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COURT OF APPEALS,
DIVISION III
OF THE STATE OF WASHINGTON

LANZCE G. DOUGLASS, INC.,

Appellant,

v.

WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES

Respondent.

APPELLANT'S REPLY

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I. INTRODUCTION

The Department takes the position that to meet its burden of proving a serious violation of WAC 296-155-100(1)(a) by a general contractor it only needs to show that the subcontractor violated a safety standard under the Washington Industrial Safety and Health Act (WISHA), chp. 49.17 RCW. It also argues that its speculative inferences should be considered as evidence. The Department is wrong.

II. ARGUMENT IN REPLY

- 1. The Department admits that it had the burden of proving that Douglass committed a serious violation of WAC 296-155-100(1)(a)**

The Department cited Douglass for a serious violation of WAC 296-155-100(1)(a).¹ This regulation provides:

(1) It is the responsibility of management to establish, supervise, and enforce, in a manner which is effective in practice:

(a) A safe and healthful working environment.

WAC 296-155-100(1)(a). A serious violation exists –

– 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 workplace, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

¹ Certified Record (CR) Exhibit 2, p. 2.

RCW 49.17.180(6).

The Department bears the initial burden of proving that Douglass did not meet the WAC 296-155-100(1)(a) requirements. *J.E. Dunn Northwest, Inc. v. Department of Labor and Industries*, 139 Wn. App. 35, 50, 156 P.3d 250 (2007). It also bears the initial burden of proving the additional elements of a serious violation under RCW 49.17.180(6). *Id.* at 44.

Accordingly, to establish its prima facie case of a serious violation of a WISHA regulation, in this instance WAC 296-155-100(1), the Department had to prove each of the following elements: (1) the cited standard applies; (2) the requirements of the standard were not met; (3) employees were exposed to, or had access to, the violative condition; (4) the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition; and (5) there is a substantial probability that death or serious physical harm could result from the violative condition.

Express Construction Co. v Department of Labor and Industries, 151 Wn. App. 589, 597-98, 215 P.3d 951 (2009). The Department acknowledges that it bears the burden of proof. Resp. Brief, pp. 16-17 and p. 25.

2. The Department's view of what its burden requires would render that burden virtually meaningless

The Department argues that it meets its burden of proving that a general contractor committed a serious violation of WAC 296-155-100(1)(a) merely by showing that the subcontractor violated WISHA. The Department's position is incompatible with *J.E. Dunn Northwest* and

Express Construction, and misreads *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 788 P.2d 545 (1990). It would render the Department's burden meaningless, and effectively shift that burden to the general contractor in every case where a subcontractor violated WISHA.

a. **Evidence of a subcontractor's WISHA violation does not prove that the general contractor did not meet the requirements of WAC 296-155-100(1)(a).** The Department argues that it "may satisfy its affirmative burden of proving a general contractor violated WAC 296-155-100 by presenting evidence of a subcontractor's underlying WISHA violations." Resp. Brief, p. 17. The Department's position conflates the first three elements of a WAC 296-155-100(1)(a) violation into a single element.

By showing that subcontractor employees were exposed to a subcontractor's violation of a WISHA safety standard, the Department establishes the third element of a WAC 296-155-100(1)(a) violation: that employees were exposed to, or had access to, the violative condition. In the present case, the violative conditions that Neilson's employees were exposed to were three fall hazards.

But showing that subcontractor Neilson's employees were exposed to three fall hazards resulting from Neilson's WISHA violations does not itself establish the other elements. Of importance in this case, it does not establish the second element: that the requirements of the standard were not

met. The standard in question is the specific duty standard that the general contractor is alleged to have violated – in the present case, WAC 296-155-100(1)(a).

The establishment, supervision and enforcement of a safe and healthful working environment that is effective in practice ... [is a] requirement[] of WAC 296-155-100(1). Accordingly, a showing that such requirement[] [is] not met is an element of the violations alleged ..., the burden of proving which must be borne by the Department.

J.E. Dunn Northwest v. Department of Labor and Industries, 139 Wn. App. at 50. As the Board has held, where a general contractor is alleged to have violated WAC 296-155-100(1)(a), the issue is “whether [the general’s] safety program was ‘effective in practice’ in maintaining a safe and healthful working environment.” *In re Exxel Pacific, Inc.*, BIIA Dec. 96 W182 *4, 1998 WL 718040 *2 (1998).

The Department tries to leap over this second element. It argues that “the safety violation’s very presence at the worksite” (element 3) shows the work environment was unsafe” (element 2). Resp. Brief, p. 19. And: “[T]he fact that workers did not have adequate fall protection” (element 3) “alone made the worksite not a ‘safe and healthful working environment’” (element 3). *Id.* But the Board has made it clear that these are two separate elements, and that a subcontractor’s safety violation does not alone establish

that the general contractor's safety program was not effective in practice:²

A general contractor's safety program can be "effective in practice" even in those circumstances where a cited safety violation by a subcontractor has occurred. The existence of a cited safety violation does not, automatically, establish that a safety program is ineffective. To hold otherwise would be to impose a hopelessly strict standard and would give no meaning to the words, "effective in practice."

In re Exxel Pacific, Inc., BIIA Dec. 96 W182 *26, 1998 WL 718040 *16 (1998).

The Department argues that its position is supported by the Board's decision in *In re Mediterranean Pacific Corp.*, BIIA Dec. 06 W0162 (2007). It is not. *Mediterranean Pacific* does not hold that proof of a subcontractor's safety violation satisfies the Department's burden of proving that the general contractor's safety program was not effective in practice. In *Mediterranean Pacific*, the Board reviewed the Department's entire inspection file, which had been introduced as an exhibit before the Board, and found "there is sufficient evidence on this record to establish that Mediterranean Pacific Corp. had not established, supervised, or enforced a safe and healthful working environment that was effective in

² In *Exxel Pacific*, the Board "addressed the substance of general contractor's primary responsibility for WISHA compliance on its jobsite." *Id.* at *6, 1998 WL 718040 at *4. That is, it addressed the elements of a WAC 296-155-100(1)(a) violation. It expressly declined to decide whether the Department or the general contractor has the initial burden of proof regarding an alleged violation of WAC 296-155-100(1)(a). *Id.* at *11, 1998 WL 718040 at *6. As the Department has agreed, it is now well established that this burden is placed on the Department. Resp. Brief, p. 16.

practice.”³ *In re Mediterranean Pacific Corp.*, BIIA Dec. 06 W012 *3, 2007 WL 3054885 *2 (2007).

The Department also argues that a general contractor’s per se control of the work place under *Stute v. P.B.M.C.* establishes its liability whenever a subcontractor violates WISHA standards. Resp. Brief, p. 20 (“By the presence of these violations, Douglass, Inc. failed its duty as the general contractor to establish, supervise, and enforce a safe working environment effective in practice.”). But in *Exxel Pacific*, the Board noted that *Stute* did not “provide detailed guidance regarding the full substance or extent of a general contractor’s obligations under WISHA.” *In re Exxel Pacific, Inc.*, BIIA Dec. 96 W182 *7, 1998 WL 718040 *4 (1998). Therefore, simply referring to *Stute* begs the question as to what constitutes a safety program that is “effective in practice.”

b. A subcontractor’s knowledge of its own WISHA violation is not imputed to the general contractor. The Department also argues that it meets its initial burden of proving the contractor’s actual or constructive knowledge (the fourth element of a serious violation of WAC 296-155-100(1)(a)) by showing that the subcontractor knew of the

³ In the present case, by way of contrast, only discrete documents contained within the Department’s inspection file were admitted. These were: Corrective Notice of Redetermination (Exhibit 1); Citation and Notice of Assessment (Exhibit 2); and various photographs (Exhibits 3 through 11).

underlying violations. “If the subcontractor knows of the violation, so does the general contractor.” Resp. Brief, p. 25, citing *Potelco, Inc. v Department of Labor and Industries*, 194 Wn. App. 428, 377 P.3d 251 (2016), *rev. den.*, 186 Wn.2d 1024 (2016).

Potelco does not hold that a subcontractor’s knowledge of a WISHA violation is imputed to the general contractor. In fact, the *Potelco* case did not involve a general contractor’s alleged failure to provide a safe work environment for employees of a subcontractor. It involved safety hazards directly created by *Potelco*. *Potelco* holds that “when a supervisor has actual or constructive knowledge of a safety violation, such knowledge can be imputed to the employer.” *Potelco, Inc. v. Department of Labor and Industries*, 194 Wn. App. at 440. Thus, where a supervisor employed by the cited firm has knowledge of violations, the supervisor’s knowledge is imputed to his or her employer, i.e., the cited firm.

Even if the Department were correct that a subcontractor’s knowledge of a violation may be imputed to the general contractor, that would not help the Department. The Board made no finding or conclusion that Neilson, the subcontractor, had actual or constructive knowledge of the violations. Thus, there is nothing to input.

3. The Board's conclusion no. 5 that Douglass committed a serious violation of WAC 296-155-100(1)(a) is not supported by the Board's findings

To bolster its defense of the Board's Conclusion of Law No. 5, the Department refers to selected portions of the record not reflected in the Board's findings of fact. Resp. Brief, pp. 22-24. This is not proper under the standard of review.

“The Board's findings of fact are conclusive if supported by substantial evidence when viewed in light of the record as a whole. ... If there is substantial evidence to support the findings, we determine whether the findings support the conclusions of law.” *Western Oilfields Supply v. Department of Labor and Industries*, ___ Wn. App. ___, 408 P.3d 711, 716 (2017) (internal quotation marks omitted); *see also, Pilchuck Contractors, Inc. v. Department of Labor and Industries*, 170 Wn. App. 514, 517, 286 P.3d 383 (2012). In other words, in considering a challenge to the Board's findings of fact, the Court reviews the record to determine whether the findings are supported by substantial evidence. But in reviewing the Board's conclusions of law, such as Conclusion of Law No. 2, the Court determines whether the findings of fact support the conclusions of law. That is, in reviewing conclusions of law, this Court “review[s] the Board's findings of fact to determine ... whether *those* findings support the conclusions of law.” *Potelco, Inc. v. Department of Labor and Industries*,

191 Wn. App. 9, 21, 361 P.3d 767 (2015) (emphasis added). Therefore, in defending the Board's Conclusion of Law No. 2, the Department must rely on the Board's findings of fact – not on other parts of the record that the Board did not incorporate into a finding.

With respect to the Department's discussion of additional evidence purportedly supporting Conclusion of Law No. 2, one further point should be made. The Department makes the following statement: "As the Board reasoned, if Douglass, Inc. had been taking effective steps to discover and correct safety rule violations throughout the project, it would have rectified the multiple violations before the inspection. AR 32." Dept. Resp., pp. 22-23. Page 32 of the record, cited by the Department, is page 10 of the Board's decision. However, the reasoning attributed to the Board in the Department's brief is not found in the Board's decision – not on page 10 (i.e., AR 32), or anywhere else.

4. The Board's finding no. 6 that Douglass knew or, through the exercise of reasonable diligence, could have known of the presence of the three underlying violations is not supported by the record

The Department argues that Douglass had constructive knowledge of the underlying violations for three reasons.

a. Neilson's knowledge is not imputed to Douglass. First, it argues that subcontractor Neilson's knowledge of the violations may be

imputed to Douglass. But the Department has no authority for this broad proposition. As discussed above, the caselaw only provides that an employer may be imputed with the knowledge of a supervisor who works for the employer.

b. The Department misstates the evidence. Second, the Department argues that the underlying violations were in plain view for a week or 10 days. Dept. Resp., p. 29. The Department's argument, however, relies upon misstatements of the record.

Neilson testified that it was his guess that the Skytrak was on site for 10 days.⁴ He did not, however, testify that the Skytrak had been *in use* for 10 days, as the Department claims. Dept. Resp., pp. 27 and 29. From its faulty supposition that the evidence showed use of the Skytrak for 10 days, the Department argues that “[i]t is reasonable to conclude that additional violations had occurred in plain view within that time period.” Dept. Resp., p. 27. In jumping to this inference, however, the Department fails to point to the evidence that the primary function of the Skytrak forklift is to lift lumber up to the second floor of the house under construction, not to provide a work platform.⁵ When being used for its primary function, then, no one is standing on the platform and no one is exposed to a fall hazard. Neilson did

⁴ CR 10/22/2015 Transcript 34.

⁵ CR 10/22/2015 Transcript 50.

not testify that the workers used the Skytrak platform without a guardrail from an unsafe height for more than two days, as the Department implies. Dept. Resp., p. 29. In fact, Neilson testified that did not believe he had ever seen the workers standing on the Skytrak platform on this or any other job.⁶ The evidence before the Board is that a photograph taken by a neighbor late on the afternoon of December 17, 2014 shows a worker on the Skytrak platform without a guardrail, and that at 8:00 the next morning the Department's inspector, Hadwiger, observed a worker on the Skytrak platform without a guardrail.⁷ Thus, the evidence shows that at the end of the workday on December 17, and the start of the workday on December 18, a worker was on the Skytrak platform without a guardrail. Hadwiger admitted that she had no knowledge of any safety violations by subcontractor Neilson prior to this date.⁸

The Department also states that "Hadwiger estimated the stairs had been in place for at least a week before the inspection." Dept. Resp., p. 29.

⁶ CR 10/22/2015 Transcript 49-50.

⁷ CR 10/22/2015 Transcript 129-130 and 133-138; Exhibits 3 and 5.

⁸ CR 10/23/2015 Transcript 20-21. When Hadwiger was asked specifically whether she had personal knowledge of the platform being used by a worker without a guardrail prior to December 17, 2014, the Department objected that the question had been asked and answered and the objection was sustained. CR 10/23/2015 Transcript 59. However, as pointed out in Douglass's initial brief, the question had not been asked and answered; therefore, Douglass has asked that Hadwiger's answer taken in colloquy be admitted to the record. App. Brief, pp. 11-12, fn. 30. Her answer was: "I did not observe anyone in that condition prior to that date." CR 10/23/2015 Transcript 60

Actually, Hadwiger never offered her own estimate of time. She only testified as to what she thought she had heard Neilson testify earlier in the hearing.⁹ From that recollection, she inferred that the walls for the upper floor were raised about a week before the inspection opened; and, therefore, that the stairway would have been in place during that period of time.¹⁰ But, as pointed out in Douglass's initial brief, Hadwiger's recollection of Neilson's testimony was faulty. Neilson had estimated the number of days that the SkyTrak had been at the site,¹¹ how long the job might take,¹² how long his workers had been on the site before December 18, 2014,¹³ and how much longer might be needed to complete the job.¹⁴ Neilson did not offer any testimony as to when the walls for the upper floor or the stairway were installed. Thus, the basis for Hadwiger's inference as to how long the stairway had been in place is mistaken.

Finally, the Department argues that "[i]t is ... reasonable to infer that since Douglass, Inc.'s truck was at the jobsite during Hadwiger's inspection, Douglass, Inc. could have known that the workers had been

⁹ CR 10/23/2015 Transcript 61-62.

¹⁰ CR 10/23/2015 Transcript 61-62.

¹¹ CR 10/22/2015 Transcript 34.

¹² CR 10/22/2015 Transcript 37.

¹³ CR 10/22/2015 Transcript 37-38.

¹⁴ CR 10/22/2015 Transcript 38.

working on the unprotected lift platform.” Dept. Resp., pp. 27-28. The Department offered no evidence as to the identity of the person, or persons, who were in the truck; nor whether the person or persons included Douglass’s site foreman, Brad Sollie. The Department also offered no evidence as to why the truck was at the site. Had the Department introduced evidence that Douglass’s site foreman was at the site when the underlying violations occurred, it could reasonably argue that the foreman’s actual or constructive knowledge should be imputed to Douglass. But it offered no such evidence. Having failed to meet its burden of proof with evidence, the Department is not permitted to meet it with speculation.

c. The Department points to no evidence that Douglass failed to exercise reasonable diligence. Finally, the Department argues that Douglass may not rely upon WAC 296-155-110(9)(a), which only requires an employer to conduct a walk-around inspection “at least weekly.” Dept. Resp., pp. 29-30, The Department argues:

WAC 296-155-110(9)(a) sets a floor for the required number of walk-around safety inspections, but the reasonable diligence standard may require more. *See Erection Co.*, 160 Wn. App. at 206. In other words, a contractor may avoid a citation under WAC 296-155-110(9)(a) if it conducts a weekly inspection, but reasonable diligence is a separate question that the Board resolved against Douglass, Inc.

Dept. Resp., p. 30. In *Erection Co.*, the court of appeals stated that “[r]easonable diligence involves several factors, including an employer’s

obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence.” *Erection Co. v. Department of Labor and Industries*, 160 Wn. App. 194, 206-07, 248 P.3d 1085 (2011). But the Department points to no evidence in the record that Douglass was not reasonably diligent based on the factors identified by the court of appeals. Again, the Department gives lip service to its burden of proving Douglass’s actual or constructive knowledge. But in reality it seeks to shift that burden to require Douglass to prove that the firm did not have actual or constructive knowledge. That is contrary to the holding in *J.E. Dunn Northwest*.

III. CONCLUSION

The Department did not present evidence that Douglass’s safety program was not effective in practice, or that Douglass knew or, through the exercise of reasonable diligence, could have known of the violative conditions. These are the second and fourth elements of a serious violation of WAC 296-155-100(1)(a) as articulated in *Express Construction Co. v Department of Labor and Industries*, 151 Wn. App. at 597-98. The Department has the burden of proving each element. *Id.* But instead of proving these elements, the Department argues that a showing that subcontractor Neilson committed the underlying violations (which may be enough to establish that the employees were exposed to the violative

conditions, i.e., element 3), shifts the burden to Douglass to prove that its safety program was effective in practice. And it argues that Neilson's knowledge of the underlying violations should be imputed to Douglass, even though no case cited by the Department, or known to Douglass, imputes a subcontractor's knowledge to the general contractor. Nor does the additional "evidence" to which the Department refers in its brief actually show that the safety program was not effective in practice, or that Douglass had actual or constructive knowledge of the underlying violations. For these reasons, and those discussed in Douglass's initial brief, the Board's decision should be vacated.

DATED February 9, 2018

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on February 9, 2018, I caused a true and correct copy of the foregoing document to be served upon counsel of record in the following manner:

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The foregoing statement is made under penalty of perjury and under the laws of the State of Washington and is true and correct.

SIGNED February 9, 2018 at Seattle, Washington.

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