that a hazard does not exist does not disprove any element of a WISHA violation; instead, it is "an impermissible challenge to the wisdom of the standard." *Frank Coluccio Constr. Co. v. Dep't of Labor & Indus.*, 181 Wn. App. 25, 41-42, 329 P.3d 91 (2014). A standard that proscribes certain conditions "presumes the existence of a safety hazard." *Frank Coluccio Constr.*, 181 Wn. App. at 41. The Department need only prove "that the specific standard was violated." *SuperValu, Inc. v. Dep't of Labor & Indus.*, 158 Wn.2d 422, 434, 144 P.3d 1160 (2006).

Substantial evidence supports the findings that Hamilton knew about the violations.

E. Whether Finding of Fact 3 Is Supported by Substantial Evidence Does Not Matter Because a Demolition Plan Is Not an Engineering Survey

Hamilton named an issue as to whether the trial court erred in concluding that Finding of Fact No. 3 was not supported by substantial evidence. AB 3, 15, 28. Whether this finding is supported by substantial evidence does not affect the outcome of this appeal. In Finding of Fact No. 3, the Board found Hamilton’s employees “were aware of the demolition plan created by Staton Construction and performed saw cutting activities consistent with the plan.” AR 10 (FF 3). It also found the job foreperson “showed schematic diagrams to the Hamilton employees” and that they “did not accurately depict the bridge deck[.]” AR 10 (FF 3). These findings do not matter for two reasons.

First, knowing about a demolition plan has nothing to do with having a written engineering survey. They are two separate things, as is apparent in the Board’s next finding, which states, “At no time was the Hamilton crew presented with a written engineering survey of the structural integrity of the bridge or a demolition plan for the job.” AR 10 (FF 4).

Second, even if Hamilton's cutting followed the demolition plan, all the violations still stand because the Department did not cite Hamilton for performing the work in a manner that was inconsistent with the demolition plan. It cited Hamilton for failing to have the engineering survey in writing, failing to ensure no one was working below, and failing to ensure what it was demolishing was secured or braced. It could have followed the demolition plan perfectly and still been in violation because each employer has a non-delegable duty to comply with WISHA, *see Ward*, 40 Wn. App. at 628-29, and that duty does not disappear simply because they are following another contractor's demolition plan. Even if this Court finds that Finding of Fact No. 3 is not supported by substantial evidence, the Court should uphold the Board's order affirming all three violations. This Court should affirm.

VI. CONCLUSION

Hamilton's attempt to opt out of WISHA by calling itself something other than an employer does not work because it was hired by another contractor to bring specialized equipment and specially-trained workers to perform demolition work. Settled case law brings Hamilton well within the definition of an employer at a multi-employer construction site and renders it responsible for the safety and health of workers at jobsites to which it dispatches them. Substantial evidence supports the

Board's findings that Hamilton knew or could have known of the violative conditions. This Court should affirm.

RESPECTFULLY SUBMITTED this 2nd day of October, 2020.



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No. 54578-1-II

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

HAMILTON CONSTRUCTION CO.,

Appellant,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

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The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Brief of Respondent Department of Labor & Industries and this Declaration of Mailing in the below described manner:

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DATED this 2nd day of October, 2020, at Seattle, Washington.



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