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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.

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

REPLY 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

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I. REPLY TO RESPONDENT PRESENTED ISSUES

- A. Where the site at issue was found to have posed no threat to human health, the Department has failed to prove exposure to a recognized hazard.**

The Department has issue with the Board's finding that the site at issue posed no threat to human health. (Respondent's Brief, p. 4). However, 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.

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. The Department conveniently 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. 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).

Administrative decisions are reviewed on the administrative record, not the record of the superior court. *Franklin County Sherriff's Office v. Sellers*, 97 Wn.2d 317, 323- 324, 646 P.2d 113 (1982). Pursuant to RCW 49.17.150(1), findings of the Board, if supported by substantial evidence when considering the record as a whole, are deemed conclusive. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair minded, rational person that a finding is true. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Moreover, as this court held in *Cobra Roofing Services v. Department of Labor & Industries*, 122 Wn. App. 402, 411, 97 P.3d 17 (2004), the appellate courts will defer to the Board of Industrial Insurance Appeals' factual findings that are in its area of expertise, and they will not be reversed unless they are clearly erroneous.

Findings of fact that are supported by substantial evidence are considered “verities on appeal.” *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 819, 828 P.2d 549 (1992). Accordingly, review of the findings is therefore limited to examining the record to establish whether there is substantial evidence to support each challenged finding. *Robinson v. Safeway Stores, Inc.* 113 Wn.2d 154, 157, 776 P.2d 676 (1989), quoting *Holland v. Boeing Co.*, 90 Wn.2d 384, 390 – 391, 583 P.2d 621 (1978).

The Superior Court respectfully overstepped its role by setting aside testimony presented by the Employer, and adopting the Department’s factual theory that the ROD and Consent Decree established that Harbor Island continued to be contaminated at the same levels as set forth in the historical documentation at the time construction activities were initiated by the Employer. For the reasons set forth below, the Superior Court erred by substituting its judgment and credibility for that of the Board.

B. Where the record reflects the site at issue primarily involved construction, the Board was correct in finding Part P applied only to a small portion of the site at issue.

Despite the Department's assertions in its opening brief, the record reflects hot spot remediation would take place *prior* to the Employer's involvement onsite and where potential exposure could take place, the Employer took the requisite precautions. (Respondent Brief, p. 25-26).

Specifically, prospective bidders specifically advised Berger Abam that they would not bid on the project if the project would include a cleanup operation under Part P. As a result, a June 1997 letter from Ms. Elizabeth Leavitt Stetz and the Port of Seattle was issued to limit cost controls for the successful contractor. As follow-up on June 23, 1998, a pre-construction meeting was held to make it clear that the project would *not* be an environmental cleanup project.

Ms. Leavitt Stetz 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).

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).

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 non-Part 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. 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.

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. In addition, 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 cleanup activities required by the ROD as compared to regular construction activities. Consequently, the Department failed to establish that any of the MK employees engaged in clean up operations covered by Part P or the ROD.

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 Appellant respectfully asserts this Court to make the same finding.

C. Where objective samples taken contributed to compelling testimony at hearing, the Board was correct in finding a negative health risk.

The Respondent's brief asserting Board error over simplifies the findings made by failing to recognize the objective findings of Mr. Gilmore and Dr. Wohl. (Respondent Brief, p. 40). 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). 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 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 Appellant respectfully asserts that the Superior Court erred when concluding that the Board's findings were arbitrary or capricious and clearly in error.

D. Where witnesses may have stood to receive personal gain but most important testimony was found to be inconsistent, the Board was correct in finding credibility issues with the Department witnesses.

The Department incorrectly asserts that the Board failed to adopt the testimony of Messrs. Vos, Fleming and Slater because they asserted their right to raise health issues. (Respondent Brief, p. 5). In fact, the record reflects witness testimony was discredited when there was a finding of personal gain, conflicting testimony, and inconsistencies between written diary entries and sworn testimony.

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). 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 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, not an issue of

discrimination. 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 Fleming.

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.

E. The board was correct in its finding that the violations at issue did not constitute a serious violation where the record reflects unascertained hazards and exposure.

Compliance Officer, McClelland Davis, by his own testimony, was not sure where the initial work was being done. Yet Mr. Davis provided testimony that no periodic monitoring was

conducted when work began in different portions of the site. Such testimony was not supported by any facts and was rebutted by 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.

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. 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.

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.

Furthermore, the Board 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). 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 Department asserts in briefing that the Board decision is based upon a misunderstanding of the arsenic standards. (Respondent Brief p. 40). However, the fact remains that without a sufficient basis to identify the work activities being performed and where, the Board was simply unwilling to affirm citations based on “vague or illusory” facts. (CABR, D&O at page 23, lines 9 – 15).

The record reflects the Department’s witnesses provided 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.

F. Where vast data demonstrated as nothing close to PEL and conditions were well controlled, a possibility of over exposure was not present and a medical evaluation was not required.

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) employer is notified of the symptoms and 3) 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 did not

accept his testimony as fact.

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. Considering the Department's failure to link Mr. Eger's symptoms to any exposure

at Harbor Island, the record supports the finding that Mr. Egers, like the 23 or 24 other operators, never reported any symptoms to Morrison Knudsen.

II. CONCLUSION

The Appellant respectfully asserts 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.

DATED this 14 day of February, 2011.

AMS Law, P.C.



Aaron K. Owada, WSBA #13869