NO. 99032-8

SUPREME COURT
THE STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Petitioner,

v.

LABORWORKS INDUSTRIAL STAFFING SPECIALISTS, INC.,

Respondent.

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

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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. The Court of Appeals Decision below is an unpublished decision thus limiting any adverse impact claimed by the Department.

II. ANSWER

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

Pursuant to RAP 2.5, the Department failed to raise OSHA's Blood Borne Pathogen Worker and Temporary Worker Initiatives and Worker's Compensation statistical arguments at the Board and at the King County Superior Court when it appealed the Board's Decision and Order. The Department called one witness, Kari Misterek, the HR and Safety Manager for LaborWorks in the administrative hearing before the Board. As noted in the CABR, she did not present any evidence relating to the Blood Borne Pathogen or temporary worker injury rates. Those issues were not addressed before the Board, or the King County Superior Court. Although the Department made similar arguments in its brief, the Court of Appeals did not address these policy arguments ostensibly because they were not raised below.

Generally, failure to raise an issue before the trial court precludes a party from raising it on appeal. *Smith v. Shannon*, 100 Wash.2d, 26, 37, 666 P.2d, 351 (1983); RAP 2.5. But if an issue raised for the first time on appeal is "arguably related" to issues raised in the trial court, a court may exercise its discretion to consider newly-articulated theories for the first time on appeal. *See State Farm Mut. Auto. Ins. Co. v. Amirpanahi,* 50 Wash.App. 869, 751 P.2d 329 (1988). Because the Certified Appeal Board Record which was reviewed and considered by the Board did not contain the policy theories raised for the first time on appeal, and the Court of Appeals did not address those issues, the Court should not consider them now.

The new OSHA Initiatives for Blood Borne Pathogens have no force of law because they have never been adopted as a CFR under the federal rule making process, nor were they adopted by Congress. The Department incorrectly cites to RCW 49.17.010 to support its proposition that Washington must adopt OSHA's initiative for the protection of temporary workers. RCW 49.17.010 requires the Department to adopt OSHA standards that are equal to or exceed OSHA's promulgated standards. Since the OSHA initiatives have not been adopted as standards, RCW 49.17.010 does not apply.

If the Supreme Court is inclined to entertain the Department's newly raised arguments, it should also consider that 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:

> "The temporary work industry is growing rapidly, with a vulnerable worker population. Dep't of Labor & Indus., Temporary Workers. L&I treats the influx of temporary workers seriously, as temporary work poses significant hazards to workers. Temporary workers file about 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] 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. The reasons why new workers have a higher injury rate than permanent employees is complex.

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

More importantly, the real issue at bar is whether LaborWorks had any authority or control to abate the hazards cited by the Department.

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 LaborWorks should be an "employer" for purposes of WISHA. The Board's Finding of Fact No. 5

[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).

was specifically reviewed by the Court of Appeals. Finding of Fact No. 5 found:

> 5. Both LaborWorks and Strategic maintained the right to terminate workers. However, Strategic exerted daily control over the employees by assigning work and providing supervision over the LaborWorks workers.[3]

Based on this Finding of Fact that Strategic Material exerted daily control over the temporary employees, the worksite, and the work environment at the Strategic Materials jobsite the Court of Appeals held that LaborWorks did not have significant control over the workers or the working conditions. Therefore, the Board's Decision and Order vacating the Citation against LaborWorks was supported by substantial evidence and the law and was therefore affirmed.

The Department argues that control over the work environment should not be necessary to establish an employment relationship, and cites *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 871–72, 281 P.3d 289 (2012).

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:

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[3] Pursuant to RCW 49.17.150, the Board's Findings of Fact are deemed conclusive if supported by substantial evidence in the record. The Court of Appeals found that this Finding of Fact was supported by substantial evidence and was therefore conclusive. This Court respectfully lacks jurisdiction to overturn Findings of Fact supported by the record. As such, the Department' invitation to change the findings to support its contention that LaborWorks had significant control must be declined.

> "[I]n leased employment situations, whether the lessor or the lessee should be cited for WISHA violations depends on the economic realities of who controls the workplace. Both employers cannot be cited unless they both have substantial control over the workers and the work environment involved in the violations." *In re Skills Res. Training Ctr.,* No. 95 W253 at 3 (Wash. Bd. of Indus. Ins. App. Aug. 5, 1997) (emphasis added). Under the Agreement, Strategic Materials had the responsibility to "[p]roperly supervise Assigned Employees performing its work" and to "[p]roperly supervise, safeguard, and control its premises." Strategic Materials also took on the responsibility to "[p]provide Assigned Employees with a safe work site." Thus, under the contract, Strategic Materials bore the responsibility of controlling the workers and the job site. This factor weighs against citing Laborworks as an employer.

In applying the economic realities test to decide whether a staffing agency constitutes an 'employer' under WISHA, the Court of Appeals looked to whether staffing agencies have control over the work environment.

Worker safety is not eroded by the Court of Appeals' decision. 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 a temporary staffing agency responsible for safety violations it did not create, control, or have any ability to correct.

The decision from 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, and to have the Department regulate employers who create and control hazardous conditions for all workers, including temporary workers.

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 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 a known safety hazard. *D. Harris Masonry v. Dole*, 876 F.2d 343, 345– 46 (3d 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.). Thus, control over the worker should be the test, not control over the worksite. A lack of control over the worksite should not excuse a staffing agency from protecting its workers. See *Staffchex, No.* 10-R4D3-2456, 2014 WL 4546924, at *3 (*Cal. Occ. Safety & Health Admin.* Aug. 28, 2014) ("When [a staffing agency] assigns an employee to a worksite, it has a non-delegable duty to inspect the site and make certain that it is safe for its 18 employees' intended activities . . . . [a staffing agency] cannot escape liability by its assertions of lack of control.") (quotation omitted)."

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:

> "Otherwise, there would be the situation where a staffing agency manager could witness a temporary worker using bare hands to sort waste potentially laden with needles and Laborworks would have no obligation to do anything while the manager watches a needle puncture the worker's skin. Such a scenario may seem preposterous but could be a direct outcome from the Court of Appeals' decision."

The Department ignores a dual employer worksite cases 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 LaborWorks manager to watch a needle puncturing the skin of a worker 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 provided 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 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 Laborworks.

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 sufficient 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.

D. The Court of Appeals did not err by rejecting the Department's Directive 1.15 for Dual Employers.

The Department urged the Court of Appeals to adopt its DOSH Directive 1.15 that it had established as a policy directive. The Department argues that pursuant to its policy directive, the Court should apply a "knew or clearly should have known" standard. The Court of Appeals rejected the Department's argument for the reasons it set forth in the Tradesmen companion case. The Court of Appeals held:

> The Department also argues that we should apply a standard from its Dual Employers Directive, which would make Laborworks liable as an employer for the WISHA citations if they "knew or clearly should have known" of the violations. We recently rejected this argument in *Department of Labor and Industries v. Tradesmen International, LLC*, No. 79634-8 (Wash. Ct. App. Aug. 17, 2020). As noted in the *Tradesmen* decision:
>
> But the Department did not promulgate the Directive under the rulemaking requirements of the Administrative Procedure Act (APA). In contrast to agency rules, the Directive constitutes a policy statement, which lacks the force of law and is advisory only. *See J.E. Dunn Nw., Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 35, 51-53, 156 P.3d 250 (2007) (explaining why WISHA Regional Directive 27.00, which was not promulgated under the APA, cannot operate to shift burden of proof on element of WISHA violation). We thus decline to apply the "knew or clearly should have known" standard from the Directive.

The "knew or clearly should have known" standard derives from a multi-employer worksite analysis, not a dual employer analysis.

E. The Department's assertion that "permanence in the working relationship" is a factor in the economic realities test for Minimum Wage Act cases is not dispositive to the issue of whether a temporary agency has sufficient control.

The Department cites *Becerra v. Expert Janitorial, LLC*, 181 Wash.2d 186 (2014) to support its argument that "permanence in the working relationship" is a relevant factor in the economic realities test. The *Becerra* decision, however, is not helpful to determine whether LaborWorks had sufficient control to be an employer at Strategic Materials. The procedural background in *Becerra* is significantly different than the present case. In *Becerra,* King County granted the employers' Motion for Summary Judgment thereby dismissing *Becerra's* Minimum Wage Act (MWA) claim. The Court of Appeals reversed by holding that the Superior Court did not consider all factors for minimum wage claims adopted by the Ninth Circuit in *Torres-Lopez,* 111 F.3d 633. Permanence in the working relationship was one of 13 non-exclusive factors under the minimum wage statutes. The Court noted that of the 13 non-exclusive factors, there are 5 regulatory factors, and 8 functional factors. Because there were questions of material fact in dispute, the case was remanded to the Superior Court.

Permanence of the working relationship focuses on the length of time the employee works. In *Torres-Lopez,* the Ninth Circuit concluded that 32 days was not a factor that demonstrated a joint employer relationship. In our present case, the Department presented no evidence as

to the length of time the LaborWorks temporary employees worked at Strategic Materials. Thus, there was no evidence or finding by the Board, that LaborWorks was in the best position given its longer relationship with its workers to comply with the work-site to work-site regulations. The Department, as the moving party, had the burden of proof to establish all elements of its case. WAC 263-12-115(2)(b); *Mowat Constr. Co. v. Dep't. of Labor and Indus.*, 148 Wn. App. 920, 924, 201 P.3d 407 (2009). Merely stating that LaborWorks had a longer relationship with the temporary workers is not supported by any evidence in the record.

The Department also asserts that LaborWorks was aware of the violations taking place at Strategic Materials. The only evidence presented were references to a poke in the hand and a needle stick claim. No other evidence was presented to demonstrate that these references amounted to citation violations alleged by the Department. For example, Ms. Misterek, the only witness presented by the Department, had never been to the Strategic Materials jobsite and had no knowledge of the working conditions. She did not know if Strategic Materials provided any tools such as forceps, prongs or pliers, or if the needle stick occurred because the PPE used was not defective, or if it had even been used or not. Ms. Misterek testified that LaborWorks has no expert in the recycling business and has no knowledge of who or how job assignments are made.

Even though the MWA economic realities test incorporates 13 factors, with control over the worksite being the first regulator factor to be considered, the Department's reliance on *Becerra* is not sufficient to

demonstrate that LaborWorks was an employer under WISHA as a matter of law. Even if permanence of the working relationship is a relevant factor for OSHA/WISHA cases, as well as minimum wage cases, the Department never presented any factual basis to address this factor. As such, the Court of Appeals did not err as a matter of law by concluding that LaborWorks was not an employer for purposes of WISHA because the Board concluded that LaborWorks did not have sufficient control based on Finding of Fact No. 5.

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. The *Becerra* decision does not affect the Court of Appeals' decision because the Department never presented any facts pertaining to the permanence of the relationship as it applied to Strategic Materials.

The Court of Appeals also rejected the Department's DOSH Directive for Dual Employers as it has no force of law and the Department cannot create a legal standard by way of a policy. Thus, the "knew or

clearly should have known" standard which is not a part of the economic realities test cannot be applied to Temporary Agencies.

WISHA citations are appropriate when the host employer fails to meet its obligation to follow WISHA regulations. Temporary Agencies that do not have sufficient control over the working conditions are not employers under the Act. 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 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:

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