**NO. 99031-0**

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**SUPREME COURT**
**THE STATE OF WASHINGTON**

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DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Petitioner,

v.

TRADESMEN INTERNATIONAL, LLC,

Respondent.

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# RESPONDENT'S ANSWER TO PETITIONER'S PETITION FOR DISCRETIONARY REVIEW

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## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

### CASES

***CASES CONTINUED*** ...



**OTHER AUTHORITIES**

## I. INTRODUCTION

The Supreme Court should deny the Department's Petition for Discretionary Review because new workers, including temporary workers, have higher rates of injury than permanent workers and the existing safety laws apply to temporary workers to ensure that there is no "gap" in worker safety coverage. As such, there is no issue of substantial public interest that should be determined by the Supreme Court.

## II. ANSWER

### A. New workers have three times the risk of lost time injury than permanent workers.

New workers, including temporary workers, are injured at higher rates than permanent workers. Although not part of the record below, the Department states that temporary workers file twice as many worker's compensation claims as compared to permanent workers. The Department states:

> "Temporary workers are vulnerable to exploitation because they often don't recognize safety hazards, and they may fear dismissal if they challenge the hazards they identify. This precariousness has real-world effects: temporary workers file nearly twice as many workers' compensation claims as permanent workers in comparable occupations. Dep't of Labor & Indus., Temporary Worker Injury Claims."

The Department ignores the fact that new employees in their first month on the job have more than three times the risk for a lost-time injury than workers who have been at their job for more than a year.[1]

[1] New workers, higher risk , June 2016, Safety & Health Magazine, www.safetyandhealthmagazine.com, articles 14053.

IWH research published in 2012 concluded that risk was higher among new workers who were older, men and workers in the "goods sector," including construction and manufacturing. This may be because these jobs have more physical demands, and older workers might be more physically susceptible to injury.

Additionally, IWH researchers determined that newness is a more significant risk factor than youth. A 2006 study concluded that workers' compensation claim rates decrease as tenure increases, regardless of age. These researchers concluded that as there is more part time work, workers are moving from job to job, and are thus more exposed to hazards and job settings that they have yet to become familiar with.

Whether the higher probability of injury is based on the fact that the new workers are temporary workers, or just new to the job regardless of their status as a temporary worker dispatched by a staffing agency or hired by the host employer is subject to debate, those policy considerations were argued at the Board, but rejected.

The injury rates of new workers, temporary workers and permanent workers was considered to be policy arguments that the Board declined to address. The Board held at CABR p. 8 (Decision and Order page 5, lines 12 - 30):

> "The Department presented evidence of a change in employment patterns in recent years. There has been an increase in the use of temporary employees in the economy. At the same time, there has been an increase in worker injuries during the first days of a temporary worker's assignment to a worksite. Based on this

> temporal correlation of events, the Department argues that continued reliance on the status of a company as a controlling employer to determine liability will result in gaps in protection for workers and that policy considerations justify abandoning using the status of a controlling employer as the test of for liability. However, such policy-based decisions, while appropriate for the legislature and for the Department, are not appropriate for us and do not support a decision on our part to abandon established health and safety laws. As an appellate tribunal, our function is to determine whether the Department's citation and notice was warranted under the facts and the law. It is not to create new law based on policy considerations that are outside our purview and we decline the invitation to do so."

The Department should not turn to the courts to change the law. Rather, the Department should exercise its vast authority to enact administrative rules to address the concerns and precarious nature of new workers, including temporary workers.

**B. The economic realities test is the law of the land to determine whether a temporary staffing agency has sufficient control over the worker and the worksite to be an "employer" under the Act.**

Under current law, the Court of Appeals and the Board correctly concluded that in order to cite a temporary staffing agency, it must be shown under the economic realities test that the temporary agency had sufficient control over the worker and the worksite. Both the Court below and the Board adopted the leading case across the country, *Secretary of Labor v. MLB Industries,* OSHRC Docket No. 83-0231. In that case, the Commission vacated a fall protection citation against MLB, the loaning employer, because it was not an "employer" for purposes of the Occupational Safety and Health Act. The Commission held:

> This case involves the circumstances under which a particular company can be considered an "employer" under the Act so as to be held responsible for the safety of its employees. The Supreme Court has held, in the context of other statutes, that it is inappropriate to use varying state common law definitions of an employee and employer in construing federal legislation. *United States v. Silk*, 331 U.S. 704 (1974). Instead of looking at narrow common law definitions, the Supreme Court has looked to the purpose of the statute involved in deciding how employment relationships should be defined. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 124 (1944) (the meaning of the term" employee" under the National Labor Relations Act is to be determined primarily from the history, terms, and purposes of the legislation). Further, the United States courts of appeals that have addressed the issue under the Act have held that employment relationships should be determined by reference to the Act's purpose and policy. *Clarkson Construction Co. v. OSHRC*, 531 F.2d 451, 457-58 (10th Cir. 1976); *Frohlich Crane Service, Inc. v. OSHRC*, 521 F.2d 628, 631-32 (10th Cir. 1975).
>
> The express purpose of the Act is to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. 651(b). To effectuate this purpose, it is appropriate for the Commission, ***in considering whether an employment relationship exists, to place primary reliance upon who has control over the work environment such that abatement of the hazards can be obtained.*** This approach is consistent with the above-cited Supreme Court and courts of appeals opinions. It is also in keeping with the Commission's analysis in the analogous situation of the multi-employer construction worksite, where the Commission has concluded that ***the Act's purpose is best served if an employer's duty to comply with OSHA standards is based upon whether it created or controlled the cited hazard.***
>
> (Emphasis added).

Likewise, the Board adopted the *MLB* holding in *In re Skills Resource Training Center*, BIIA Dec., 95 W 253 (1997) (holding that the Employer, for purposes of a WISHA Citation, is the employer with control over the worksite). Significantly, in joint-employment situations, both employers cannot be cited unless both have substantial control over the

workers and the work environment involved in the violations. *See Id.* (determining that the primary employer should not have been cited for any WISHA violations because it did not control the worksite where the violations occurred).

The Court of Appeals below affirmed the Federal Government's seven part "economic realities" test in joint employment situations to determine which employers should be issued a WISHA citation. *Id.* As held below, the economic realities test was also used by the Court of Appeals in determining whether there is a WISHA violation involving leased or temporary employees. *Potelco, Inc. v. Dept' of labor and Indus.*, 191 Wn. App. 9, 30-31, 361 P.3d 767 (2015). The economic realities test analyzes: (1) who the worker considers their employer; (2) who pays the workers' wages; (3) who has the responsibility to control the workers; (4) whether the alleged employer has the power to control the workers; (5) whether the alleged employer has the power to fire, hire, or modify the employment condition of the workers; (6) whether the workers' ability to increase their income depends on efficiency rather than initiative, judgment and foresight; and (7) how the workers' wages are established. *Potelco,* 191 Wn. App. at 31.

Despite the Department's spurious attempts to downplay the issue of control over workers and the work environment in determining whether

an "employer" is liable at a joint-employer jobsite[2], this is exactly what the Occupational Safety and Health Review Commission ("OSHRC") and the Board considered.

Washington State caselaw and federal OSHA caselaw do not support the Department's assertion that Tradesmen should be an "employer" for the purposes of WISHA. As correctly found below, Tradesmen lacked any control over Mr. Seinafo, the worksite, and the work environment at the Palatine jobsite. Therefore, the Board's Decision and Order vacating Citation No. 317940588 was supported by substantial evidence and the law and was affirmed.

The Court of Appeals rejected the Department's argument that control of the worksite was not a required element under the economic realities test. The Court held:

> "We determine substantial evidence supports the Board's findings that Tradesmen did not have control over the temporary employee when at a job site for Dochnahl and did not control the Palatine Ave. job site. And the Board's findings support its conclusion that the Department could not cite Tradesmen as an employer for the WISHA violations."

The Department argues that the Court of Appeals, "deeply eroded WISHA's protections by distorting the 'employer' test under WISHA. In applying the economic realities test to decide whether a staffing agency

[2] A joint-employer worksite generally involves leased workers or temporary employees, which must be distinguished from a multi-employer worksite, which is one where employees of several employers perform their duties under the ultimate direction of one of the employers, such as a general contractor. (CABR p. 5-6)

constitutes an 'employer' under WISHA, the Court of Appeals looked to whether staffing agencies have control over the work environment."

As set forth below, worker safety is not eroded by the Court of Appeals' decision. The Department ignores the fact that Dochnahl was the subcontractor that created the safety hazards at the Palatine job site, as well as JAS Design, the general contractor of the Palatine project, were all cited as they had the non-delegable duty to provide safety for all workers at the multi-employer worksite.

Not content with citing two contractors, the Department now seeks to hold Tradesmen responsible for the unsafe conditions even though it had no knowledge that Mr. Seinafo was sent there that morning. Moreover, Tradesmen had no active role in the Palatine project. Tradesmen had no authority or ability to control the means and methods of work to be performed and it knew nothing of the construction taking place. Accordingly, the precarious nature of the new employment for Mr. Seinafo that the Department addresses could only be corrected by the three contractors responsible for the project under a multi-employer site analysis.

The rationale in *MLB, supra,* is sound. It is consistent with WISHA to place primary reliance upon who has control over the work environment such that abatement of the hazards can be obtained. This approach is consistent with the above-cited Supreme Court and courts of appeals opinions. It is also in keeping with the Commission's analysis in the analogous situation of the multi-employer construction worksite, where the Commission has concluded that, "the Act's purpose is best served if an

employer's duty to comply with OSHA standards is based upon whether it created or controlled the cited hazard." It would be fundamentally unfair to hold Tradesmen responsible for safety violations it did not create, control, or have any ability to correct.

The decision from the Court of Appeals below reflects this sound judgment and correctly notes the difference between dual employer v. multi-employer worksites. The strong public interest is to maintain the existing law.

### C. The Department's attempt to apply a multi-employer worksite analysis to a dual employer relationship should not be adopted.

The Department's use of constructive knowledge that is part of a multi-employer worksite analysis is intellectually dishonest. The Department's assertion that Tradesmen was "tipped off to unsafe behavior" is not in any way supported by the evidence.

The Department argues that, "knowledge serves the same purpose as control over the work environment as it allows a company to address the hazardous conditions." The Department further asserts that:

> "Federal cases find an employer responsible for safety violations when the employer does not control the worksite but exposes the worker to the hazard and knows about the unsafe condition. *e.g., D. Harris Masonry Contracting, Inc. v. Dole,* 876 F.2d 343, 345–46 (3rd Cir. 1989); *Havens Steel Co. v. Occ. Safety & Health Review Comm'n,* 738 F.2d 397, 400–01 (10th Cir. 1984); *Bratton Corp. v. Occ. Safety & Health Rev. Comm'n,* 590 F.2d 273, 275–76 (8th Cir. 1979); *Mark A. Rothstein, Occ. Safety & Health L.* § 7:7 (2020 ed.) (compiling cases)."

All of the cases cited by the Department to support its argument that knowledge serves the same purpose as control involve multi-employer

worksites, not dual employer worksites. Accordingly, the Department's argument is not valid and should not be accepted.

The Department argues that the existing definition is, "far too limited and lets staffing agencies off the hook even when they know their workers face safety risks. If the Court of Appeals decision stands, staffing agencies will escape liability even for known safety violations that the agencies intentionally failed to address." By extension, the Department argues that:

> "The law should encourage staffing agencies to act on known hazards rather than sanction them by closing their eyes to potential danger. Otherwise, the law would permit the scenario described above of a Tradesmen manager watching a safety violation and doing nothing."

The Department ignores a dual employer worksite case where the temporary agency was cited because it had sufficient control. *Sec. of Labor, v. Aerotek* OSHRC Docket No. 16-0618, p. 8 (March 23, 2018)

Contrary to the Department's misguided argument that the law would allow a Tradesmen manager to watch a safety violation and do nothing, the existing law would not excuse a Temporary Agency to do nothing if it observed a safety violation. Aerotek was cited because it had sufficient control by providing an on premise Manager. The Commission held that:

> In addition to providing contract employees, Respondent also supplied Coorstek with an On Premise Manager, Yarie Ortiz, whose primary responsibility was serving as a liaison between contract employees, Coorstek, and Respondent. (Tr. 94–95, Ex. C-5 at 1). This included enforcing discipline when safety rules were violated by contract employees; performing screening of those employees for qualifications, background checks, and references; attending

> production and staff meetings; and reporting injuries suffered by contract employees. (Tr. 99; Ex. C-5 at 1). In addition, Ms. Ortiz walked the production floor with new contractor employees as part of their orientation to the Coorstek facility.

This holding is consistent with a recent case decided by the Court of Appeals, Division II, in *Staffmark, LLC,* No. 52837-1-II. In that case, the Court held:

> "[I]t is settled law that jobsite owners have a specific duty to comply with WISHA regulations if they retain control over the manner and instrumentalities of work being done on the jobsite." *Afoa,* 176 Wn.2d at 472. "[T]his duty extends to all workers on the jobsite that may be harmed by WISHA violations." *Afoa,* 176 Wn.2d at 472."

In *Staffmark,* Andy Johnson, Staffmark's onsite manager, provided onsite supervision and granted supervisory responsibility to some of its lead workers. Additionally, the onsite manager worked on a daily basis and maintained a permanent workstation. He conducted daily walkthroughs of the host facility. Staffmark's lead workers reported to Staffmark's onsite manager who also had the ultimate authority to discipline or terminate workers who were not meeting the host employer's standards. Under these facts, even though Staffmark provided temporary workers, it had sufficient control to be considered as an "Employer" under WISHA. Thus, the Department's concerns that the Court of Appeals decision would allow temporary agencies to be "let off the hook" for not taking appropriate action which they know about is simply not the case.

As held by this Court in *Afoa, supra,* control over the instrumentalities of the work being done at the worksite is the operative factor to determine whether WISHA applies. This is the settled law in

Washington which the Court of Appeals followed in affirming the Board's decision to vacate the citations against Tradesmen.

It is clear that when a temporary agency has sufficient control over the instrumentalities that it has the ability to correct hazards that adversely affects its temporary workers. Citations under WISHA are appropriate when an employer has control to abate the hazard but fails to do so. This is consistent with the holding in *MLB* where the Commission held that the purpose of the health and safety act is best served when the employer's duty to comply with OSHA standards is based upon whether it created or controlled the cited hazard.

## III. CONCLUSION

Existing law for dual employers is well settled and is based on whether the temporary agency has sufficient control over the worker and the work environment to effectuate abatement of the hazard at hand. Where a temporary agency does not have sufficient control and cannot abate the hazard, it is not an employer under the Act.

The Court of Appeals' decision below does not leave a gap in worker safety for temporary employees. The host employer has a non-delegable duty to provide a safe working environment for all of its workers, including temporary workers under its control. It is in the best position to provide worker safety. WISHA citations are appropriate when the host employer fails to meet its obligation to follow WISHA regulations.

The Department should use its rule making authority instead of turning to the Courts to make policy decisions to specifically address the precarious nature of new and temporary employees.

The Court should respectfully deny the Petitioner's/Department's Petition for Discretionary Review.

RESPECTFULLY SUBMITTED this this 16th day of November 2020.

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## CERTIFICATE OF SERVICE

I certify that on November 16, 2020, I caused the original and copy of the **Respondent's Answer to Petitioner's Petition for Discretionary Review** to be filed via Electronic Filing, with the Washington State Appellate Courts Portal, and that I further served a true and correct copy of same, on:

**(X) Email via Washington State Appellate Courts Portal:**

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