

65729-1

65729-1

NO. 65729-1-I

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

MORRISON KNUDSEN CONSTRUCTION,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES
OF WASHINGTON,

Respondent.

FILED
COURT OF APPEALS
STATE OF WASH.
2010 NOV 19 AM 11:36

Appeal from Superior Court of King County 03-2-14468-1KNT

BRIEF OF APPELLANT

Aaron K. Owada, WSBA #13869
Attorney for Appellant

AMS LAW, P.C.
975 Carpenter Rd. NE, Suite 201
Lacey, WA 98516
(360) 459-0751

ORIGINAL

TABLE OF CONTENTS

I. ASSIGNMENT OF ERROR..... 6

Where the record reflects substantial facts to support the Board’s findings that the Department failed to meet its burden of proving all elements required under RCW 49.17.180(6), the Superior Court erred in Findings of Fact Nos. 17, 18, 19, 20, 21, 22, 23 and 24 and Conclusions of Law Nos. 2, 6, 8 and 9.

II. ISSUES..... 6

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR NO. 1.

Where the record reflects substantial facts to support the Board’s findings that employees were not exposed to hazards at the Terminal 18 Redevelopment project, did the Superior Court err by reversing the Board’s findings and conclusions that the Department failed to meet its burden of proving all elements contained in RCW 49.17.180(6) as reflected in the Superior Court’s Findings of Fact Nos. 17, 18, 19, 20, 21, 22, 23 and 24 and Conclusions of Law Nos. 2, 6, 8 and 9?

III. STATEMENT OF THE CASE..... 7

A. Procedural Background..... 7

B. Harbor Island Terminal 18 Redevelopment Project..... 11

IV. ARGUMENT 28

A. Standard of Review..... 28

B. The Department Has the Ultimate Burden
of Proof in Assessing A Serious
Citation.....33

C. The Board’s Finding of Fact that the
Department did not meet its burden of
proof in establishing that employees were
exposed to contaminated soil is supported
by substantial evidence in the
record. 36

D. Finding employees not credible is not a
violation of RCW 49.17.160(1) and is solely
within the purview of the finder of fact to
make.42

V. CONCLUSION..... 49

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Adkins v. Aluminum Company</i> , 110 Wn.2d 128 (1988).....	32
<i>Buechel v. Dep't of Ecology</i> , 125 Wn.2d 196, 884 P.2d 910 (1994).....	43
<i>Callecod v. Washington State Patrol</i> , 84 Wn. App. 663, 929 P.2d 510, <i>review denied</i> , 132 Wn.2d 1004, 939 P.2d 215 (1997).....	29
<i>City of Redmond v. Central Puget Sound Growth Management Hearings Board</i> , 136 Wn.2d 38, 959 P.2d 1091 (1998).....	29
<i>Department of Labor & Industries v. Morrison Knudsen</i> , 130 Wn. App. 27, 121 P.3d 726 (2005).....	9
<i>Port of Seattle</i> , 151 Wn.2d at 588, 90 P.3d 659.....	43
<i>Tapper v. Employment Security Department</i> , 122 Wn.2d 397, 858 P.2d 494 (1993).....	28

<u>Statutes</u>	<u>Page</u>
RCW 34.05	28
RCW 34.05.570(1)(a)	28
RCW 34.05.570(3)(d).....	29
RCW 34.05.570(3)(e).....	29
RCW 49.17	7, 28
RCW 49.17.150	28, 42, 50
RCW 49.17.160	45, 46
RCW 49.17.180(6).....	32, 33, 42
WAC 296-62.....	7, 8
WAC 296-62-3030	40
WAC 296-62-30510(1)(d).....	46

I. ASSIGNMENT OF ERROR

Where the record reflects substantial facts to support the Board's findings that the Department failed to meet its burden of proving all elements required under RCW 49.17.180(6), the Superior Court erred in Findings of Fact Nos. 17, 18, 19, 20, 21, 22, 23 and 24 and Conclusions of Law Nos. 2, 6, 8 and 9.

II. ISSUES

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR NO. 1.

Where the record reflects substantial facts to support the Board's findings employees were not exposed to hazards at the Terminal 18 Redevelopment project, did the Superior Court err by reversing the Board's findings and conclusions that the Department failed to meet its burden of proving all elements contained in RCW 49.17.180(6) as reflected in the Superior Court's Findings of Fact Nos. 17, 18, 19, 20, 21, 22, 23 and 24 and Conclusions of Law Nos. 2, 6, 8 and 9?

III. STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND.

This case involves a safety citation against Morrison Knudsen, under the Washington Industrial Safety and Health Act (WISHA), Ch. 49.17 RCW. Specifically, the Department alleged that the Employer committed 10 serious violations (amounting to 31 grouped instances) of Ch. 296-62 WAC, 4 grouped instances of “general” violations, and issued a total monetary penalty of \$48,500.

An administrative hearing was held before the Board of Industrial Insurance Appeals in December, 2001 and February, 2002. In its Proposed Decision and Order, Chief Industrial Appeals Judge Mark Jaffee vacated all violations by concluding that the Part P HAZWOPER regulations contained in Ch. 296-62 WAC which are applicable for hazardous waste clean operations did not apply because MK was involved in a construction project,

and not a hazardous waste clean up operation. A timely Petition for Review was filed on September 17, 2002. The Board issued a Decision & Order on December 3, 2002 and concluded that the Proposed Decision & Order was correct.

The Department filed a timely appeal to the King County Superior on January 3, 2003. King County Superior Court Judge Ehrlick reversed the Board's Order on August 9, 2004, and found that Board Findings of Fact Nos. 5 and 6 were not supported by substantial evidence in the Board record.

Additionally, Judge Erlick found in Findings of Fact Nos. 18 and 19 that MK's work at Harbor Island was an "uncontrolled hazardous waste site" and that MK was engaged in a "clean-up operation" as defined in Part P of Ch. 296-62 WAC. Accordingly, Judge Erlick reversed the Board by ultimately concluding that the Part P Hazwoper regulations for Hazardous Waste Clean-up Operations applied to MK's activities at Harbor Island. The Superior Court remanded the Citation to the Board with specific instructions to apply the Part P Hazwoper regulations to each

citation item which alleged a violation of Part P to determine on the merits whether the Department sustained its burden of proving the violations. The Employer appealed Judge Erhlick's decision to the Court of Appeals. This Court affirmed Judge Erhlick's decision on August 15, 2005. *See, Department of Labor & Industries v. Morrison Knudsen*, 130 Wn. App. 27, 121 P.3d 726, (2005). After denying the Employer's Petition for Review at the Washington State Supreme Court, the matter was returned to the Board to apply the Part P regulations and individually address each citation.

On remand, the Board issued a lengthy Decision and Order 54 pages long on November 20, 2007. (CABR at p.) In the second Decision & Order (D&O), the Board reviewed the testimony of each witness, as well as the numerous exhibits that were admitted into evidence. Decision and Order, (CABR page 2, lines 26 – 27).

The Board stated its mission as ordered by the Superior Court at (CABR at page 4, lines 14 – 19):

The Superior Court order requires that we find that Morrison Knudsen's activities at Harbor Island were covered by Part P, WAC 296-62-300, et seq., and that Morrison Knudsen was required to comply with the standards contained therein. We are also instructed to make specific findings and conclusions on the merits of each violation contained in the Citation & Notice, except that Citation 1, Item 10 is to remain vacated, pursuant to the findings of the Superior Court. We turn now to the violations in the Citation & Notice.

After a careful review of the evidence and application of the Part P regulations, the Board found that the Department failed to prove by a preponderance of the evidence that Morrison Knudsen was in violation of the standards as alleged by the Department.

The Department appealed this Decision to the King County Superior Court where Judge Ehrlick had retained jurisdiction. After oral argument, Judge Ehrlick issued Findings of Fact and Conclusions of Law on June 25, 2010. Morrison Knudsen now appeals the Superior Court's decision.

The Superior Court concluded that the Board's Finding of Fact No. 35 contained language that was in addition to the language contained in Finding of Fact No. 7 of the First D&O, and

that Finding of Fact No. 35 was not supported by substantial evidence in the record. As such, the Superior Court set aside Finding of Fact No. 35. See Finding of Fact No. 17 of the second Superior Court Order.

Additionally, the Superior Court set aside the Board's Findings of Fact numbers 6 – 34, 36, and 38 – 40 as not being consistent with the Superior Court's First Order of August 9, 2004 and this Court's decision of August 15, 2005, and were not supported by substantial evidence in the record. *See* Finding of Fact No. 18.

In Finding of Fact No. 24, the Superior Court found that the Board ignored the law of the case that, "the record established that the site created a risk to the health and safety of individuals. There is no evidence in the record that Harbor Island does not continue to be a specific threat to the health and safety of individuals."

B. Harbor Island Terminal 18 Redevelopment Project.

Harbor Island has a long and colorful history. It is owned by the Port of Seattle. As the site is zoned commercial, the Port

had an interest in developing it. (Tom Taylor, TR of December 5, 2001, CABR at page 11, lines 17 - 20)¹. The Terminal 18 Redevelopment Project is a multi-million dollar project to extend the Port's shipping facility by constructing an infra-structure for the Port of Seattle. Exhibit 99 is an overview photo of the project just prior to its completion.

Examination of Exhibit 97 shows in intimate detail the level and magnitude of this construction project. As noted by the testimony of the Project Manager, George Harvey, the first phase of this immense project involved mobilization of people and equipment that would be used for the project. (George Harvey, TR February 4, 2002, CABR at page 18). Thereafter, demolition of approximately 130 existing buildings was necessary before the underground utilities could be put in. Following the demolition phase, the site for the Klickitat overpass was prepared and the overpass was built. Building permits were required at many stages

¹ All references to the transcripts and Exhibits are from the Certified Appeal Board Record or CABR

of the project. Regarding paving, all of the underground utilities needed to be first installed. That included water, sewer, storm drainage, electrical conduits and telephone lines. In the overlay and intermodal yard for the big container handlers, MK put in 23 inches of crushed rock and 10 inches of pavement. From an engineering perspective, capping is used to provide stability to the soil and to reinforce it. (George Harvey, TR February 4, 2002, CABR at page 22, lines 3 - 6). Thus, capping was an integral base needed to provide stability for the container yard.

The project also included constructing a new building (the CEM Building), installing new railroad tracks, new lighting fixtures, and building a pedestrian overpass. There is no doubt that the primary scope and magnitude of this project that ultimately carried a price tag of almost \$120 Million was to design and build a port expansion facility. Based on the evidence presented, the Employer asserts that there was more than substantial evidence in the record for the Board to find that the Project was primarily a construction project. *See* exhibit 99.

The heart of the issue in the first appeal, Morrison Knudsen I, was whether the Terminal 18 Redevelopment Project was only a construction project, or an environmental clean-up operation for which the Part P regulations would be applicable. That issue has been firmly decided, but certainly not dispositive of whether MK actually violated any of the Part P regulations. That is, the case was remanded to the Board to make factual determinations whether the Employer had violated each citation of the HAZWOPER regulations as alleged by the Department.

It is undisputed that Harbor Island was once contaminated with various hazardous substances, and that it was placed on the National Priority List as a Super Fund site. The Department boldly states that the Consent Decree and Record of Decision demonstrate that at the time of the inspection in April 2000, the site still contained the same levels of contamination identified in the Record of Decision and Consent Decree. However, the Department ignored the reality that all known and identified “hot spots” of hazardous waste identified in the ROD were removed

prior to any construction activities. Thus, the Department's reliance on either the ROD or the Consent Decree is flawed because the site conditions were substantially changed. The Board rejected the Department's theory and correctly concluded that the Department did not establish that Harbor Island was still contaminated at the same levels identified years before in the ROD because the Department provided no evidence to demonstrate that workers were in fact exposed to hazardous waste materials that were still present after the work began on November 1, 1999. Moreover, as noted by the Board, the Department took no samples of the soil or air to determine whether the soil contained contamination above the clean up levels for any material set forth in the Consent Decree.

Without establishing the basic levels of allegations that the soil was contaminated at the time of the WISHA inspection or during work performed by employees the Board correctly concluded that evidence presented by the Department did not support the Department's contention that Terminal 18 was

contaminated above the levels set forth in the Consent Decree after November 1, 1999 in the areas where they worked.

As part of the bidding process, a Request for Proposal, “RFP,” was prepared and sent to potential contractors to submit a bid for the Terminal 18 Redevelopment Project. Although the RFP was finalized in June, 1998 (TR of Tom Taylor, December 5, 2001, CABR at page 16, line 35), the RFP contained performance specifications that changed during the bidding process. (TR of Tom Taylor, December 5, 2001, CABR at page 17, lines 7- 15).

Because of the importance of the issue and also because contamination had once been identified at the Harbor Island project, Mr. Taylor testified that contractors had expressed concerns about bidding on an environmental clean up project. Specifically, prospective bidders advised Berger Abam that they would not bid on the project if the project was a clean up operation under Part P. This is why Mr. Taylor believed that the Port of Seattle generated the June 1997 letter, admitted as Exhibit 32. (TR of Tom Taylor, December 5, 2001, CABR at page 52, lines 1- 23).

The purpose of the June 1997 letter from Elizabeth Leavitt Stetz and the Port of Seattle was to limit cost controls for the successful contractor. On June 23, 1998, a pre-construction meeting was held to make it clear that the project would not be an environmental clean up project. At this meeting, Ms. Leavitt Stetz, on behalf of the Port of Seattle, clearly advised the contractors that the contaminated soil at the Sea-Fab was going to be removed before they ever got there. (TR of Tom Taylor, December 5, 2001, CABR at page 63, lines 27 - 45).

Ms. Leavitt Stetz specifically emphasized the point that known hot spots of lead and TPH would be removed prior to construction. (TR of Tom Taylor, December 5, 2001, CABR at page 84, lines 11 - 15). And, in fact, Mr. Taylor testified that hot spot remediation did take place prior to the contractors taking possession of the site. (TR of Tom Taylor, December 5, 2001, CABR at page 85).

Ms. Leavitt Stetz specifically advised the prospective contractors that, “What we’ve done is attempted to limit the areas where 40 hour trained people are going to be necessary in those jobs where they actually come into contact with dirt or water.” Ms. Kathy Bahnik testified that the organic “hot spots” on the Terminal 18 project were cleaned up pursuant to the requirements of the ROD prior to Morrison Knudsen beginning its work activity in November 1999. The Board accepted these facts as unrebutted. (D&O, CABR at page 19, lines 15– 22.)

The Board noted at page 35, lines 12 – 16 of the D&O that the Compliance Officer, McClelland Davis, by his own testimony was not sure where the initial work was being done. Additionally, his belief that there was no periodic monitoring when work began in different portions of the site is not supported by any facts and is contrary to the testimony of Bob Johnson, Donald Woolery, and Vivian Mead. Additionally, the Board noted that Exhibit No. 120, AGRA’s daily field reports, contain information indicating that testing for lead was conducted as needed.

A section of the contract required the successful contractor to provide a cap, a term which Mr. Taylor associated with “remediation”. (TR of Tom Taylor, December 5, 2001, CABR at page 41, line 43 through page 42, line 11). In addition to the cap, the RFP also provided a section on how the contractor would deal with suspect soils. (TR of Tom Taylor, December 5, 2001, CABR at page 42, line 41 through page 43, line 3). Moreover, Section 4.01 contained a provision that required the contractor to take into account underground problems that were not known or not previously defined with any degree of accuracy. (TR of Tom Taylor, December 5, 2001, CABR at page 43). The parties recognized that given the history of Harbor Island, even though known hot spots were removed before any construction began, like any other construction site, there was a potential that hazardous chemicals could nevertheless be encountered during construction activities. The purpose of the 40 hour training was to ensure that all employees working directly with the dirt would receive adequate training to be in compliance with the nonPart P lead in

construction standards. Mr. Bob Gilmore, a Certified Industrial Hygienist, testified that the 40 hour HAZWOPER training is a readily identifiable and known product that was available. Even though it was prepared specifically for Part P use, it also met and exceeded the requirements for work with hazardous substances not regulated under Part P.

Mr. Gilmore testified that he developed the health and safety plan for this project, and that AGRA had two full time health and safety technicians at the project. (TR of Robert Gilmore, February 5, 2002, CABR page 78 - 79). Their function was to be there for eight hour shifts to ensure that work practice procedures were being followed to minimize any potential occupational exposure that may be present. (CABR, Gilmore at page 104.) Mr. Gilmore gave his opinion that sufficient controls and procedures were implemented to assure that workers were adequately protected. (Gilmore, CABR at page 176).

Under the environmental section of the contract documents, Mr. Kulas understood that the contractor was required to notify the

Port of Seattle if they encountered suspect soil. It was the Port of Seattle's obligation to analyze the soil and to make the final decision as to how the soil would be used. (TR of William Kulas, December 11, 2001, CABR page 24).

No testimony was provided by the state to establish that contaminated soil was ever handled, removed or treated by either MK or the Port pursuant to the established policy. Mr. Kulas considered Exhibit 2, the Site Safety and Health Plan, Appendix A, as being part of a private contract between Morrison Knudsen and Terminal 18 Development Company. (TR of William Kulas, December 11, 2001, CABR, page 61). Mr. Kulas believed that hazardous waste operations took place as part of this project. However, he was only referring to the asbestos and other hazardous materials that were to be removed from the old buildings that were to be demolished. (TR of William Kulas, December 11, 2001, CABR page 63).

Mr. Kulas was also familiar with the contractual provision that advised MK that the Port of Seattle would remove all known

hot spots prior to construction. He testified that he believed that the Port had complied with this contractual provision. (TR of William Kulas, December 11, 2001, CABR page 65). Thus, not only had the Port represented that the successful bidder would not be doing any environmental work, the parties also understood that all known hot spots had been cleaned up prior to construction activities.

Ms. Kathy Bahnick, an environmental management specialist, testified on December 11, 2001. She agreed that the ROD (Exhibit 32) contains a table on page 43 of clean up levels for lead. As noted in this table, lead above 10,000 milligrams per kilogram would be a “hot spot” subject to cleanup. (TR of Kathy Bahnick, December 11, 2001, CABR page 198).

Thus, capping was only required under the selected remedy for exposed soil that contained lead above the stated cleanup goal of 1,000 mg/kg, but not more than 10,000 mg/kg.

Although the contract required capping, it is clear that capping had two functions at this project: First and foremost,

capping is customary in the construction industry. (George Harvey, TR February 4, 2002, CABR page 21, line 19 - 26). In the overlay and intermodal yard for the big container handlers, MK put in 23 inches of crushed rock and 10 inches of pavement. From an engineering perspective, capping is used to provide stability to the soil and to reinforce it. (George Harvey, TR February 4, 2002, CABR page 22, lines 3 - 6).

Second, three inches of capping over exposed soil containing lead greater than 1,000 mg/kg was part of the selected remedy under the ROD. In addressing this second function, the Department failed to identify any specific area where there was exposed soil that contained lead between 1,000 - 10,000 mg/kg that was capped solely for purposes of the selected remedy set forth in the ROD. On the contrary, the Department provided no employee testimony to establish that any of the witnesses engaged in any capping activity.

More importantly, since the Department took no bulk samples, nor offered any proof that employees capped exposed soil

that contained between 1,000 - 10,000 mg/kg of lead, the Department cannot establish that the scope of work engaged in by Morrison Knudsen employees was done to specifically comply with the requirements of the ROD itself. Except for capping, none of the activities performed by the employee witnesses were required under the ROD. Thus, the Department failed to prove that employees engaged in clean up activities required by the ROD as compared to regular construction activities. Thus, contrary to the Department's conclusion, no clean up operation required by the ROD (i.e., capping of soils between 1,000 - 10,000 mg/kg of lead) was ever engaged in by any of the witnesses presented by the Department. Consequently, the Department failed to establish that any of the MK employees engaged in clean up operations covered by Part P or the ROD.

The Board noted numerous deficiencies in the Department's lack of presentation in its case in chief regarding specific areas where work was performed. The Board reviewed the testimony of Eugene Vos, Lawrence Rogers, Henry Eger, Nate Willis, Rocky

Brock, Danny Becker, Richard Kelly, Glenn Westphalen, Douglas Frizzell, Johnie Wilkins, and Don Fleming. Throughout the examination of these witnesses by the AAG, the Board noted that the witness was never asked to identify the demonstrative exhibit. Additionally, the Board attempted to use the testimony of the witnesses to locate work activity by using Exhibit Nos. 56 and 57, which are aerial photos of Harbor Island, and Exhibits 96 and 111a - f, that show the buildings and streets on Harbor Island. The Board noted:

However, we are unable to locate with any degree of certainty the work sites alluded to by these witnesses.

See CABR ,D&O at page 20, line 24 through page 21, line

11. The Board also declared at page 23, lines 9– 15 that:

This type of questioning, which produces no clear understanding of the location of the work activity is repeated in the testimony of the other witnesses presented by the Department. Without identifying the photo or map used by the witness, and without marking the location on the photo or map, the testimony regarding the location is vague and uncertain. The reference to the location as being along a street or between streets alone is insufficient to locate the work activity with the degree of

accuracy necessary to support a violation. We find these references to location vague and illusory.

In order to affirm the allegations, the Board required the Department to meet its burden of proof. Without a sufficient basis to identify the work activities being performed, the Board was simply unwilling to affirm citations based on “vague or illusory” facts.

The Board’s frustration in understanding the facts is highlighted by the complexity of the overall project. Examination of Exhibit 97 shows in intimate detail the level and magnitude of this construction project. As noted by the testimony of the Project Manager, the first phase involved mobilization of people and equipment that would be necessary for this project. (George Harvey, TR February 4, 2002, CABR page 18). Thereafter, demolition of approximately 130 buildings was necessary before the underground utilities could be put in. Following the demolition phase, the site for the Klickitat overpass was prepared and the overpass was built. Building permits were required at

many stages of the project. Regarding paving, all of the underground utilities needed to be first installed. That included water, sewer, storm drainage, electrical conduits and telephone lines. Thereafter, crushed rock was put in for the base of the pavement, then asphalt or cement pavement was put in. The project also included constructing a new building (the CEM Building), installing new railroad tracks and new lighting fixtures, and building a pedestrian overpass. There is no doubt that the scope and magnitude of this project that ultimately carried a price tag of almost \$120 Million was to design and build a port expansion facility.

Because of the different kinds of work performed, and because the appellate courts directed the Board to specifically consider whether the construction activity was a hazardous waste clean-up activity, and further directed the Board to review only the evidence at the administrative hearings, the Board reviewed the evidence to determine if each alleged Part P citation was supported by the evidence. As noted in the D&O, the Board concluded that

the Department failed to provide sufficient facts to meet its burden of proof and vacated most of the Part P citations.

IV. ARGUMENT

A. STANDARD OF REVIEW.

Under the Administrative Appeals Act, Ch. 34.05 RCW, it is well settled that appellate review is based directly on the record that was before the agency. Moreover, the appellate courts will sit in the same position as the superior court. *Tapper v. Employment Security Department*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). Under the judicial review statute of the Administrative Procedure Act, the "burden of demonstrating the invalidity of agency action is on the party asserting invalidity." RCW 34.05.570(1)(a).

In reviewing agency findings for cases under the Washington Industrial Safety and Health Act (WISHA), Ch. 49.17 RCW, the Courts are mandated to accept the Board's findings as "conclusive" if they are supported by substantial

evidence in the record. RCW 49.17.150. Under RCW 34.05.570(3)(e), substantial evidence is, "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *Callecod v. Washington State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510, *review denied*, 132 Wn.2d 1004, 939 P.2d 215 (1997).

With respect to issues of law under RCW 34.05.570(3)(d), the Washington Supreme Court in *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 959 P.2d 1091 (1998) held at pages 45 – 46 (CABR at p.):

...we essentially review such questions de novo. We accord deference to an agency interpretation of the law where the agency has specialized expertise in dealing with such issues, but we are not bound by an agency's interpretation of a statute. As we stated in *Overton v. Washington State Econ. Assistance Auth.*, 96 Wash.2d 552, 555, 637 P.2d 652 (1981)

Where an administrative agency is charged with administering a special field of law and endowed with quasi-judicial functions because of its expertise in that field, the agency's construction of statutory words and phrases and legislative intent should be

accorded substantial weight when undergoing judicial review.... We also recognize the countervailing principle that it is ultimately for the court to determine the purpose and meaning of statutes, even when the court's interpretation is contrary to that of the agency charged with carrying out the law.

"Concerning conclusions of state law this court is the final arbiter, and conclusions of state law entered by an administrative agency or court below are not binding on this court." Leschi Improvement Council v. Washington State Highway Comm'n, 84 Wash.2d 271, 286, 525 P.2d 774, 804 P.2d 1 (1974)

Finally, as to "arbitrary and capricious" agency action for purposes of RCW 34.05.570(3)(i), we mean "willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding *47 the action. Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous." Kendall v. Douglas, Grant, Lincoln & Okanogan Counties Pub. Hosp. Dist. No. 6, 118 Wash.2d 1, 14, 820 P.2d 497 (1991) (footnote omitted) (quoting Abbenhaus v. City of Yakima, 89 Wash.2d 855, 858, 576 P.2d 888 (1978)).

As set forth below, the Employer respectfully asserts that the Superior Court erred by reversing findings of fact that were

based on substantial evidence in the record, and by further applying erroneous findings to reach conclusions of law not supported by the evidence. Moreover, the Superior Court failed to give substantial weight to the Board's interpretation of the applicability of the Part P Hazardous waste regulations.

B. THE DEPARTMENT HAS THE ULTIMATE BURDEN OF PROOF IN ASSESSING A SERIOUS CITATION.

Washington 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.

At the administrative level, the Board correctly concluded that the Department failed to establish all prima facie elements required under RCW 49.17.180(6) to establish violations of the Part P standards. That is, the Department failed to establish that any Morrison Knudsen employee was ever exposed to any serious hazard where there was a substantial likelihood that an employee would suffer serious bodily injury or death. The Appellant respectfully asserts that the superior court erred by reversing the Board.

B. Consistent with the Superior Court's Order, the Board applied the Part P HAZWOPPER Regulations to determine whether the Department met its burden of proving the cited violations.

In its Assignments of Error, the Department argues that the Board ignored and disregarded the Superior Court and the Court of Appeals' order, misread and misstated the record, and did not make findings based on substantial evidence. Brief of Department

CABR at page 3. This Court accurately reflected the nature of the proceedings below:

In a proposed decision and order (PD & O), the industrial appeal judge (IAJ) determined that soils were found to be contaminated and were stockpiled by Morrison Knudsen personnel on the project. The IAJ also indicated that there was no dispute that part of the project involved capping of soil, a remediation activity ordered to be done in the consent decree. But the IAJ found these activities did not subject Morrison Knudsen under definitions of Part P of the HAZWOPER. Therefore, the IAJ vacated the citation holding that the Part P HAZWOPER contained in chapter 296-62 WAC, applicable to hazardous waste clean-up operations, did not apply because Morrison Knudsen was involved in a construction project, not a hazardous waste clean up operation as defined by WAC 296-62-30003.

Because of the nature of the Board's decision, this Court concluded that the scope of review was "more limited than usual."

CABR at page 35, this Court declared:

Most courts reviewing a board decision under WISHA determine whether the underlying citation was correct. But here, the BIIA held that Part P regulations do not apply to Morrison Knudsen's work on the project *so it did not reach a determination of whether Morrison Knudsen violated the*

regulations/standards.
(Emphasis added).

Because the Board did not initially determine whether Morrison Knudsen violated the HAZWOPER standards under Part P, the Superior Court specifically remanded the case to the Board to make individual findings to determine whether the Part P violations were violated.

Consistent with the Court's remand order dated August 9, 2004, CABR on page 2 of the D&O the Board acknowledged that,

The Superior Court issued an order on August 9, 2004, in which it reversed our decision and found that Part P WAC 296-62-300, et seq., applied to the operations being conducted by Morrison Knudsen and that Morrison Knudsen was required to comply with the standards contained therein. The Superior Court further instructed this Board to issue a new Decision and Order and enter specific findings and conclusions on the merits of each alleged violation.

The D&O contains the complete analysis of each citation item and supports the reasoning of the Board's determination.

The Board complied with this Court's Order and engaged in the analysis which it did not perform when it wrote the initial PD&O. Contrary to the Department's assertion, the Board did not disregard the Superior Court's Order on remand. This is evidenced by the 54 page D&O prepared by the Board, the independent state agency created by the Legislature to review decisions of the Department of Labor & Industries.

C. The Board's Finding of Fact that the Department did not meet its burden of proof in establishing that employees were exposed to contaminated soil is supported by substantial evidence in the record.

As a major theme of the Department's appeal, it argues that the Board erred by not finding that employees were exposed to hazardous substances when work began on November 1, 1999. The Department continues to base its argument on the historical ROD prepared in 1993, Consent Decree and studies prepared for the 1993 ROD. The Board did not accept the Department's argument because there was substantial evidence that the conditions of Harbor Island had changed since 1993. Specifically, Ms. Leavitt Stetz specifically emphasized the point

that known hot spots of lead and TPH would be removed prior to construction. (TR of Tom Taylor, December 5, 2001, CABR at page 84, lines 11 - 15). And, in fact, Mr. Taylor testified that hot spot remediation did take place prior to the contractors taking possession of the site. (TR of Tom Taylor, December 5, 2001, CABR at page 85).

Ms. Leavitt Stetz also advised the contractors at the pre-construction meeting that except for laying the cap which the Port of Seattle was responsible for, the contractors would not perform any kind of EPA remediation work. (TR of Tom Taylor, December 5, 2001, CABR at page 64, lines 15 - 31).

The Board specifically held at page 20, lines 1– 3 that:

The record persuades us that the clean-up goals and objectives set out in the ROD for organic compounds were met prior to Morrison Knudsen commencing its work activities on Harbor Island in November 1999.”

The Board also rejected the Department’s reliance on the ROD and the Consent Decree because the Compliance Officer admitted that he had not fully read the ROD or Consent Decree, and that he lacked expertise in EPA remediation criteria and was unaware of the extent to which the clean-up operations were

completed on Harbor Island, as set forth in the ROD and Consent Decree. (D&O, CABR page 6, line 32 – page 7, line 3). Moreover, the ROD in Appendix B eliminated arsenic from the hot spot treatment because the distribution of the concentration showed that it was widely distributed across the island at levels ***not significantly above background and was not highly concentrated in any particular area.*** (CABR, D&O at page 9, lines 5 – 9. The Board commented that Mr. Davis would have been aware of this had he read the entire document. The Board was not persuaded by the Department's reliance on the ROD to support the contention that employees were exposed to hazardous levels of arsenic.

The Board rejected the testimony of the Department's witnesses as to the nature, extent, location and scope of work they performed. The Board could not locate with any degree of certainty the work site testified to by the Department's witnesses. *See* CABR,D&O at page 20, line 24 through page 21, line 11. Without a sufficient basis to identify the work activities being

performed, the Board was simply unwilling to affirm citations based on “vague or illusory” facts. (CABR, D&O at page 23, lines 9 – 15).

Yet, despite these findings that were supported by the record, the Superior Court concluded that the Board erred by not relying solely on the ROD and Consent Decree.

The Department’s failure to prove employee exposure to hazardous substances is also illustrated in Citation 1 Item 2d. This citation specifically focuses on an employer’s obligation to implement appropriate site control procedures under the HAZWOPER regulations to control exposure to hazardous substances before clean up work begins as required by WAC 296-62-3030. (CABR at page 29, lines 2 - 18) of the D&O, the Board held:

Critical to a finding that WAC 296-62-3030 is applicable in any given situation is evidence of any exposure to hazardous substances. Mr. Davis relied on the ROD and Consent Decree, which he did not fully read, in reaching his belief that the entire work site was

contaminated with hazardous wastes that required clean-up. As we previously stated, our review of this record, including a complete review of the ROD and Consent Decree convinces us that only a small portion of the work site was contaminated with hazardous substances. Absent a showing by the Department that specific work on specific days was done in specific areas containing hazardous substances, there is no basis for implementing site control procedures under WAC 296-62-3030.

As we have previously discussed, the testimony of the workers called by the Department fails to identify any work area with a sufficient degree of specificity for us to find that work was done in an area containing hazardous substances. Nor do we find that level of certainty in the testimony of McClelland Davis or Karen Johnson, the two Department inspectors who visited the site.

Not only did the Department's witnesses provide vague and illusory testimony, the Department also failed to provide to take any kind of bulk soil samples at the time of the inspection to determine whether the soil where employees were working contained hazardous substances. The Employer, on the other hand, provided evidence that amply demonstrated that employees were not exposed to hazardous substances such as lead or arsenic.

Morrison Knudsen took **910 air samples** that are shown in Exhibit 98e. As testified by Robert Gilmore, lead was used as a species indicator. Under the Marlow analysis, if the lead levels were controlled, all other potential hazardous substances would also be controlled. (CABR, Gilmore at pages 130 – 131). This was adopted by the Board at D&O at CABR pages 5 – 6). Three of the 910 samples exceeded the Permissible Exposure Level for lead. However, these were found to be statistical outliers and not indicative of the actual levels. The Board adopted this testimony at page 40 of the D&O. Morrison Knudsen also had analytical data for arsenic that would be representative to working conditions in November 1999. (CABR, Gilmore at page 193).

The Board also accepted the testimony of Dr. Peter Wohl, a board certified physician in internal medicine, occupational medicine and toxicology who testified that he reviewed 53 blood tests for employees at Harbor Island. He testified that together with the blood tests and air monitoring results, none of the

employees were exposed to significant levels of lead or arsenic at this project. (CABR, D&O at page 41, lines 19– 23).

Evidence of exposure to a hazard is a prima facie element required by RCW 49.17.180(6). Not only did the Department fail to provide sufficient evidence to support its citations, the Employer provided ample evidence of the effectiveness of the safety measures it provided to ensure the safety of its employees. These are Findings of Fact that this Court must accept as conclusive pursuant to RCW 49.17.150. The Superior Court respectfully erred by concluding that the Board’s findings were arbitrary or capricious and clearly in error.

D. Finding employees not credible is not a violation of RCW 49.17.160(1) and is solely within the purview of the finder of fact to make.

The Department argues that the Board erred by not adopting the testimony of Messrs. Vos, Fleming and Slater regarding testimony of the 55-gallon drums. Additionally, the Department asserts that the Board’s findings are more “worrisome at a

fundamental level.” As the finder of fact, the Board is charged with the task of making findings based on credibility of the witnesses. It is well established that questions of credibility of witnesses will not be overturned unless the reviewing Court can conclude that an agency's findings of fact “are clearly erroneous” and the court is “definitely and firmly convinced that a mistake has been made.” *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 202, 884 P.2d 910 (1994). Moreover, the reviewing court will not weigh the credibility of witnesses or substitute its judgment for that of an administrative agency with regard to findings of fact. *Port of Seattle*, 151 Wn.2d at 588, 90 P.3d 659.

With regards to Ron Slater, the record amply demonstrates that he had a disagreement over his employment conditions. He wanted to have both the benefits of a company truck and be paid on an hourly wage. It was Mr. Slater’s decision to leave employment with Morrison Knudsen. (CABR, Slater, pages 128–130 December 6, 2001). Mr. Slater also acknowledged that if the

citation against Morrison Knudsen were to be upheld it would financially benefit him in his lawsuit against Morrison Knudsen. (CABR Slater, page 137, lines 9 – 13). Mr. Slater acknowledged that he has also filed a lawsuit against another contractor, Lease Crutcher Lewis that involved allegations of exposure to hazardous substances. (CABR, Slater at page 137, lines 14 – 19). The Board wrote at page 25:

While Mr. Slater paints a picture in his testimony of an overriding concern for safety procedures, he documented only a few of these concerns in his daily diary. The more serious concerns expressed in his sworn testimony are absent from his sworn testimony. Additionally, Mr. Slater testified that he had no contact with AGRA, the environmental consulting firm, during the first two months of work. However, his diary indicates that he was supporting AGRA for five hours on December 8, 1999, approximately one month after beginning work.

Based on his personal gain, conflicting testimony, and inconsistencies between his written diary and his sworn testimony, the Board was entitled to find Mr. Slater not credible, despite the fact that he and two other employees had filed discrimination

complaints against Morrison Knudsen. The Department further argues that pursuant to RCW 49.17.160, that somehow this Court and the Board must find their testimony credible. The purpose of the non-discrimination section of the Safety and Health Act is to protect employees from being retaliated against in the event they engage in a protected activity. This statute declares in relevant part:

No person shall *discharge* or in any manner discriminate against any *employee* because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter,... (Emphasis added).

This statute gives an employee a private right of action against his employer if he is unlawfully discriminated against for engaging in safety related activities. Whether Mr. Slater and others worked on unmarked drums that were leaking was a question of fact. The Board was presented with conflicting testimony between Messrs. Voss, Slater and Fleming and Don Frizzell and the photograph admitted as Exhibit 123. At page 36

of the D&O, the Board referred to the testimony of Don Frizzell who testified that he worked for Morrison Knudsen on Harbor Island and was the person who moved a large number of 55-gallon drums. He testified that all of the drums were sealed and labeled. Exhibit No. 123 is a photograph that supports his testimony. Thus, there was independent evidence that contradicted the testimony of Messrs Vos, Slater and Flemming. RCW 49.17.160 offers no special benefits the Board was required to provide, and the Board was entitled to rely on the photograph and Mr. Frizzell's testimony.

The Department in Citation 2, Item 3, alleges a violation of WAC 296-62-30510(1)(d) which requires an employer to make medical examinations and consultations available when they are notified that an employee has developed signs or symptoms indicating possible overexposure to hazardous substances. Under this WAC provision, the prima facie elements are as follows: 1. An employee has developed signs or symptoms indicating possible

overexposure to hazardous substances. 2. These employer is notified of the symptoms. 3. The employer fails to make available medical examinations or consultations. The Board considered the testimony of Rocky Brock, Danny Becker, Richard Kelly, Glenn Westphalen, Lawrence Rogers, Henry Eger, Eugene Vos, Ron Slater, Don Flemming, Douglas Frizzell, and Johnie Wilkins. (CABR, D&O at page 44, lines 3 – 9). The Board noted that of these workers, only Henry Eger *testified* that he had nosebleeds, headaches, blurry vision, and slight nausea and that he reported this to Bob Johnson. Rocky Brock, Richard Kelly, and Glenn Westphalen testified that they had experienced headaches and dizziness, but they had not reported these symptoms to their employer. (CABR, *Id* at lines 11 – 13).

Don Frizzell testified that he worked for Morrison Knudsen and was the shop steward for 23 to 25 operators. None of these workers reported illnesses associated with their work at Harbor Island. (CABR, D&O at page 44, lines 13– 15).

Although the record establishes that Mr. Eger testified that he reported symptoms to Morrison Knudsen, the Board obviously did not accept his testimony as fact. As is evident in Finding of Fact No. 40 pertaining to Citation 2, Item 3, the Board found that the Department had failed to make a prima facie case. This Finding states in relevant part:

The Department failed to make a prima facie case that Morrison Knudsen failed to provide medical examinations and consultation to employees after being notified by an employee that the employee had developed signs or symptoms indicating possible overexposure to hazardous substances or health hazards, or that the employee had been injured or exposed above the permissible exposure limits or published exposure levels in an emergency situation.”

Given the testimony that none of the 23 – 25 operators reported any symptoms to Don Frizzell the shop steward, and of the employees who testified that they experienced symptoms only one employee testified that he notified Bob Johnson of such symptoms, the Board was not obligated to find that Mr. Egers in fact reported his symptoms to Mr. Johnson, the Safety Director,

nor was it obligated to find that Morrison Knudsen failed to make the medical examinations available. Moreover, there was no factual testimony that even if the symptoms were reported to Mr. Johnson, that such a failure was reasonably likely to cause serious bodily injury or death. Moreover, given the 910 samples that showed that levels of hazardous substances were well below the Permissible Exposure Level, the Board was correct in not finding a violation. That is, the regulation requires medical evaluations where there is a possibility of an overexposure. Given the vast data to show there was nothing close to reaching the PEL, and that the conditions were well controlled, the Board was not obligated to find a violation based solely on Mr. Egger's testimony.

Moreover, considering the Department's failure to link Mr. Egger's symptoms to any exposure at Harbor Island further supports the finding that Mr. Eggers, like the 23 or 24 other operators, never reported any symptoms to Morrison Knudsen. This Court must accept Finding of Fact No. 40 as conclusive.

CONCLUSION

Where there are substantial facts in the record, the Superior Court erred by substituting its judgment on factual matters and reversing the Board's findings that the Department met its burden of proving the alleged violations. Pursuant to RCW 49.17.150, this Court must adopt the Board's findings of fact as conclusive, and affirm the Board's Decision and Order.

DATED this 12th day of ^{November}~~October~~, 2010.

AMS Law, P.C.



Aaron K. Owada, WSBA #13869

DIVISION I, COURT OF APPEALS
STATE OF WASHINGTON

MORRISON KNUDSEN,

Appellant,

v.

DEPARTMENT OF LABOR &
INDUSTRIES,

Respondent.

NO. 65729-1-I

**CERTIFICATE OF
SERVICE OF BRIEF OF
APPELLANT**

I, Lisa Ockerman, hereby certify under penalty of perjury under the laws of the State of Washington that on November 12, 2010, I filed with the Washington State Court of Appeals Division I, via U.S. Mail, the original and one copy of the following document:

1. BRIEF OF APPELLANT

and that I further served a copy of the same via U.S. Mail upon:

Beth A. Hoffman, AAG
Office of the Attorney General
Labor & Industries Division
PO Box 40121
Olympia, WA 98504-0121

SIGNED in Lacey, Washington on November 12, 2010.



Lisa Ockerman