

66842-1

66842-1

NO. 66842-1-I

DIVISION ONE COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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PILCHUCK CONTRACTORS INC.,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LABOR  
& INDUSTRIES,

Respondent.

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Superior Court of Snohomish County Cause No. 09-2-09980-2  
BIIA Docket No. 08 W1253, C&N No. 312325400

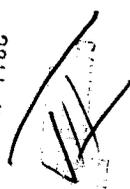
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**APPELLANT'S OPENING BRIEF**

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**ORIGINAL**

**TABLE OF CONTENTS**

**I. ASSIGNMENTS OF ERROR . . . . . 6**

A. Where the record reflects employees at issue did not flag traffic but merely engaged in spotting activities, the Board of Industrial Insurance Appeals and Superior Court erred by finding the Department met their prima facie burden to establish a violation of WAC 296-155-305(3)(a).

B. Where the Department failed to show the employees at issue were flagging traffic in a restricted area of the work zone or where vehicles were still in motion, the Board of Industrial Insurance Appeals and the Superior Court erred in finding the Department met their prima facie burden to establish a violation of WAC 296-155-305(9)(b).

**II. ISSUES . . . . . 7**

A. Issues Pertaining to Assignments of Error No. 1

Where the record reflects employees at issue did not flag traffic but merely moved traffic control devices and only acted as spotters, did the Board of Industrial Insurance Appeals and Superior Court err when finding the Department met its prima facie burden to establish a violation of WAC 296-155-305(3)(a)? . . . . . 7

B. Issues Pertaining to Assignments of Error  
No. 2

Did the Board of Industrial Insurance Appeals and the Superior Court err in finding a violation of WAC 296-155-305(9)(b) where the record reflects the Department failed to show the employees at issue were flagging traffic in a restricted area of the work zone or where vehicles were still in motion? ..... 7

**III. STATEMENT OF THE CASE.....8**

A. Procedural Background..... 8

B. Substantive Background of the Inspection .....9

**IV. ARGUMENT .....10**

A. Standard of Review.....10

B. Where the record reflects employees at issue did not flag traffic but merely moved traffic control devices and acted as spotters, the Board of Industrial Insurance Appeals and Superior Court erred by finding the Department met the prima facie burden to establish a violation of WAC 296-155-305(3)(a).....11

C. Where the Department failed to show the employees at issue were flagging traffic in a restricted area of the work zone or where vehicles were still in motion, the Board of Industrial Insurance Appeals and the Superior Court erred in finding a violation of WAC 296-155-305(9)(b)..... 28

V. **CONCLUSION**..... 33

## TABLE OF AUTHORITIES

### STATE CASES

<i>Adkins v. Aluminum Company,</i> 110 Wn.2d 128 (1988)	16
<i>Department of Ecology v. Campbell &amp; Gwinn, L.L.C.,</i> 146 Wn.2d 1, 43 P.3d 4 (2002)	11
<i>Department of Labor &amp; Industries v. Gongyin,</i> 154 Wn.2d 38, 109 P.3d 816 (2005)	11
<i>Gary Concrete Prods., Inc.,</i> 15 BNA OSHC 1051, 1052, 1991-93CCH OSHD.	17
<i>In re Atkinson-Dillingham,</i> BIIA Docket No. 88-W091 (1990)	18
<i>In re North Fork Timber Company,</i> BIIA Docket No. 98-W0015 1999)	18
<i>In re Savage Enterprises, Inc.,</i> BIIA Docket No. 86-W053 (1988)	17
<i>Olympia Glass Company,</i> BIIA Docket No. 95 W0455	17
<i>State v. Ryan,</i> 103 Wn.2d 165, 691 P.2d 197 (1984)	12
<i>The Quadrant Corporation v.</i> <i>Growth Management Hearings Bd.,</i> 154 Wn.2d 224,110 P.3d 1132 (2005)	11

## **STATE STATUTES**

RCW 49.17.010	33
RCW 49.17.150(1)	10
RCW 49.17.180(6)	14, 15

## **WASHINGTON ADMINISTRATIVE CODE**

WAC 296-62-07517	16
WAC 296-155	17
WAC 296-155-305	11, 18
WAC 296-155-305(1)(a)	19
WAC 296-155-305(3)(a)	9, 11, 18
WAC 296-155-305(9)(b)	10, 28 29

## **I. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error No. 1**

Where the record reflects employees at issue did not flag traffic but merely engaged in spotting activities, the Board of Industrial Insurance Appeals and Superior Court erred by finding the Department met their prima facie burden to establish a violation of WAC 296-155-305(3)(a).

### **B. Assignments of Error No. 2**

Where the Department failed to show the employees at issue were flagging traffic in a restricted area of the work zone or where vehicles were still in motion, the Board of Industrial Insurance Appeals and the Superior Court erred in finding the Department met their prima facie burden to establish a violation of WAC 296-155-305(9)(b).

## **II. ISSUES**

### **A. Issues Pertaining to Assignments of Error No. 1**

Where the record reflects employees at issue did not flag traffic but merely moved traffic control devices and only acted as spotters, did the Board of Industrial Insurance Appeals and Superior Court err when finding the Department met its prima facie burden to establish a violation of WAC 296-155-305(3)(a)?

### **B. Issues Pertaining to Assignments of Error No. 2**

Did the Board of Industrial Insurance Appeals and the Superior Court erred in finding a violation of WAC 296-155-305(9)(b) where the record reflects the Department failed to show the employees at issue were flagging traffic in a restricted area of the work zone or where vehicles were still in motion?

### **III. STATEMENT OF THE CASE**

#### **A. Procedural Background**

The matter before this Court involves safety and health citations issued to the Appellant Pilchuck Contractors, Inc., (hereinafter “Employer”) under the Washington Industrial Safety and Health Act (WISHA), Ch. 49.17 RCW.

On October 9, 2008, the Department of Labor and Industries (hereinafter “DLI”) issued Citation and Notice No. 312325400 against the Employer and a timely appeal was made with the DLI on October 29, 2008. (CABR p. 35)<sup>1</sup>

The Department transferred the Employer’s appeal to the Board of Industrial Insurance Appeals (hereinafter “Board”) and a hearings were held before the Board on May 15, 2009 and May 19, 2009. Industrial Appeals Judge Franklin issued a Proposed Decision and Order on August 6, 2009. The

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<sup>1</sup> The Certified Appeal Board Record (CABR) is referenced in the Clerk’s Papers. References throughout this brief will be contained in the CABR. Specifically, references to the Certified Appeal Board Record are hereby referred to as “CABR.” References to the record transcripts will be referred to as “Tr.”

Employer filed a timely Petition for Review which was denied on September 30, 2009 resulting in the Proposed Decision and Order becoming the Final Decision and Order of the Board.

The Employer made a timely appeal to Snohomish County Superior Court. On February 15, 2011, Judge Thomas J.

Wynne issued a Memorandum Decision on Administrative Law Appeal affirming the Board's prior decision.

**B. Substantive Background**

Pilchuck Contractors, Inc., was involved in a road paving project located on 44<sup>th</sup> Avenue West and 212<sup>th</sup> Street Southwest in Mountlake Terrace, Washington (hereinafter "work zone"). On August 18, 2008 the DLI Compliance Safety and Health Officer Mr. Berhan Beraki (hereinafter "Mr. Beraki") performed a drive-by inspection at the work zone. As a result, Mr. Beraki recommended three serious citations against the Employer. The Department vacated one of the citations (Violation 1-2). As a result the only citations before the Court for consideration are as follows: Violation 1-1 cited under WAC

whole. *The Quadrant Corporation v. Growth Management Hearings Board*, 154 Wn.2d 224, 239, 110 P.3d 1132 (2005).

Further, courts must harmonize statutes and rules to give effect to both. *State v. Ryan*, 103 Wn.2d 165, 178, 691 P.2d 197 (1984).

**B. Where the record reflects employees at issue did not flag traffic but merely engaged in spotting activities, the Board of Industrial Insurance Appeals and Superior Court erred by finding the Department met their prima facie burden to establish a violation of WAC 296-155-305(3)(a).**

Contrary to the Department's assertions, the record reflects the activities of the employees at issue cannot be characterized as flagging.

The Honorable Judge Thomas J. Wynne referenced the use of a modus tollens argument in the Superior Court's Memorandum Decision on Administrative Law. In reality, it is the Department that in essence utilizes such an argument by incorrectly asserting that if an employee is a certified flagger, presence on a worksite must equate to the performance of

flagging duties. In the present case, the Employer's worksite did not require certified flaggers. Any inquiry regarding the mechanism of control is clearly indicated in the record reflecting use of a traffic signal, signs and officer presence.

The Employer wanted to ensure the safety of its employees and motorists by providing additional safety measures. Such assurance resulted in the Employer's trained personnel onsite to ensure barricades and cones would be installed and moved correctly. However, the insistence upon the Department to issue citations were the Employer took all actions with a safety in mind deems the notation of "no good deed goes unpunished" applicable.

The Appellant's distinction regarding the difference between "controlling" and "directing" is not in effort to parse language to avoid complying with the code at issue. Instead, the Employer is merely emphasizing the plain language of WAC 296-155-305 which states a flagger is "a person who provides temporary traffic *control*." (Emphasis added).

The employees at issue are referenced in the record as the “Hsiao brothers.” Together, the Hsiao brothers had distinct duties separate from those that could be characterized as flagging. There is no dispute that a uniformed officer was onsite to flag. The Hsiao Brothers were only providing positive guidance to passing motorists by setting up traffic control devices and occasionally reminding confused motorists to abide by the traffic signal and traffic signs. The Respondent indicates in recent briefing that “positive guidance” unequivocally equates to a “flagger qualification.” However, guidance to drives to remind them to follow the signal, sign or officer can hardly be seen as “controlling” and providing a temporary traffic control.

The dictionary definition of “control” refers to restrain or direction over. Simply, where a traffic signal, sign and officer were present, the employees at issue did not have control in exercising restraint against drivers nor were they directing them.

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Exhibits upon which the Department relies do not show that the Employer's workers were flagging. Rather, these photographs only demonstrate the employees reminding motorists to abide by the traffic signal and signs in place.

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:

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(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.

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

Industries has the burden of establishing all of the elements necessary to prove a violation of the cited standard. WAC 263-12-115(2)(b).” *In re Atkinson-Dillingham*, BIIA Docket No. 88-W091 (1990) involved alleged violations of WAC 296-155 and stated that “it was the Department’s responsibility to present evidence establishing that the alleged violations actually occurred. Because the Department has failed to meet that burden, the Corrective Notice must be vacated in its entirety.” *In re North Fork Timber Company*, BIIA Docket No. 98-W0015 (1999) regarded an alleged violation of 296-54-557(22) and determined that “[w]e do not believe that the Department carried the burden of establishing the existence of the violation.... The Department had to show by a preponderance of the evidence that the violation occurred.”

As the Board ruled in *In re Western Plant Services, Inc.*, BIIA Dkt. Nos. 95-W281 and 95-W282 (1998), at page 11:37-47:

The elements that the Department had to establish for each violation were:

1. An applicable standard
2. Non-compliance
3. Employee exposure
4. Employer knowledge of the **cited condition**, and
5. Existence of feasible and effective counter-measures
- 6.

*M. Rothstein, Occupational Safety & Health Law*, (3d. ed. 1990).” This was the Board’s same finding in *In re Hall-Buck Marine, Inc.*, BIIA Dkt. Nos. 95-W262 and 96-W263 (1998) at 12:3-13.

1. **Where the Hsiao brothers did not control traffic through the work zone, stop/slow paddles were not required.**

The Department alleges the Employer violated WAC 296-155-305(3)(a) because the Hsiao Brothers, were flagging traffic without stop/slow paddles. To violate this regulation, an Employer’s worker must first be found to be flagging. Under WAC 296-155-305, a flagger is defined, “as a person who provides temporary traffic control (hereinafter “TTC”).” The WAC does not define what constitutes “TTC.” However, after

applying the relevant sections of the WAC, employers are instructed to set up and use TTCs according to the guidelines and recommendations in Section 6 of the Manual on Uniform Traffic Control Devices (hereinafter “MUTCD”). WAC 296-155-305(1)(a). Hand-signaling devices such as stop/slow paddles are to be used by flaggers when instructing motorists to proceed and stop through a TTC zone. *See* MUTCD § 6E.03. These hand-signaling devices control when a motorist is to proceed and stop. Thus, a flagger controls the flow of traffic through a TTC zone. Washington State Trooper Ron Somerville testified that the functioning traffic light controlled traffic flow and that his primary role was not to direct the flow of traffic. Rather, his role was to make sure traffic flowed smoothly with the revised traffic pattern.

At the work zone the Hsiao Brothers were responsible for repositioning the traffic cones and spotting for contractor trucks. (Kelderman, Tr. 5/19/09, p. 7, lines 14-16). A spotter’s duties consist of assisting construction vehicles to move in and

out of a work zone and repositioning traffic cones so they are not crushed when the construction vehicles are moving in and out of the work zone. (Kelderman Tr. 5/19/09, p. 21, lines 12-15). Mr. Kelderman gave these duties to the Hsiao Brothers before work commenced that morning. Given these duties, Mr. Kelderman did not intend for the Hsiao Brothers to flag traffic at the work zone. (Kelderman Tr. 5/19/09, p. 16, lines 18-25). Employees who are acting as spotters cannot be flaggers at the same time because they cannot carry a stop/slow paddle while repositioning traffic cones. (Kelderman Tr. 5/19/09, p. 22, lines 16-19). Ms. Jennifer Richards (hereinafter "Ms. Richards"), an expert witness, testified that if someone is assigned to flag traffic he or she should not have any other duties except to flag. (Richards Tr. 5/19/09, p. 85, lines 3-6).

As spotters, the Hsiao Brothers occasionally reminded confused motorists to abide by the traffic signal and traffic signs. Mr. Mingkang Hsiao would only direct motorists to follow the traffic signal when they were confused where to

proceed. (Mingkang Hsiao Tr. 5/15/09, p. 81, lines 23-26; p. 82, lines 1-3). It was not necessary for Mr. Mingkang to control traffic because it was controlled by the traffic signal. (Mingkang Hsiao Tr. 5/15/09, p. 81, lines 18-22 and p. 89, lines 5-7). He just made “sure no one made a mistake as far as understanding what the correct traffic pattern was.” (Mingkang Hsiao Tr. 5/15/09, p. 97, lines 24-26). Because Mr. Mingkang Hsiao was only reminding motorists to follow the traffic signal, he had no need for a stop/slow paddle while performing his duties (Mingkang Hsiao Tr. 5/15/09, p. 99, lines 25-26; p. 100, lines 1-7).

Mr. Mingwah Hsiao also testified that he was not controlling traffic and did not need a stop/slow paddle in performing his duties. (Mingwah Hsiao Tr. 5/15/09, p. 106, lines 16-19). Mr. Mingwah Hsiao was performing the same duties as Mr. Mingkang. Simply, the Hsiao Brothers did not need stop/slow paddles in performing their duties because their duties did not include controlling traffic through the work zone.

The Department looks to Exhibits 6, 8, 12, 20, and 23 to show that the Employer's workers were flagging traffic at the work zone.

In Exhibit 6, Mr. Mingwah Hsiao is photographed with his arm to the side. Despite the Department's assertions, Mr. Mingwah Hsiao testified that he was not signaling to any vehicle. Instead, his arm positioned reflected the way he would normally rest his hand. (Mingwah Hsiao Tr. 5/15/09, p. 104, lines 1-3). This Exhibit does not show Mr. Mingwah Hsiao flagging traffic.

In Exhibit 8, Mr. Mingkang Hsiao is photographed standing within the permitted work area observing traffic flow. This photograph does not show Mr. Mingkang Hsiao physically signaling to any motorists to flag traffic.

In Exhibit 12, Mr. Mingkang Hsiao is photographed with his arm appearing to motion traffic to proceed through the intersection. However, the record reflects the traffic light was green and the signal controlled and caused traffic to move, not

Mr. Mingkang. (Mingkang Hsiao Tr. 5/15/09, p. 88, lines 3-10). Furthermore, Ms. Richard's observations of the photograph supports that Mr. Mingkang Hsiao was not controlling traffic but providing positive guidance to motorists. (Richards Tr. 5/19/09, p. 94, lines 24-26; p. 95, 1-26; p. 96, lines 1-3).

In Exhibit 20, Mr. Mingwah Hsiao is photographed with his arm appearing to motion traffic to proceed through the intersection. Mr. Mingwah Hsiao is not controlling traffic in this photograph. He testified a car not shown in the photo was attempting to make a left turn and he was indicating to the driver that he was to go straight. (Mingwah Hsiao Tr. 5/15/09, p. 108, lines 20-23). Mr. Mingwah Hsiao was reminding the driver to follow the posted "no left turn" traffic sign which controlled.

In Exhibit 23, Mr. Mingwah Hsiao is photographed moving a traffic cone and his arm appears to be motioning to a vehicle to proceed. Contrary to Department assertions, Mr.

Mingwah Hsiao was engaging in his spotting duties at the time signaling to one of the Employer's trucks to move into the work zone. (Mingwah Hsiao Tr. 5/15/09, p. 107, lines 1-12). When Mr. Mingwah was performing this duty, all traffic was stopped by the Trooper to allow the construction vehicle to move around the work zone. (Mingwah Hsiao Tr. 5/15/09, p. 107, lines 13-20). This Exhibit does not show Mr. Mingwah Hsiao flagging traffic.

The aforementioned exhibits fail to show the Employer's workers were flagging. Mr. Heist, as a Commercial Construction Safety and Health Specialist, acknowledged that "it is permissible for labors to install barricades and move traffic control cones and those activities do not need to be performed by a certified flagger." (CABR p. 28, lines 3-8). During the testimony of Mr. Kelderman, it was established that the listing of any flagger status in the Traffic Control Plan was for administrative reasons pertaining to qualification and pay codes. (Kelderman Tr. 5/19/09, p. 16, lines 4-5). Listing the

Hsiao Brothers as flaggers for purposes of pay rate does not indicate in any way that they were actually engaged in flagging activities at the work zone. (Martinez Tr. 5/19/09, p. 66, lines 5-10 and Kelderman Tr. 5/19/09, p. 24, lines 12-15).

Furthermore, being certified as a flagger does not mean a person can only perform flagging duties.

**2. The Department did not make a distinction between controlling and directing traffic when issuing its citations against the Employer.**

Mr. Beraki believed that the Hsiao Brothers were flagging traffic when he witnessed the Hsiao Brothers using hand signals to communicate to motorists where to proceed. (Beraki Tr. 5/15/09, p. 17, lines 10-12; p. 20, lines 19-22; p. 28, lines 7-9; p. 30, lines 2-4). Mr. Beraki, never having been a professional flagger and having a limited understanding of flagging, incorrectly assumed the communication aforementioned would be characterized as flagging. (Beraki Tr. 5/15/09, p. 52, lines 1-6). This belief that an individual

signaling motorists where to proceed is controlling the direction of traffic flow is conclusory.

The Hsiao Brothers were not controlling traffic but only reminding the motorists to *follow the direction of the traffic signal*. (Mingkang Hsiao Tr. 5/15/09, p. 81, lines 23-26; p. 82, lines 1-3 and Mingwah Hsiao Tr. 5/15/09, p. 106, lines 16-19). Contrary to the Superior Court finding, the presence of a working traffic control is relevant. Where the traffic signal was in use, the traffic signal controlled the flow of the intersection, not the Hsiao brothers.

The Employer assigned the Hsiao Brothers to help support the TTC that were in use. Even with adequate traffic controls being used, motorists may still be confused where to proceed in a TTC zone. (Richards Tr. 5/19/09, p. 74, lines 12-16). The record reflects Trooper Somerville has flagged traffic at many other intersections, commented in his deposition that motorists are “creatures of habit” and when they are placed in an unfamiliar situation they tend to act as they normally do

rather than follow instructions. Mr. Ron Martinez, Pilchuck's safety director who has much experience as a flagger, and is also a traffic control flagger instructor testified that, "In our atmosphere of working on the construction industry, over the years, motorists, no matter what you put up, even the guide signs or the markers . . . are inattentive to what they're doing." (Martinez Tr. 5/19/09, p. 56, lines 11-15). The Employer well aware of the dangers in traffic control, instructed both the Trooper and the Hsiao Brothers to provide additional safety measures for positive guidance.

The Employer provided adequate traffic controls and did not assign the Hsiao Brothers to flag at the work zone. The only reasonable options for the Employer was to (1) hire a uniformed police officer to flag against the traffic light or (2) turn off the traffic light and use four flaggers at each entrance of the intersection. The Employer chose to use a uniformed policeman because there was a functioning traffic signal. The Employer believed that having the motorists obey something

more familiar, such as a traffic signal, would cause less confusion for motorists. Furthermore, the flagger handbook highly recommends that a uniformed police officer be used to flag traffic in a four-way intersection because of the confusion of stop/slow paddles in a four-way intersection. (Richards Tr. 5/19/09, p. 71, lines 13-24). The Employer wanted traffic to be controlled by the traffic signal and hired the Trooper to ensure that traffic abided by the traffic signal.

Where the record clearly reflects the Hsiao brothers only provided guidance for the motorists but did not direct traffic flow, there is a lack of substantial evidence and Violation 1-1 must be vacated.

**C. Where the Department failed to show the employees at issue were flagging traffic in a restricted area of the work zone or where vehicles were still in motion, the Board of Industrial Insurance Appeals and the Superior Court erred in finding the Department met their prima facie burden to establish a violation of WAC 296-155-305(9)(b).**

Assuming arguendo, even if the Hsiao Brothers were flagging traffic at the work zone, the Employer did not violate

WAC 296-155-305(9)(b) because the Hsiao Brothers were not exposed to oncoming traffic.

Under WAC 296-155-305(9)(b), an employer is to provide a safe job site for its flaggers and must make sure that “[f]laggers stand either on the shoulder adjacent to the road being controlled or in the closed lane prior to stopping road users.” WAC 296-155-305(9)(b). Furthermore, a flagger must only “stand in the lane being used by moving road users after road users have stopped.” *Id.* The Employer provided a safe job site for its employees by positioning traffic cones around the work area in the intersection. The Hsiao Brothers were performing their duties in the work area within the traffic cones and only stepped outside this area when oncoming traffic was stopped. Under the regulation, stepping outside the traffic cones into the restricted area is not a violation unless there is oncoming traffic in the lane in which a person is standing. The Department looks to Exhibits 1, 2, 6, 10, 15, 16, 17, and 21 to show that the Employer’s workers were in the restricted area

exposed to oncoming traffic.

In Exhibit 1 and 2, photos of Mr. Mingwah Hsiao show him outside the traffic cones in the restricted area. In these photos, Mr. Mingwah Hsiao is not standing in the lane with oncoming traffic. The traffic lights are red to North-South traffic which means that traffic has stopped for motorists traveling North and South on 212<sup>th</sup> Street Southwest. All of the traffic from all of the directions was blocked by the red lights with the exception of the cars turning left onto 212 Street Southwest. (Mingwah Hsiao Tr. 5/15/09, p. 102, lines 22-25). Mr. Mingwah Hsiao is not standing in the lane in which traffic is entering the intersection. These photos fail to prove Mr. Mingwah Hsiao was in the restricted area exposed to oncoming traffic.

In Exhibit 6, Mr. Mingwah Hsiao is photographed between a traffic sign and traffic cone. In this photo, Mr. Mingwah Hsiao appears to be somewhat outside the permitted work area. However, in Exhibit 7, which is a photograph taken

just moments after the photo in Exhibit 6; Mr. Mingwah Hsiao is seen standing behind the traffic sign within the permitted work area. Mr. Mingwah Hsiao may have been exposed to traffic for just moments and normally was standing back behind the sign. (Mingwah Hsiao Tr. 5/15/09, p. 104, lines 6-8).

In Exhibit 10, 15, and 16, photos of Mr. Mingkang Hsiao show him inside the traffic cones in the permitted work area. In these photos, the traffic cones are clearly shown in front of him and around him, which indicates he was not in the restricted area. These photos fail to prove Mr. Mingkang Hsiao was in the restricted area exposed to oncoming traffic

In Exhibit 17, Mr. Mingkang Hsiao is photographed between the traffic cones and Mr. Mingwah Hsiao is shown standing between the traffic signs. Mr. Mingkang Hsiao is not outside the permitted work area as he is standing between the traffic cones and not in the restricted area. Mr. Mingwah Hsiao is standing between two traffic signs which indicate that he was not outside the permitted work area. These photos fail to prove

Mr. Mingkang Hsiao and Mr. Mingwah Hsiao were in the restricted area exposed to oncoming traffic.

In Exhibit 21, Mr. Mingwah Hsiao is photographed with a traffic sign and traffic cone between him and a motorist making a left turn through the intersection. Although Mr. Mingwah Hsiao is shown with his back to a motorist making a left turn, he is still standing within the permitted work area. The traffic sign and traffic cone separate Mr. Mingwah Hsiao from the motorists. Mr. Mingwah Hsiao testified there was at least a full lane separating him from the motorist. (Mingwah Hsiao Tr. 5/15/09, p. 109, lines 14-21). This photo fails to prove Mr. Mingwah Hsiao was in the restricted area exposed to oncoming traffic.

Finally, Trooper Somerville testified that he never observed either of the Hsiao brothers do anything he considered unsafe while at this intersection. That is, they never stepped into oncoming traffic.

Where the record reflects employees at issue did not engaging in flagging activities in a restricted area of the work zone or where vehicles were still in motion, the lack of substantial evidence indicates Violation 1-2 must be vacated.

## V. CONCLUSION

In general the WAC provisions pursuant to which Employers are cited is promulgated under the authority of the Washington Industrial Safety and Health Act (hereinafter “WISHA”).

In relevant part RCW 49.17.010 states:

In the public interest for the welfare of the people of the state of Washington and in order to assure, insofar as *may reasonably be possible, safe and healthful working conditions* for every man and woman working in the state of Washington, the legislature in the exercise of its police power, and in keeping with the mandates of Article II, section 35 of the state Constitution, declares its purpose by the provisions of this chapter to create, maintain, continue, and enhance the industrial safety and health program of the state, which program shall equal or exceed the standards prescribed by the Occupational Safety and Health Act of 1970. (Emphasis added).

The Employer respectfully asserts that the violations at issue stand for a greater policy issue to be addressed. Clearly, the record reflects a situation where the Employer hands-down took affirmative actions to plan ahead for traffic pattern revisions. As noted by Trooper Somerville, the Employer conducted the traffic pattern revision appropriately.

The present case does not represent a scenario where the Employer has made a mistake and seeks broad interpretation of the relevant codes in attempt to side step discipline. Rather, the Employer exercised due diligence, what more could they have done or contemplated? Maybe, the Employer could have allowed all certified flaggers onsite to utilize paddles/signs. However that situation would bring forth more confusion as motorists would need to subjectively decide whether to follow the traffic signal, traffic sign, officer or flaggers. Such option would not be conducive to bringing forth a clear direction to motorists resulting in a potential harmful working condition for employees as confused motorists are turning unexpectedly.

Maybe, instead of giving positive reinforcement that motorists were in fact proceeding in the correct direction as indicated by the traffic control signal, the Hsiao brothers could have ignored confused motorists and allow them to turn as subjectively desired. However, such option would have also resulted in a potential harmful working condition for employees as confused motorists are turning unexpectedly contrary to the traffic control signal.

The affirmation of the violations as they stand not only punishes Pilchuck Contractors but takes away any incentive for future employers to initiate and implement safety mechanisms.

Where the traffic control pattern was required to be altered, the Employer took the best approach possible to ensure healthful working conditions. For all of the reasons set forth above, the Employer respectfully urges the Court to direct the Board to reverse the Findings and Conclusions of the Board and to vacate the violations at issue.

DATED this 17th day of June, 2011.

AMS LAW P.C.

A handwritten signature in black ink that reads "Aaron K. Owada". The signature is written in a cursive style with a horizontal line underneath it.

Aaron K. Owada, WSBA No. 13869  
Attorney for Appellant

COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON

PILCHUCK CONTRACTORS, INC.,

NO. 66842-1-I

Appellant,

**CERTIFICATE OF  
SERVICE**

v.

WASHINGTON STATE  
DEPARTMENT OF LABOR AND  
INDUSTRIES,

Respondent.

I, Lisa Ockerman, hereby certify under penalty of perjury under the laws of the State of Washington that on June 17, 2011, I filed with the Court of Appeals Division I, via U.S. MAIL the original of the following document:

**1. Appellant's Opening Brief**

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

Sarah E. Kortokrax, AAG  
Office of the Attorney General  
Labor & Industries Division  
PO Box 40121  
Olympia, WA 98504-0121

SIGNED in Lacey, Washington on June 17, 2011.



Lisa Ockerman