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COURT OF APPEALS

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NO. 34752-1-II
COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

ST. J. ...
BY DM

PILCHUCK CONTRACTORS INC,

Appellant,

v.

WASHINGTON STATE DEPARTMENT
OF LABOR & INDUSTRIES,

Respondent,

Appeal from Superior Court of Pierce County

APPELLANT'S OPENING BRIEF

Aaron K. Owada, WSBA #13869
Attorney for Appellant

The Law Offices of Aaron K. Owada
4405 7th Ave. SE, Suite 205
Lacey, WA 98503
(360) 459-0751

ORIGINAL

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I. ASSIGNMENTS OF ERROR

A. Assignments of Error No. 1

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II. ISSUES

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Where the Employer established all elements of Employee Misconduct set forth in RCW 49.17.120, and the Department offered no evidence to controvert those facts, did the Board err by not finding that Pilchuck established employee misconduct as an affirmative defense?

III. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

On September 10, 2003, the Department of Labor and Industries initiated an inspection of a work site located at the intersection of Meridian Avenue and 144th South in Puyallup, Washington. 11/08/04 TR at pg 8, lines 8-14.¹ The safety inspector, Susan Case, decided to conduct the investigation while driving through the intersection and observing at least one individual engaging in traffic control. Id at pg 8, lines 16-21. Ms. Case testified that she observed the individual directing traffic without using a paddle. Id at pg 8, lines 16-18. As Ms. Case was driving along the construction site, her colleague, Mary Jo Boies, took several photographs of the individuals conducting traffic control. Id at pg 11, lines 9-14. These photographs were admitted as Board Exhibits 3 through 9.

Ms. Case testified that she arrived at this inspection site at approximately 12:45 p.m. Id at pg 9, line 4. Ms. Case further testified that when she arrived *no one from Pilchuck other than the flaggers* were working and further stated her belief that the other Pilchuck employees were at lunch. Id at pg 38, lines 1-15. As such, when she arrived at the

¹ Throughout this brief, "TR" refers to the location in the trial transcripts contained in the Certified Appeal Board Record (CABR) where the cited testimony can be located. For ease of distinction among different dates on which testimony was provided, the date of the testimony is also provided.

site, no construction activities were occurring and the two individuals present were the flaggers. Id at pg 9, lines 5-7. Ms. Case stated that she initiated the inspection by presenting her credentials to one of the individuals doing the traffic control on site. Id at pg 9, lines 11-20. At that point, Ms. Case had to wait until the employer representative, Don Smith, arrived on site before continuing her inspection. Id at pg 9, lines 18-22. Ms. Case proceeded to conduct an opening conference which lasted a total of five minutes. Id at pg 10, line 9-25; pg 11, lines 1-3. As a result of her inspection, Ms. Case recommended that the citations, currently before the Board, be issued by the Department. Id at pg 11, lines 19-25.

On November 4, 2003, the Department of Labor & Industries issued Citation and Notice No. 306427535 to Pilchuck. Item 1-1(a) alleges that the employer did not ensure that the individuals conducting traffic control at the inspection site were either standing behind a barricade or adjacent to the traffic being controlled. Item 1-1(b) alleges that the employer did not ensure that the individuals conducting traffic control at the work site were not exposed to oncoming traffic approaching from behind. Item 1-1(a) and 1-1(b) were issued as grouped violations.

Item 1-2 alleges that the employer did not ensure that the individuals conducting traffic control utilized sign paddles or lights approved by WSDOT. Both the group violations in item 1-1, and the violation alleged in item 1-2 were cited under WAC 296-155-305 and classified as "Serious" citations by the Department.

In addition, the Department issued several general violations. Item 2-1 alleges that the individuals conducting traffic control did not properly utilize high visibility garments called for in WAC 296-155-305(5)(a). Item 2-2 alleges that the employer failed to conduct an orientation that familiarized the flaggers with the job site, pursuant to WAC 296-155-305(9). Item 2-3 alleges that the employer failed to keep a copy of the traffic control plan on site as stated in WAC 296-155-305(9)(b). Finally, Item 2-4 alleges that the employer failed to ensure that a person with a valid first-aid certificate was available on site, per WAC 296-155-120(2).

On cross examination, Ms. Case was asked about her understanding of the acronym HECK as it applies to the issuance of serious WISHA citations. *Id* at pgs 36-37. The “H” in HECK means that a hazard must exist before an inspector will recommend that a serious citation is issued. *Id* at pg 36, lines 19-21. The “E” in HECK signifies that an employee exposure must be found to exist before a serious WISHA citation can be issued. *Id* at pg 36, lines 22-24. Next, the “C” in HECK means that there must be an applicable statute or code provision governing the hazard before a serious WISHA citation can be issued. *Id* at pg 36, line 25; pg 37, line 1. Finally, Ms. Case testified that without evidence the employer had knowledge (“K”) of the violation, the inspector’s training is that no serious WISHA citation can be issued. *Id* at pg 37, lines 2-5. Ms. Case acknowledged without evidence that **all four** elements exist, the safety inspectors are trained not to issue a serious WISHA citation. *Id* at pg 37, lines 6-9.

Ms. Case also stated that she and Ms. Boies had conducted another, previous safety inspection of Pilchuck approximately one to two weeks prior to the current matter. Id at pg 29, lines 8-13. On the date of this prior inspection, Ms. Case also observed Pilchuck was engaging in traffic control activities. Id at pg 37, lines 14-26. At that time, the Department did not issue any citations related to traffic control.

On cross examination, Ms. Case was asked about the contents of the employer's traffic control plan. Id at pgs 38-39. Ms. Case testified that she received a copy of the employer's traffic control plan for this site shortly after her inspection. Id at pg 38, lines 18-21. After reviewing the traffic control plan, Ms. Case did not dispute that the plan was adequate for the conditions at the work site. Id at pg 39, lines 14-17.

Also during cross examination, Ms. Case acknowledged that the employer was not required to provide written documentation of any safety orientation provided to its flaggers related to the employer's traffic control plan. Id at pg 40, lines 2-5. However, on direct examination, Ms. Case testified differently, claiming that her basis for the issuance of Item 2-2 was that the employer could not provide such written documentation:

Q. (By Ms. Hoffman) Did you ask the employer representatives whether they had conducted the orientation for their employees?

A. (By Ms. Case) Yes, I did.

Q. And what was their response?

A. That they -- actually, what I had asked was for written documentation of the safety orientations, which they did not have.

Q. Did they explain to you why they didn't have that written documentation?

A. No.

Q. At any time throughout your inspection, were they able to provide that written documentation to you?

A. No.

Q. And so at the conclusion of your inspection, what was your understanding about whether or not this orientation had been conducted?

A. My understanding was that there wasn't an orientation done.

Id at pg 27, lines 6-21.

Ms. Case also modified her testimony related to the Department's requirement that each element of the HECK acronym, discussed above, be established before issuing a serious safety citation. Ms. Case testified that she would have issued the serious citation *even without evidence* that the employer knew, or should have known, of the occurrence of the alleged violations. Id at pg 42, lines 4-7. Ms. Case asserts that she may simply *assume* that the employer had knowledge of the violation until proven otherwise. Id at pg 42, line 10.

The Department also called Dan McMurdie as an expert witness. Mr. McMurdie's testimony, while lengthy, consisted primarily of his offering three opinions. The first opinion was that the individuals working at this inspection site were providing traffic control. 11/12/04 TR at pg 26, lines 11-20. Second, Mr. McMurdie expressed his opinion that WAC 305-155-305 would be applied as opposed to the MUTCD. Id at pg 26,

lines 21-26. Finally, Mr. McMurdie expressed his opinion that the citation was properly issued. Id at pg 27, lines 1-8.

However, on cross examination, Mr. McMurdie acknowledged that he had no personal knowledge of the facts of the present case. Id at pg 29, lines 5-10. Moreover, Mr. McMurdie admitted that if the factual basis provided to him was incorrect, that could change his opinion. Id at pg 29, lines 14-19. Mr. McMurdie, like Ms. Case, acknowledged familiarity with the acronym HECK as it applies to the issuance of serious WISHA citations. Id at pg 29, line 20-26; pg 30, lines 1- 3. Mr. McMurdie agreed that if all of the elements of HECK were not present, including evidence that the employer had knowledge of the violation, the inspector should not issue a serious citation. Id at pg 30, lines 1-3.

On behalf of the employer, Don Smith provided testimony. Mr. Smith testified that he has been in the construction industry, primarily as a foreman and heavy equipment operator, since around 1988. 11/12/04 TR at pg 39, lines 1-11. Mr. Smith stated that as a part of his training in the construction industry, he has acquired knowledge of the general safety rules applicable to the industry. Id at pg 39, lines 12-14. Moreover, while he does not hold a traffic control card personally, Mr. Smith is familiar with the industry safety rules applicable to traffic control as well. Id at pg 39, lines 15-17. In particular, Mr. Smith testified that he was aware of the requirement that individuals conducting traffic control generally must utilize a stop/slow paddle. Id at pg 54, line 26 - pg 55, line 2. Furthermore, Mr. Smith stated his awareness of the requirement to wear

protective clothing when engaging in traffic control. Id at pg 55, lines 3-5.

During the date of the Department's inspection, Mr. Smith was acting as the foreman for Pilchuck Contractors. Id at pg 39, lines 20-26. As such, Mr. Smith had overall responsibility for the employer for the construction occurring at this inspection site. Id at pg 39, line 26 - pg 40, line 2. As a part of Mr. Smith's duties, he was responsible for setting up appropriate traffic control for the work site. Id at pg 40, lines 5-10. Mr. Smith stated that he was familiar with Pilchuck Contractor's traffic control plan, and the safety requirements contained therein, prior to this inspection. Id at pg 44, lines 23-26. Exhibit 11 represents the traffic control plan used by the employer for this work site. Mr. Smith understood that the employees were required to follow the traffic control plan at this particular job site. Id at pg 44, line 26 - pg 45, line 4.

Mr. Smith testified that the traffic control plan was properly being implemented when he inspected the work site just a short time earlier in the morning before Ms. Case initiated this inspection. Id at pg 47, lines 10-17. During that inspection, Mr. Smith observed that the flaggers were using stop/ slow paddles, were wearing their protective clothing properly and were generally following the company's traffic control plan. Id at pg 42, line 14 - pg 43 line 2; pg 48 lines 21-26.

In particular, Mr. Smith noted that the individuals conducting traffic control were properly utilizing their stop/slow paddles. Id at pg 42, lines 23-26. Moreover, each of the individuals engaging in traffic control had the proper safety clothing on their person and each safety vest was

being worn properly. Id at pg 42, lines 26-43, line 2. Mr. Smith did not observe the two flaggers engaging in traffic control in a way that was inconsistent with the traffic control plan. Id at pg 48, line 21 - pg 49, line 7. Finally, Mr. Smith testified that, as the individual responsible for the company's traffic control implementation, he was unaware that these two flaggers may engage in traffic control without using stop/slow paddles, without properly wearing their protective clothing and without following the traffic control plan. Id at pg 49, lines 8-20.

Mr. Smith testified that, when he returned from lunch, he was surprised and unhappy to discover that traffic control safety issues were the subject of a Department inspection. Id at pg 45, lines 5-9. Mr. Smith stated that his reaction was based upon the fact that during the previous weeks of working at this site, there had been no problems with compliance with the traffic safety rules. Id at pg 45, lines 11-13. Moreover, Mr. Smith's surprise was based on the fact that he had previously inspected the traffic control operations earlier in the morning, and found that the employees were properly implementing the traffic control plan. Id at pg 45, lines 13-15. Upon his arrival, Mr. Smith immediately ordered the flaggers to utilize the stop/slow paddles when engaging in traffic control, adjust their safety vests per the WAC codes and generally follow the company's traffic control plan. Id at pg 45, lines 16-20.

Mr. Smith further testified that, in his experience, the flaggers arriving at a particular work site generally arrive with all of the equipment necessary to do their job. For example, the flaggers arrive with their own

personal stop/slow paddle, all necessary protective clothing, hard hats, and proof of traffic control certification. Id at pg 46, lines 10-24. Moreover, Mr. Smith stated that Pilchuck has a policy of ensuring that each individual providing traffic control services on its behalf has the proper proof of traffic control training, namely a flagging certification card. Id at pg 46, line 24 - pg 47, line 2. This policy was followed for the individuals providing traffic control at this inspection site. Id at pg 47, lines 3-4.

At no point did Mr. Smith authorize the individuals conducting traffic control to direct traffic without using stop/slow paddles or without proper safety clothing. Id at pg 49, lines 14-16. Mr. Smith testified that had he observed the employees engaging in traffic control without following the traffic control plan, he would have instructed the employees to immediately comply with the safety code. Id at pg 49, line 21 - pg 50, line 5.

On cross examination, Mr. Smith testified about the traffic control plan orientation provided for these employees. Mr. Smith acknowledged that the employer could not provide written verification of the safety orientation, but that the plan was verbally communicated to the individual engaged in traffic control. Id at pg 51, lines 4-16. Mr. Smith stated that he had personally provided the verbal orientation to one of the two employees working at the site. Id at pg 51, lines 17-20.

Mr. Smith also testified that in between the time that he first inspected the work site and the opening conference, one of the flaggers originally present was apparently called away on an emergency. Id at pg

44, lines 3-11. The individual replacing this worker was named Lon Wilke. Id at pg 52, lines 18-23. Mr. Smith testified that he did not *personally* provide the traffic control orientation for Wilke. Id at pg 52, line 26 - pg 53, line 3. However, neither Mr. Smith, nor any other Pilchuck official, was ever asked whether Mr. Wilke received the orientation from any one else working at this work site.

Pilchuck Safety Director, Ron Martinez, also testified on behalf of the employer. Mr. Martinez's job duties call for him to implement and enforce the company's accident prevention program, provide safety training for employees, conduct safety audits and generally act as a safety reference. Id at pg 56, lines 19-26.

Mr. Martinez stated that, besides himself, Pilchuck Contractors mandates that several other individuals conduct safety inspections as well. In particular, Mr. Martinez testified that supervisors at each work site are required to conduct safety inspections at individual sites. Id at pg 57, lines 19-23. Mr. Martinez stated that he personally instructs both the supervisors and foreman regarding proper compliance with the company and the State's safety and health rules. Id at pg 58, lines 1-12. Part of Mr. Martinez's instruction relates specifically to traffic control safety issues. Id at pg 58, lines 12-13. Furthermore, Mr. Martinez directs the employer's foreman to conduct a hazard assessment, prior to work commencing at a job site. Id at pg 58, lines 14-26; pg 59, line 11. Mr. Martinez also requires that the individuals working at a job site conduct tailgate meetings and discuss, on a daily basis, the potential safety issues facing

the crews. Id at pg 61, lines 1-26. The tailgate meetings are conducted on a weekly basis but, in the event that conditions change at a work site, a tailgate meeting is required as well. Id at pg 62, lines 3-20. Finally, Mr. Martinez requires that the individual foreman working at a site conduct safety audits periodically throughout the day. Id at pg 63, lines 4-18. In Mr. Martinez's words, as our foreman are constantly conducting, you know, an overview, safety audits, themselves, throughout the day on the site. Id at pg 63, lines 19-21.

Given Mr. Martinez's role with Pilchuck Contractors, he was involved with the formulation of the traffic control plan followed by the employer at this site. Id at pg 63, line 25 - pg 64, line 1. Mr. Martinez pointed out that the employer has never been cited as a result of any potential inadequacies for this particular traffic control plan. Id at pg 64, lines 7-11. Moreover, upon learning of the violation of the safety provisions of the traffic control plan, Mr. Martinez took disciplinary action. Mr. Martinez testified that the employees involved in this incident were given a verbal warning from the employer that is currently kept in each of the employee's employment file. Id at pg 66, lines 19-21.

The final witness testifying on the employer's behalf was Jennifer Richards. Ms. Richards is currently a safety director with Approach Management. 12/01/04 TR at pg 5, lines 18-24. Ms. Richard's responsibilities include training of traffic control issues. Id at pg 6, lines 2-4. In addition, Ms. Richards conducts the training course by which individuals receive their flagging certification. Id at pg 7, lines 6-21. As

such. Ms. Richards has an understanding of the requirements of the Washington Administrative Codes as applied to traffic control. Id at pg 8, lines 1-4.

Ms. Richards testified that individuals obtaining a traffic control card are taught several fundamental tenants related to traffic control safety. In particular, such individuals are required to know the protective equipment requirements as described in the Code and ANSI, as well as, the need to utilize a stop/slow paddle when conducting traffic control. Id at pg 8, lines 5-13. Ms. Richards stated that, as a part of the flagging certification process, individuals are specifically taught that, unless an emergency situation arises, a stop/slow paddle must be utilized to direct traffic. Id at pg 10, lines 9-18. Moreover, Ms. Richards' instruction is that the onus for utilizing the stop/slow paddle is placed on the employee rather than the employer. Id at pg 10, lines 19-22. Likewise, the onus to properly wear the protective clothing while conducting traffic control is placed upon the employee pursuant to Ms. Richards' traffic control training courses. Id at pg 10, line 23 - pg 11, line 4. Finally, a certified flagger would be aware, in Ms. Richards' opinion, of the need to utilize the stop/slow paddle and safety clothing even if neither were mentioned in the employer's traffic control plan. Id at pg 12, lines 9-18. Ms. Richards pointed out that the individuals obtain their traffic control certification cards independent of their employment with a particular company. Id at pg 20, lines 6-9. When an individual obtains the flagging certification, his or her "card" is good for a period of three years irrespective of

employment. Id at pg 20, lines 10-17.

Furthermore, Ms. Richards stated that she has an understanding of what must be contained in a traffic control plan in order for the plan to be in compliance with the WAC's. Id at pg 8, lines 20-25. After having reviewed the employer's traffic control plan, contained in Exhibit 11, Ms. Richards expressed her opinion that the plan was in compliance with the applicable code provisions. Id at pg 9, line 14 - pg 10, line 8 .

IV. ARGUMENT

A. STANDARD OF REVIEW.

The standard for judicial review of a WISHA citation is set forth in RCW 49.17.150(1). In relevant part, this section declares:

The findings of the board or hearing examiner where the board has denied a petition or petitions for review with respect to questions of fact, **if supported by substantial evidence on the record considered as a whole, shall be conclusive.**

(Emphasis added).

The Board's conclusions must also be based on its findings of fact. *Martinez Melgoza & Associates v. Department of Labor & Industries*, 125 Wn. App 1004. Based on this standard, for the reasons set forth below the Employer respectfully asserts that

B. THE DEPARTMENT FAILED TO ESTABLISH ALL ELEMENTS UNDER RCW 49.17.180(6) TO ISSUE A SERIOUS VIOLATION.

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:

(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 OSHC 1051, 1052, 1991-93 CCH OSHD.

C. THE UNCONTROVERTED EVIDENCE DEMONSTRATES THAT PILCHUCK ESTABLISHED ALL ELEMENTS FOR EMPLOYEE MISCONDUCT AS REQUIRED BY RCW 49.17.120.

Even if one were to assume that the Employer somehow had knowledge of the existence these safety violations, the wrongful acts leading to the alleged violations were the result of unpreventable employee misconduct.

The Board announced the criteria for establishing that an alleged safety violation was caused by unpreventable employee misconduct in the matter of *Jeld-Wen of Everett*, Docket No. 88 W144(1990). Therein, the Board held that four elements must be established by the Employer to establish the affirmative defense of employee misconduct: 1) an employer

must show that it has established work rules designed to prevent the violation; 2) has adequately communicated these rules to its employees; 3) has taken steps to discover violations, and 4) has effectively enforced the rules when violations have been discovered. *Id.* The elements set forth in *Jeld-Wen*, are codified in RCW 49.17.120(5). In relevant part, that section declares:

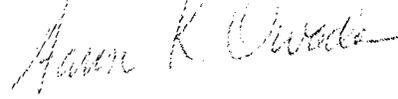
- (5)(a) No citation may be issued under this section if there is unpreventable employee misconduct that led to the violation, but the employer must show the existence of:
 - (i) A thorough safety program, including work rules, training, and equipment designed to prevent the violation;
 - (ii) Adequate communication of these rules to employees;
 - (iii) Steps to discover and correct violations of its safety rules; and
 - (iv) Effective enforcement of its safety program as written in practice and not just in theory.
- (b) This subsection (5) does not eliminate or modify any other defenses that may exist to a citation.

V. CONCLUSION

For these reasons, the citation must be vacated.

DATED this 2nd day of October , 2006.

The Law Offices of Aaron K. Owada

A handwritten signature in cursive script that reads "Aaron K. Owada".

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

CERTIFICATE OF SERVICE

I, Kris Wambem, hereby certify under penalty of perjury under the laws of the State of Washington that on this date I filed with the Court, via

Personal Service:

1. Original of the opening brief

And a copy via US Mail to:

Beth Hoffman
Assistant Attorney General
Office of the Attorney General
Labor & Industries Division
P. O. Box 40121
Olympia, WA 98504-0121

SIGNED in Lacey, Washington on October 2, 2006.



—
Kris Wambem