

. 668421

66842-1

NO. 66842-1-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

PILCHUCK CONTRACTORS, INC.,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR AND INDUSTRIES**

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I. NATURE OF THE CASE

This is an appeal under the Washington Industrial Safety and Health Act (WISHA), RCW 49.17. The Department of Labor and Industries (Department) cited Pilchuck Contractors Inc. (Pilchuck) for violating WISHA regulations regarding flagging operations at its work site. The citations alleged a serious violation of WAC 296-155-305(3)(a) for failure to require use of a sign paddle while flagging and a serious violation of WAC 296-155-305(9)(b) for exposing the employees to traffic while flagging. The Board of Industrial Insurance Appeals (Board) affirmed both violations.¹ On Pilchuck's appeal, the trial court upheld the Board's decision in its entirety.

Pilchuck concedes that the two employees exposed in this citation were not using paddles as required by the flagging regulation. Pilchuck argues, however, that there is insufficient evidence to support the Board's determination that the two Pilchuck employees were conducting flagging activities, that they therefore were required to use sign paddles, and that the employees were exposed to oncoming traffic. The evidence is compelling, however, that Pilchuck employees were conducting flagging activities and that they were conducting these activities without the

¹ The Board vacated another violation on the Department's citation on the Department's request, and the Department did not appeal this decision.

required sign paddles as well as that they were exposed to oncoming traffic.

The employees testified that they engaged in the following activities: directing traffic to either stop or continue moving through the intersection, stopping cars from making left hand turns, and stopping cars that were not heeding the red light. These activities constitute temporary traffic control as contemplated by WAC 296-155-305. Additionally, the compliance officer observed the employees flagging in an open lane of traffic in violation of WAC 296-155-305(9)(b).

II. COUNTER STATEMENT OF THE ISSUES

1. Does substantial evidence support the Board's finding that Pilchuck employees were performing flagging duties without sign paddles in violation of WAC 296-155-305(3)(a)?

2. Does substantial evidence support the Board's finding that Pilchuck employees were exposed to traffic while flagging in violation of WAC 296-155-305(9)(b)?

III. COUNTER STATEMENT OF THE CASE

On August 18, 2008, Pilchuck conducted road paving work at the intersection of 44th Avenue West and 212th Street Southwest in Mountlake Terrace, Washington. Tr. 5/15/09, at 9.² During this time, Compliance Safety and Health Officer Behann Beraki drove through the worksite and

² The transcripts in the certified appeal board record are cited as "TR" followed by the date of the hearing or deposition. The certified appeal board record is cited as "CABR".

observed and photographed two of Pilchuck's employees, Minghang and Mingwah Hsiao, directing and signaling traffic without sign paddles. Tr. 5/15/09, at 10. Mr. Beraki also observed and photographed the same employees outside of a shoulder or closed lane and exposed to traffic in lanes of travel. Tr. 5/15/09, at 12-13.

Minghang and Mingwah Hsiao are brothers and certified flaggers. Tr. 3/15/09, at 79, 101. On August 18, 2008, they provided verbal and hand directions to drivers while not using sign paddles. Tr. 3/15/09, at 82-83, 108. Pilchuck's own traffic control plan for the worksite identified two flaggers and a police flagger as the individuals who would control traffic at the worksite. Tr. 5/19/09, at 9-11; Exhibit (Ex.) 6, 7, 12, 20, 39. The photographs taken by Mr. Beraki show the Hsiao's gesturing and using hand signals in the midst of oncoming traffic.

Minghang Hsiao testified that on the day of the inspection he was assisting the state trooper with his work to keep traffic moving. Tr. 3/15/09, at 81-82. He testified that he would gesture with his hand to indicate to a car whether they were going the right way when there was hesitation about where to go. Tr. 3/15/09, at 82. He further testified that some cars who did not see the red light (the "other" traffic control device mentioned by Pilchuck) would continue to move forward, and he would show them they were supposed to be stopped. Tr. 3/15/09, at 88.

Mingwah Hsiao testified that when a car attempted a left turn, he would indicate that it was supposed to go straight. Tr. 3/15/09 at 108.

The Department cited Pilchuck under WAC 296-155-305(3)(a) for the failure to have sign paddles when performing flagging duties under WAC 296-155-305(9)(b) for exposing the employees to traffic while flagging under WAC 296-155-305(7)(a). Pilchuck appealed to the Board. The Department withdrew the portion of the citation regarding WAC 296-155-305(7)(a). The industrial appeals judge affirmed the violations regarding WAC 296-155-305(9)(b) and WAC 296-155-305(7)(a). The decision found that:

On August 18, 2008, two employees of Pilchuck Contractors, Inc., who were certified flaggers and who were normally employed by Pilchuck Contractors, Inc., as flaggers, were working at a construction site at the intersection of 44th Avenue W and 212th Street SW in Mountlake Terrace, Washington, and were assisting a police officer by insuring traffic followed in the direction the officer indicated by using hand gestures and pointing out directions as needed, but did not possess or signal with sign paddles.

CABR 32 (Finding of Fact (FF) No.3). The decision also found that:

On August 18, 2008, two employees of Pilchuck Contractors, Inc., while performing flagging activities to assist in controlling traffic, stood in an open lane of traffic with their back[s] to moving traffic.

CABR 32 (FF 4). The industrial appeals judge reduced the penalty on the WAC 296-155-305(9)(b) violation, vacated the requested item, and otherwise affirmed the citation.

Pilchuck petitioned the three-member Board for review of the decision. The Board denied the petition and adopted the proposed decision of the industrial appeals judge on September 30, 2009.

Pilchuck appealed to Snohomish County Superior Court. CP 2. The Superior Court affirmed the Board decision on February 16, 2011. CP 2.

IV. STANDARD OF REVIEW

Review in this matter is governed by RCW 49.17.150. In a WISHA case, the appellate court reviews the Board's decision, not that of the Superior Court. *J.E. Dunn NW., Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 35, 42, 156 P.3d 250 (2007). Under RCW 49.17.150(1), the Board's findings of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. *Mowat Constr. Co. v. Dep't of Labor & Indus.*, 148 Wn. App. 920, 925, 201 P.3d 407 (2009). Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person that a finding is true. *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996).

Because the Employer failed to assign error to any of the Board's findings of fact, those findings are verities on appeal. *Moreman, v. Butcher*, 126 Wn.2d 36, 39, 891 P.2d 725 (1995). Therefore, this Court need only determine whether the Board's conclusions of law are appropriate based on the unchallenged findings of fact. *Danzer v. Dep't of Labor & Indus.*, 104 Wn. App. 307, 319, 16 P.3d 35 (2000).

This Court reviews legal issues de novo. *Prezant Assocs., Inc. v. Dep't of Labor & Indus.*, 141 Wn. App. 1, 7, 165 P.3d 12 (2007). The purpose of WISHA and the regulations promulgated under it is to assure safe and healthful working conditions for every man and woman working in the state of Washington. RCW 49.17.010. "WISHA is to be liberally construed to carry out this purpose." *Inland Foundry Co., v. Dep't of Labor & Indus.*, 106 Wn. App. 333, 336, 24 P.3d 424 (2001). The court will uphold the Department's interpretation of its own WISHA regulation "if it reflects a plausible construction of the language and is not contrary to the legislative intent." *Laser Underground & Earthworks, Inc. v. Wash. State Dep't of Labor & Indus.*, 132 Wn. App. 274, 278, 153 P.3d 197 (2006).

The legal issue Pilchuck raises in this appeal—whether employees providing positive guidance and direction to motorists were engaged in flagging activities—is a mixed question of law and fact. In determining a

mixed question of law and fact, the court determines whether the facts found by the agency are supported by substantial evidence and then determines the law de novo and applies it to those facts. *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 330, 646 P.2d 113 (1982).

V. ARGUMENT

The Board determined that Pilchuck committed a serious violation of the flagging regulations in WAC 296-155-305(3)(a) and WAC 296-155-305(9)(b). CABR 33. At the Board, to show a serious violation, the Department must show that (1) the cited standard applies; (2) the requirements of the standard were not met; (3) employees were exposed to, or had access to, the violative condition; (4) the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition; and (5) there is a substantial probability that death or serious physical harm could result from the violative condition. *Wash. Cedar & Supply Co. v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 914, 83 P.3d 1012 (2003); RCW 49.17.180.³ Here, the primary dispute regarding both WAC 296-155-305(3)(a) and WAC 296-155-305(9)(b) is whether the standards applied and regarding WAC 296-155-305(9)(b)

³ Contrary to Pilchuck's reference in its brief at AB 18, the Department does not need to establish that Pilchuck had actual knowledge of the cited condition or that there were feasible and effective counter measures. See *Washington Cedar & Supply Co., Inc.*, 119 Wn. App. at 914; *Supervalu, Inc. v. Dep't of Labor & Indus.*, 158 Wn.2d 422, 433-34, 144 P.3d 1160 (2006).

whether the employees were exposed. The argument and evidence outlined below shows that both standards applied, that they were not followed, and that employees were exposed.⁴

A. Substantial Evidence Establishes That Pilchuck Violated WAC 296-155-305(3)(A) When Two Pilchuck Employees Were Performing Flagging Without The Use Of Flagging Sign Paddles

In its brief, Pilchuck contends that the Board incorrectly determined that the Hsaio brothers, were not performing flagging because according to Pilchuck (1) they were only performing spotting activities; (2) they did not *control* traffic as contemplated by safety and health regulations; and (3) other traffic control devices were being used. Appellant's Opening Brief (AB) at 11-13. Pilchuck's assertions are incorrect. Ensuring motorists are travelling in the correct direction and stopping them if they were not following the other traffic control devices in use falls squarely within the definition of traffic control.

⁴ Additionally, the employer knew of the conditions as the foreman was on the job site. Tr. 5/19/09, at 7, 35; *Sec'y of Labor v. Danis Shook Joint Venture XXV*, 19 O.S.H. Cas. (B.N.A.) 1497, 2001 O.S.H.D. (C.C.H.) P 32397, 2001 WL 881247, *5 (O.S.H.R.C. 2001) (actual or constructive knowledge of an employer's foreman can be imputed to the employer.). The compliance officer also testified that the exposure could cause death. Tr. 5/15/09, at 40. The elements of knowledge and substantial probability of harm are not contested here.

1. The Definition Of Control Includes Directing And Guiding

WAC 296-155-305(3)(a) provides that “[f]lagger signaling must be with sign paddles approved by WSDOT and conform to guidelines and recommendations of MUTCD.”

A “flagger” is defined as “a person who provides temporary traffic control.” WAC 196-155-305. Temporary traffic control is not defined in the regulation. When interpreting a regulation, rules of statutory construction are followed, including resort to the dictionary to define terms. *City of Seattle v. Allison*, 148 Wn.2d 75, 81, 59 P.3d 85 (2002); *In re J.R.*, 156 Wn. App. 9, 17, 230 P.3d 1087 (2010). The dictionary definition of control includes the meaning “to exercise authority over; direct; command” *Webster’s New World Dictionary* 309 (2nd coll. Ed. 1986). It also includes the meaning “to exercise restraining or directing influence over” and the “power or authority to guide or manage: directing or restraining domination” *Webster’s Third New International Dictionary* 496 (2002). Pilchuck agrees that the definition includes the meaning to have “direction over.” AB 13.

Pilchuck attempts to make a distinction between “controlling” and “directing” traffic (AB 12), however, there is no such distinction under the

dictionary definition of the term. The definition of control plainly means to direct or to guide.

This plain language must be followed. Under plain language analysis, the court determines a rule's meaning from its terms "to give effect to its underlying policy and intent." *Dep't of Licensing v. Cannon*, 147 Wn.2d 41, 56, 50 P.3d 627 (2002). Here the policy is to protect employees who are interacting with traffic.

The Manual on Uniform Traffic Control (MUTCD)⁵, incorporated by reference in WAC 296-155-305⁶ also describes flagger procedures to include stopping, directing, alerting, and slowing traffic:

The following methods of signaling with paddles shall be used:

- A. To stop road users, the flagger shall face road users and aim the STOP paddle face toward road users in a stationary position with the arm extended horizontally away from the body. The free arm shall be held with the palm of the hand above shoulder level toward approaching traffic.
- B. To direct stopped road users to proceed, the flagger shall face road users with the SLOW paddle face aimed toward road users in a stationary position with the arm

⁵ The MUTCD was admitted as Exhibit (Ex.) 40 and is available at <http://mutcd.fhwa.dot.gov/pdfs/2003/Ch6A-E.pdf>. The 2003 version of the MUTCD is used as that is the version in affect at the time of regulation's enactment. The regulation calls for the use of the version "as currently modified and adopted by the Washington state department of transportation." WAC 296-155-305.

⁶ WAC 296-155-305 provides:

(1) General requirements for signaling and flaggers.

(a) Employers must first apply the requirements in this section. Then you must set up and use temporary traffic controls according to the guidelines and recommendations in Part VI of the MUTCD.

extended horizontally away from the body. The flagger shall motion with the free hand for road users to proceed.

C. To alert or slow traffic, the flagger shall face road users with the SLOW paddle face aimed toward road users in a stationary position with the arm extended horizontally away from the body.

MUTCD 6E.04.

When construing a statute or regulation, “that meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.” *See Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). The MUTCD must be considered as it is incorporated by reference into the regulation. *See Knowles v. Holly*, 82 Wn.2d 694, 700-701, 513 P.2d 18 (1973).

Section 6E.04 clearly contemplates the actions of stopping, directing, alerting, and slowing traffic. These are all aspects of traffic control under the MUTCD.

Here the employees controlled the cars by directing and guiding them which way to turn. As discussed below in Part V.4., Mingwah Hsiao testified that when a car attempted a left turn, he would alert the driver to go straight. *See Tr. 3/15/09*, at 108. By preventing the car from making a left turn, he exerted direction over the car and forced it to go a different direction. Further, Minghang Hsiao testified that when cars did not see the

red light he would show them they needed to be stopped. Tr. 3/15/09, at 88. By interacting with traffic and exercising control over traffic in this manner, the Hsaio brothers were flagging as contemplated by WAC 296-155-305.

Regulations are not interpreted in a way that has absurd results. *See In re Detention of Kistenmacher*, 163 Wn.2d 166, 182, 178 P.3d 949 (2008). It would be an absurd result to say that a person that was directing traffic, including indicating what direction to go, what way to turn, and when to stop, was not engaging in controlling traffic. To interpret the regulation otherwise would increase the harm to employees and would be contrary to directive that that WISHA rules be liberally interpreted to protect employees. *See Inland Foundry*, 106 Wn. App. at 336; *see also* RCW 49.17.010.

2. The Employees Provided Positive Guidance, Which Is Part Of Flagging Under The MUTCD

By directing, alerting, and stopping traffic, the employees provided positive guidance, which constitutes temporary traffic control under the MUTCD. The MUTCD states that flaggers must demonstrate numerous abilities, including receiving and communicating instructions clearly, firmly, and courteously, and having the ability to control signaling devices such as paddles and flags “in order to provide *clear and positive guidance*

to drivers approaching a TTC [temporary traffic control] zone in frequently changing situations.” MUTCD 6E.01(C) (qualifications for flaggers) (emphasis added).⁷ Positive guidance is a tool flaggers use to control traffic. Positive guidance is the affirmative guiding or directing of vehicles to assist them in navigating the construction area. This constitutes temporary traffic control under WAC 296-155-305.

Pilchuck concedes the employees provided “positive guidance.” AB 27. Both Minghang and Mingwah Hsaio testified that they were providing guidance to cars to ensure they knew where to go. Tr. 5/15/09, at 82, 83, 97; *see also* AB 13.

In addition, Steve Heist, Commercial Construction Safety and Health Specialist, testified that “directing traffic” includes “controlling” traffic and “providing guidance.” Tr. 5/15/09, at 175. Mr. Heist’s responses are consistent with the language of the regulations and the MUTCD that establish that the Hsiao brothers were performing flagging activities. The Department’s interpretation of its own regulations is accorded substantial weight. *See Laser Underground & Earthworks*, 132 Wn. App. at 278. In this case, that interpretation is that definition of

⁷ The provision relied by the Department in MUTCD 6E.01(C) is a guidance statement, which is a recommendation that must be followed by employer under WAC 296-155-305(1)(a). (There might be limited exceptions to guidance statements in general that are not relevant here.)

control includes directing and positive guidance as contemplated by the MUTCD.

Pilchuck's argument that providing positive guidance to passing motorists was insufficient to constitute flagging (AB 13) is without merit. As discussed above, the MUTCD specifically includes providing "clear and positive guidance to drivers" as a flagger qualification. MUTCD 6E.01. Here, the Hsiao brothers were communicating with drivers and road users through hand signals and gestures in order to facilitate the flow of traffic, in addition to other duties such as cone movement and an occasional need to spot vehicles. Minghang Hsaio testified that at times they had to re-direct traffic or stop drivers who were confused. Drivers observing employees in hard hats raising and gesturing with their arms would reasonably rely on those gestures as they are driving through the area.

3. The Fact That The Employees Were Also Acting As Spotters And The Presence Of The Traffic Light And State Trooper Does Not Mean That The Employees Were Not Also Controlling Traffic

Pilchuck argues that they did not intend for the employees to act as flaggers because they were acting as spotters for construction trucks moving in and out of the work zone. AB 20. However, the fact that they were also doing spotting duties does not mean that they were not also

performing flagging duties. The inquiry is whether the employees' activities met the definition of flagger under WAC 296-155-305. Pilchuck may have intended to not have them act as flaggers. But that intention does not change the reality of what the employees actually did, which was control traffic and therefore act as flaggers. *See* Part V.4.

Pilchuck also contends that the presence of the traffic light and the state trooper dictate whether the Hsaio brothers were actually flagging because, according to Pilchuck, they did not need to be flagging. AB 19, 21, 26. Employees engaging in flagging activities must follow safety regulations for those activities regardless of the presence of other traffic control measures. The presence of other traffic control devices is immaterial to whether the Hsaio brothers were flagging. The plain language of WAC 296-155-305(3)(a) provides that “[f]lagger signaling must be with sign paddles approved by WSDOT and conform to guidelines and recommendations of MUTCD.” WAC 296-155-305(3)(a) is triggered when there is “flagger signaling” and the regulation does not provide an exception when other measures are present. Thus, the analysis only focuses on whether the employee was performing the duties as contemplated by the regulation.

Even if one or two traffic control devices was sufficient to control traffic, once Pilchuck chose to utilize a supplemental method, they were

required to ensure the method complied with the regulations in order to ensure the safety of the employees performing the duties. Whether flaggers were necessary to the project is irrelevant to the question of whether the Hsaio brothers were performing flagging duties.

Additionally, this argument contradicts Pilchuck's traffic control plan for the worksite. Pilchuck's traffic control plan specifically lists the use of a police flagger as well as two additional flaggers. Tr. 5/19/09, at 11; Ex. 39. Presumably, if it was unnecessary for the Hsaio brothers to be flagging, and Pilchuck did not intend for them to flag at this worksite, the traffic control plan would not have listed two flaggers in addition to the police officer. Furthermore, the record shows that at times the trooper was away from the intersection while handling cell phone calls related to a family medical situation. Tr. 6/11/09, at 13; *see also* Tr. 5/15/09, at 38. This left only the Pilchuck employees in charge of facilitating traffic through the intersection, in conjunction with the traffic light.

Pilchuck concedes that the Hsaio brothers were assigned to support the traffic control devices in place, as the traffic control plan demonstrates. AB 26. Again, this contradicts Pilchuck's arguments that they were not performing flagging duties, when they were specifically assigned to supplement the state trooper and traffic light. *See* Ex. 39; AB 26. Even if, as Pilchuck contends at AB 34, they were being safety minded by

providing supplemental safety measures, they are required to ensure that those safety measures are properly performed. To argue otherwise undermines the purpose of WISHA.

Pilchuck also contends that because motorists were to follow the traffic light, the Hsaio brothers did not need a stop/slow paddle, and therefore were not performing flagging activities. AB 21. However, Pilchuck cites no authority for this contention and it is contradicted by the express terms of the regulation. Merely because it is not necessary for a flagger to actually stop traffic does not mean that they are not performing flagging duties. For instance, a flagger, providing guidance to motorists but not actually stopping the motorists, would use the slow side of the paddle to remind them to go slow through the work zone. In any event, it was necessary for the Hsaio brothers to stop traffic, and they did in fact stop traffic on some occasions. Tr. 3/15/09, at 82.

Pilchuck argues that there is nothing more they could have done to ensure safety at the worksite. AB 34. Contrary to Pilchuck's contention, however, the firm should and could either have provided the Hsaio brothers with sign paddles to guide traffic, or not utilized flaggers as part of their traffic control plan. Pilchuck argues that had the Hsaio brothers used sign paddles, motorists would have been further confused. AB 34. However, even if the traffic light was sufficient to control traffic, it is

likely that in the presence of the Hsaio brothers gesturing to vehicles without sign paddles, motorists were unclear as to whether they were supposed to follow the direction of the traffic light or that of the Hsaio brothers. Had they had sign paddles, motorists would have known to follow the direction of the Hsaio brothers, and likely would not have been confused. Thus, it is clear that if Pilchuck wished to utilize extra traffic control measures through the Hsaio brothers, providing them with sign paddles would have provided the safest working condition.

Pilchuck's arguments basically question the wisdom of applying the regulation. But the wisdom or desirability of the rule is not at issue. *St. Francis Extended Health Care v. Dep't of Social & Health Serv.*, 115 Wn.2d 690, 702, 801 P.2d 212 (1990). WAC 296-155-305 has the force and effect of law and must be followed. *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 848, 50 P.3d 256 (2002).⁸

⁸ It appears, although it is not really clear, that Pilchuck may be trying to argue to this Court that it was infeasible for the firm to comply with WAC 296-155-305. If this is the case, Pilchuck did not raise the defense of infeasibility at the Board and is barred from doing so now. CABR 19, 26. RCW 49.17.150(1), the statute governing appeals to superior court, requires a party to raise all objections at the Board absent extraordinary circumstances. If an employer wishes to argue that compliance with the standard is infeasible, it has the burden of proof on this affirmative defense. *In re: Longview Fibre Co., BIIA Dec.*, 98 W0524, 2000 WL 33217383, *4 (2000). To prevail, an employer must prove that (1) the means of compliance prescribed by the applicable standard would have been infeasible under the circumstances in that (a) its implementation would have been technologically or economically infeasible, or (b) necessary work operations would have been technologically or economically infeasible after its implementation; and (2) either (a) an alternative method of protection was used, or (b) there was no feasible alternative means of protection. *Id.* These elements were not pled or met.

4. The Evidence Shows That Pilchuck Were Performing Activities To Provide Temporary Traffic Control

The testimony and exhibits in this case establish that Pilchuck employees were performing activities to provide temporary traffic control. The evidence is uncontroverted that Minghang and Mingwah Hsiao were signaling with their hands and providing guidance to traffic at Pilchuck's worksite on the day of the Department's inspection. In arguing that the employees were not controlling traffic, Pilchuck makes several fact based arguments that go to the weight of the testimony and exhibits. AB 30-32. However, this Court does not re-weigh the evidence or make credibility determinations. *Univ. of Wash. Med. Ctr. v. Dep't of Health*, 164 Wn.2d 95, 103, 187 P.3d 243 (2008). The Board weighed the evidence and found that employees were engaged in flagging activities without a sign paddle. CABR 32 (FF 3). Based on the testimony of the Hsiao brothers as well as Pilchuck's own admissions in its briefing, the Hsiao brothers had control over traffic. Pilchuck admits that "the Hsiao Brothers occasionally reminded confused motorist to abide by the traffic signal and traffic signs." AB 20.

As noted previously, Minghang and Mingwah Hsiao were both certified flaggers, and were employed by Pilchuck as flaggers.

Tr. 3/15/09, at 79.⁹ The compliance officer testified that he observed the Hsiao brothers directing traffic. Tr. 5/15/09, at 10.¹⁰ Minghang Hsiao testified that on the day of the inspection he was assisting the state patrolman with his work to keep traffic moving. Tr. 3/15/09, at 81, 82. Minghang Hsiao testified that he would gesture with his hand to indicate to a car whether they were going the right way when there was hesitation about where to go. Tr. 3/15/09, at 82. Minghang Hsiao further testified that some cars who did not see the red light would continue to move forward, and he would show them they were supposed to be stopped. Tr. 3/15/09, at 88. Ultimately, he was responsible for making sure that traffic was going smoothly and safely through the intersection. Tr. 3/15/09, at 97. This testimony alone shows that there is control over traffic and is evidence of sufficient quantum to persuade a fair-minded person that the finding that the employees were engaged in flagging activities is true. *William Dickson Co.*, 81 Wn. App. at 411.

Exhibits 6, 7, 12, 20, and 23 show some of the activities observed by the compliance officer. While Pilchuck asserts at AB 22 that Mingwah Hsiao testified he was not signaling in Exhibit 6, the fact that in

⁹ Pilchuck contends that the Department determined the Hsiao brothers were flagging merely because they were certified flaggers. However, this was just one fact considered in conjunction with all the facts discussed in this brief.

¹⁰ The Board properly relied on this witness on the subject of whether the employees were controlling traffic and discounted the statements of Jennifer Richard, Pilchuck's expert.

this *one* exhibit at this *one* particular moment Mingwah Hsaio states he was not signaling, does not demonstrate that he *never* signaled to traffic. Indeed, Mingwah Hsaio testified that at times he was using his hand to show cars what direction they should be going. Tr. 5/15/09, at 103. Further, Minghang Hsaio concluded his description of his actions shown in Exhibit 6 by testifying he was providing assistance “[t]o make sure that the traffic went by smoothly.” Tr. 3/15/09, at 83.

Minghang Hsaio testified that his hand position shown in Exhibit 12 was “to show the cars that were coming along that they were supposed to be going in this direction.” Tr. 3/15/09, at 82. The light was green, as Pilchuck contends, but Minghang Hsaio was making sure the vehicles proceeded in the correct direction and did not take a left turn. Tr. /3/15/09 at 108. Concerning Exhibit 20, Mingwah Hsiao testified that “there’s a car . . . which wants to make a left turn . . . and I’m just making the indication that you’re supposed to go straight here.” Tr. 3/15/09, at 108. Pilchuck admits that this was the testimony. AB 20. He was controlling the car by not letting it make a left turn.

Even Pilchuck’s own traffic control plan for the worksite states that it intended to utilize two flaggers in conjunction with the state trooper. *See* Ex. 39. Exhibit 39 specifically lists the position within the intersection where two *flaggers* were to be located. This intersection is

consistent with where the Hsaio brothers were located. Tr. 5/19/09, at 11, 23, 24. This contradicts Pilchuck's contention that it did not intend for the Hsaio brothers to perform flagging duties.

The testimony and exhibits show that the Hsaio brothers were controlling traffic. The Board finding that the Pilchuck employees were performing flagging activities without sign paddles is supported by substantial evidence. As a result, the citation for a violation of WAC 296-155-305(3)(a) should be affirmed.

B. Substantial Evidence Established That Pilchuck Violated WAC 296-155-305(9)(B) When Two Pilchuck Employees Stood In An Open Lane Of Traffic Exposed To Moving Traffic While Flagging

Pilchuck disputes that it violated WAC 296-155-305(9)(b). It argues that its employees were not exposed to moving traffic while standing in an open lane because the Hsaio brothers only stood in an open lane when oncoming traffic was stopped. AB 29. However, substantial evidence clearly shows that the Hsaio brothers were standing in an open lane where cars could hit them.

WAC 296-155-305(9)(b), requires that an employer ensure that “[f]laggers stand either on the shoulder adjacent to the road user being controlled or in the closed lane prior to stopping road users. A flagger

must only stand in the lane being used by moving road users after road users have stopped.” WAC 296-155-305(9)(b).

The Board weighed the evidence and found that employees were engaged in flagging activities while standing in an open lane of traffic with their backs to moving traffic. CABR 32 (FF 4). This is supported by substantial evidence.

Compliance Safety and Health Officer Beraki testified that he personally observed Pilchuck employees outside a closed lane while traffic was moving. Tr. 5/15/09, at 12. The safety officer also saw a flagger walking back and forth directing traffic with his back to traffic. Tr. 5/15/09, at 12, 29. The Board was entitled to accept this evidence as support of its finding the employees were in an open lane with their backs to moving traffic. This is evidence of sufficient quantum to persuade a fair-minded person that the finding is true. *William Dickson Co.*, 81 Wn. App. at 411.

Additionally, the photographic evidence shows that the employees conducted flagging activity when they were not either standing on the shoulder or in a closed lane while road users were still moving. Exhibit 1 shows Mingwah Hsiao directing traffic while a vehicle approaches the intersection. The employee is not on the shoulder of the road and is not in

a closed lane. Rather, he is exposed to moving vehicles, specifically, the recently passed dark car and the approaching car. Tr. 5/15/09, at 12-14.

Similarly, Exhibit 2 shows a car after it has passed an employee who is still exposed to the oncoming traffic. Tr. 5/15/09, at 15. Pilchuck argues that all traffic except for those turning left onto 212th Street Southwest was stopped by the red light and therefore, the Mingwah Hsaio was not exposed to oncoming traffic. AB 30. While Pilchuck argues that Mingwah Hsaio was not standing in the lane in which traffic was turning left (AB at 30), Exhibit 2 shows a car turning directly in front of Mingwah Hsaio in the intersection. The record clearly shows that Mingwah Hsaio was exposed to moving traffic.

Exhibit 17 shows Pilchuck employees outside the closed lane and exposed to moving vehicles. Tr. 5/15/09, at 23-24. Pilchuck contends that Exhibit 17 does not show Mingwah or Minghang Hsaio outside the permitted work area. AB 31. However, Mr. Beraki testified that he observed the Hsaio brothers as depicted in Exhibit 17 standing outside the closed lane. Tr. 5/15/09, at 24. Pilchuck presents no evidence to rebut this testimony.

Additionally, Exhibits 6 and 7 show the employee stepping out from behind the barricade and guiding vehicles through the intersection. Tr. 5/15/09, at 17, 18. Even Pilchuck acknowledged that the Exhibit 6

shows Mingwah Hsiao standing outside the permitted work area, and then states that he may have been exposed to traffic for a short time. AB 31. This constitutes a violation of WAC 296-155-305(9)(b). Ample evidence supports the Board's finding of fact that Pilchuck employees stood in an open lane of traffic. *See* Ex. 1-3, 4-7, 16, and 17. Therefore, Pilchuck violated WAC 296-155-305(9)(b).

VI. CONCLUSION

The Department respectfully requests that this Court affirm the August 6, 2009 Decision and Order of the Board and thereby affirm the Department's Citation and Notice dated October 9, 2008.

RESPECTFULLY SUBMITTED this 18 day of August, 2011.

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