

FILED

No. 353991
COURT OF APPEALS,
DIVISION III
OF THE STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

LANZCE G. DOUGLASS, INC.,

Appellant,

v.

WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES

Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

The Board of Industrial Insurance Appeals (Board) affirmed a citation issued by the Department of Labor and Industries (Department) against Lanzce G. Douglass, Inc. (Douglass), a general contractor, for an alleged violation of WAC 296-155-100(1)(a), which provides:

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

(a) A safe and healthful working environment.

Douglass, a home builder, was cited based on three code violations committed by its siding subcontractor, Richard R. Neilson, Inc. (Neilson). Although Neilson committed the violations, the Board received no evidence showing that Douglass's safety program was ineffective, or that Douglass knew, or with the exercise of reasonable diligence, could have known of the violative conditions. In the absence of such evidence, the Department failed to prove its prima facie case. Therefore, the Board erred in affirming the citation, and its decision should be vacated.

II. ASSIGNMENT OF ERROR

Assignment of Error

No. 1: The Board erred in finding that Douglass did not take effective steps to discover and correct violations of safety rules related to the following: the use of guardrails on the platform of a SkyTrak boom lift

vehicle; inadequate guardrail systems on open-sided walking and working surfaces; and inadequate stair rails. [Finding of Fact No. 5.]

No. 2: The Board erred in finding that Douglass knew, or, through the exercise of reasonable diligence, could have known of the presence of three jobsite events set out in Finding of Fact Nos. 2, 3 and 4. [Finding of Fact No. 6.]

No. 3: The Board erred in finding that Douglass did not adequately communicate its safety rules to workers on its jobsite at 1415 Cypress Court, Spokane, Washington, regarding the use of the SkyTrak boom lift vehicle, or construction and use of guardrail and stair well systems. [Finding of Fact No. 7.]

No. 4: The Board erred in concluding that Douglass committed a serious violation of WAC 296-155-100(1)(a) as alleged in Item 1-1 of Corrective Notice of Redetermination No. 317620888, and in concluding that the violation was appropriately assigned a penalty of \$2,700. [Conclusion of Law No. 5.]

No. 5: The Board erred in concluding that Corrective Notice of Redetermination No. 317620888 is correct, and in affirming said corrective notice of redetermination. [Conclusion of Law No. 7.]

Issues Pertaining to Assignments of Error

No. 1: Did the Board improperly shift the burden of proof to

Douglass, requiring it to show that its safety program was effective in practice? [Assignment of Error Nos. 1, 3, 4, and 5.

No. 2: Did the Board improperly shift the burden of proof to Douglass, requiring it to prove that it did not know, and could not have known, of the violative conditions? [Assignment of Error Nos. 2, 4, and 5.

III. STATEMENT OF THE CASE

On March 6, 2015, the Department issued Citation No. 317620888 to Douglass.¹ After reassuming jurisdiction, on April 23, 2015, the Department affirmed the citation in Corrective Notice of Redetermination No. 317620888.² On April 28, 2015, Douglass timely appealed.³ The appeal was heard on October 22 and 23, 2015 before Industrial Appeals Judge Bruce E. Ridley. On February 1, 2016, Judge Ridley issued a proposed decision and order to affirm the Corrective Notice of Redetermination.⁴ On February 19, 2016, Douglass timely filed a petition for review with the Board.⁵ On March 8, 2016, the Board denied Douglass's petition for review, and adopted Judge Ridley's proposed decision and order as its own.⁶

¹ Certified Record from the Board of Industrial Insurance Appeals (CR) Exhibit 2.

² CR Exhibit 1.

³ CR 60 (Jurisdictional History).

⁴ CR 23-40 (Proposed Decision and Order).

⁵ CR 5-19 (Lanzce G. Douglass, Inc.'s Petition for Review).

⁶ CR 3 (Order Denying Petition for Review).

IV. SUMMARY OF ARGUMENT

In its Decision and Order, the Board did not identify any evidence that would show that Douglass failed to meet its responsibilities under WAC 296-155-100(1)(a). Instead, it shifted the burden of proof to Douglass. Once it found that Neilson committed the underlying violations, the Board concluded that Douglass failed to prove that it met its obligations under the regulation. But Douglass did not have the burden of proving it met those obligations. Rather, it was the Department's burden to prove that Douglass did not meet its responsibilities. The Board shifted the burden of proof from the Department to Douglass. For that reason, the Board's Decision and Order should be vacated.

V. ARGUMENT

A. Standard of Review

In reviewing decisions of the Board, the court of appeals "stand[s] in the same position as the superior court." *Asplundh Tree Expert Co. v. Dep't of Labor and Industries*, 145 Wn. App. 52, 56, 185 P.3d 646 (2008). Its review of a Board decision is de novo. *Id.* at 56-7. Thus, the court of appeals "review[s] the Board's decision and not the superior court's ruling." *Robison Const., Inc. v. Dep't of Labor and Industries*, 136 Wn. App. 369, 373, 149 P.3d 424 (2006). Its review is "based upon the agency record, not upon the trial court record." *Id.*

The findings of the board with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, are conclusive. Substantial evidence is evidence that would persuade a fair-minded person of the truth or correctness of the matter. We view the evidence and its reasonable inferences in the light most favorable to the prevailing party – here, the department – in the highest forum that exercised fact-finding authority – here, the board. We then review whether the findings of fact support the conclusions of law.

Erection Co., Inc. v. Dep't of Labor and Industries, 160 Wn. App. 194, 202, 248 P.3d 1085 (2011) (citations omitted). The court “review[s] the board’s interpretation of statutes and regulations de novo, but give[s] substantial weight to an agency’s interpretation of a regulation within its area of expertise.” *Id.* 201-02 (citations omitted).

Accordingly, we will uphold an agency’s interpretation of a regulation if it reflects a plausible construction of the statute and is not contrary to the legislative intent and purpose of the enabling statute. But ultimately, we retain responsibility for interpreting a statute or regulation.

BD Roofing, Inc. v. Dep't of Labor and Industries, 139 Wn. App. 98, 107, 161 P.3d 387 (2007) (citations and internal quotation marks omitted).

B. The Board Had No Evidence that Douglass’s Safety Program Was Not Effective in Practice

1. The burden was on the Department to prove that Douglass’s safety program was not effective in practice

“The establishment, supervision and enforcement of a safe and healthful working environment that is effective in practice ... are requirements of WAC 296-155-100(1). Accordingly, a showing that such

requirements are not met is an element of the violations ..., the burden of proving which must be borne by the Department.” *J.E. Dunn Northwest, Inc. v. Washington Dep’t of Labor and Industries*, 139 Wn. App. 35, 50, 156 P.3d 250 (2007). “[T]he Department had to show that the requirement – to establish, supervise, and enforce, in a manner which is effective in practice, a safe and healthful working environment – was not met.” *Express Construction Co. v. Dep’t of Labor and Industries*, 151 Wn. App. 589, 598, 215 P.3d 951 (2009).

2. The Board received no evidence that would show that Douglass’s safety program was not effective in practice

The Board made two findings relating to the effectiveness of Douglass’s safety program. First, it found that Douglass “did not take effective steps to discover and correct violations of safety rules”⁷ Second, it found that Douglass “did not adequately communicate its safety rules” to Neilson’s workers.⁸ But the Board had received no evidence that supported these findings.

The Department’s inspector testified that she lacked personal knowledge as to *any* acts or omissions by Douglass relating to this jobsite. Specifically, she admitted that she lacked personal knowledge as to the

⁷ CR 38 (Decision and Order at 16 (Finding of Fact No. 5)).

⁸ CR 38 (Decision and Order at 16 (Finding of Fact No. 7)).

following:

- whether or not Douglass required Neilson to have safety equipment on the job;⁹
- whether or not there was a contract or agreement between Douglass and Neilson, or, if one existed, the contents of the contract;¹⁰
- what steps Douglass took to review Neilson's compliance with safety requirements;¹¹
- whether or not Douglass required Neilson to respond to a safety questionnaire, or, if Neilson was required to respond, what those responses were;¹²
- what processes Douglass used to discover, control and recognize hazards;¹³
- what processes Douglass used to correct health and safety violations;¹⁴
- what processes Douglass used to enforce safety rules;¹⁵
- whether anyone employed by Douglass came by the site from time to time to review safety compliance;¹⁶ and
- whether Douglass's on-site representative was on the jobsite, and, if he was, how frequently he was on site and whether he was on site after the violative conditions arose.¹⁷

9 CR 10/23/2015 Transcript (Tr.) 22.

10 CR 10/23/2015 Tr. at 23-24.

11 CR 10/23/2015 Tr. at 25.

12 CR 10/23/2015 Tr. at 25-26.

13 CR 10/23/2015 Tr. at 26..

14 CR 10/23/2015 Tr. at 26.

15 CR 10/23/2015 Tr. at 26.

16 CR 10/23/2015 Tr. at 57.

17 CR 10/23/2015 Tr. at 57-58.

The Board reached its decision based solely on the fact that the subcontractor, Neilson, committed the underlying violations. As the Board stated: “If the underlying violations are proven, then the Department had the authority to cite Douglass as the general contractor.”¹⁸ Under this rationale, once the Department established its prima facie case against the subcontractor, it would also have proven its prima facie case against the contractor. The burden would then shift to the contractor to prove that its safety program is effective in practice. But, as noted above, *J.E. Dunn Northwest* and *Express Construction* hold that the Department bears the burden of proving that the safety program requirements, including its effectiveness in practice, are not met. The Board’s decision flatly ignores these holdings.

C. The Board Had No Evidence that Douglass Knew, or Could Have Known, of the Violative Conditions

1. The burden was on the Department to prove that Douglass knew, or through the exercise of reasonable diligence, could have known, of the violative conditions

RCW 49.17.180(6) provides that a serious violation has *not* occurred where “the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation. “[T]he Department bears the burden of proving both the existence of the elements

¹⁸ CR 29 (Decision and Order at 7).

of the violation itself and the existence of those additional elements of a ‘serious’ violation enumerated in RCW 49.17.180(6).” *J.E. Dunn Northwest, Inc. v. Washington Dept. of Labor and Industries*, 139 Wn. App. at 44. Therefore, “[a]mong the elements that the department must show in order to establish a prima facie case of a ‘serious violation’ is that the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition.” *Erection Co., Inc. v. Dept. of Labor and Industries*, 160 Wn. App. at 202-03. Federal law is consistent in requiring the Department to prove the knowledge element in addition to the underlying violation. *See, e.g., Capital Elec. Line Builders of Kansas, Inc. v. Marshall*, 678 F.2d 128, 129-30 (10th Cir. 1982) (“It is not sufficient that the Secretary merely show the existence of the violation; he must also prove that the employer had knowledge of the violation before any liability can be imposed.”).

The Board found that Douglass “knew or, through the exercise of reasonable diligence, could have known” of three violative conditions.¹⁹ These were: (1) a worker was standing and working on an elevated platform that had no guardrails;²⁰ (2) there were inadequate guard rail systems on

¹⁹ CR 38 (Decision and Order at 16 (Finding of Fact No. 6)).
²⁰ CR 37 (Decision and Order at 15 (Finding of Fact No. 2)).

open-sided walking and work surfaces;²¹ and (3) there was no handrail or stair-rail system on a stairway.²²

The burden is on the Department to prove that Douglass knew or, through the exercise of reasonable diligence, could have known of the violative conditions. As discussed below, the Board received no evidence the Douglass knew or, through the exercise of reasonable diligence, could have known of these violative conditions. Therefore, the Department failed to meet its burden of proof. Again, the Board's decision improperly shifted the burden of proof to Douglass.

2. The Board received no evidence that would show that Douglass knew, or through the exercise of reasonable diligence, could have known, of the violative conditions

Although the Board found that Douglass “knew or, through the exercise of reasonable diligence, could have known of the presence of the three jobsite events”,²³ it identified no evidence to support that finding. It simply made an oblique reference that: “These violations were obvious. They were visible to the naked eye.”²⁴ But there is no evidence that the violations were present – much less visible to the naked eye – for a period even as long as a single day. The Department's inspector admitted that,

21 CR 38 (Decision and Order at 16 (Finding of Fact No. 3)).

22 CR 38 (Decision and Order at 16 (Finding of Fact No. 4)).

23 CR 38 (Decision and Order at 16 (Finding of Fact No. 6)).

24 CR 32 (Decision and Order at 10).

other than a photograph of a worker on the elevated platform taken by a third party on December 17, 2014, she had no personal knowledge of any violation of an applicable safety requirements prior to December 18.²⁵ Specifically, she had no knowledge as to when the stairway was installed.²⁶ Nor did she have any knowledge as to whether or not the slider door was planned for installation on the day she visited the jobsite (although she believed that was likely),²⁷ and whether the guardrails had been removed only that morning.²⁸ In addition, the Department's inspector was asked whether she had any knowledge that a worker used the elevated platform without a guardrail prior to December 17; however, the Department's objection that the question had been asked and answered was sustained.²⁹ In colloquy,³⁰ the inspector admitted that she had not observed anyone on

²⁵ CR 10/23/2015 Tr. at 20-21.

²⁶ CR 10/23/2015 Tr. at 60-61. The Department's inspector inferred from Mr. Neilson's testimony that the walls for the upper floor were raised about a week before the inspection opened; and that, therefore, the stairway would have been in place during that period of time. 10/23/2015 Tr. at 61-62. However, a review of Mr. Neilson's testimony shows that he was estimating how many days the SkyTrak had been at the site, 10/22/2015 Tr. at 34, how long this job might take, 10/22/2015 Tr. at 37, and long his workers had been on this jobsite before December 18, 2014 and how much longer might be needed to complete the job. 10/22/2015 Tr. at 37-38 and 48-49. He did not offer any testimony as to when the walls for the upper floor or the stairway were installed.

²⁷ CR 10/23/2015 Tr. at 64.

²⁸ CR 10/23/2015 Tr. at 65.

²⁹ CR 10/23/2015 Tr. at 59.

³⁰ As discussed above, the Department's inspector testified that she had no personal knowledge that Neilson was in violation of any applicable safety requirements prior to December 18. *See* text accompanying n. 25, above. However, the specific question as to whether she had knowledge of a worker using the unguarded platform before that date had

an elevated platform without a guardrail prior to December 17, 2014.³¹ Therefore, if the violations were in plain sight on December 18, or even December 17 and 18, this does not mean they were plainly visible at any other time. Douglass cannot be held to have constructive knowledge of violative conditions based on their plain sight visibility for one or two days, unless it had a duty to be present on the site on a daily basis, which it did not – the standard for frequency of walk-around safety inspections is once per week. WAC 296-155-110(9)(a).

VI. CONCLUSION

WAC 296-155-100(1)(a) does not impose strict liability on a contractor. It is not enough for the Department merely to show that a subcontractor violated a safety standard. That showing alone does not shift the burden of proof to the employer with regard to the remaining elements. Nevertheless, here the only evidence presented by the Department related to the subcontractor Nielson's underlying safety violations. From there, the Board inferred that Douglass knowingly violated its WAC 296-155-100(1)(a) responsibilities because Douglass did not prove otherwise. That is nothing more nor less than shifting the burden of proof from the

not been asked or answered. Therefore, Douglass asks that the testimony taken in colloquy be admitted to the record.

³¹ CR 10/23/2015 Tr. at 60.

Department to Douglass. For that reason, Douglass respectfully asks this
Court to vacate the Board's decision.

DATED November 10, 2017.

The GILLETT LAW FIRM

A handwritten signature in cursive script, reading "Michael B. Gillett", with a horizontal line extending to the right from the end of the signature.

Michael B. Gillett, WSBA #11038
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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on November 10, 2017, 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 November 10, 2017 at Seattle, Washington.

THE GILLETT LAW FIRM


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