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**BOARD OF INDUSTRIAL INSURANCE APPEALS
OF THE STATE OF WASHINGTON**

In Re: AMAZON COM SERVICES
LLC DBA AMAZON COM
Citation & Notice No. 317965723

Docket No. 22 W0121
DEPARTMENT’S OPPOSITION TO
MOTION TO STAY ABATEMENT

I. INTRODUCTION

In this appeal of a WISHA Citation and Notice (Citation) issued by the Department of Labor and Industries (Department) to AMAZON COM SERVICES LLC DBA AMAZON COM (Amazon), Amazon has requested that the Board grant a stay of abatement of the alleged violations. The Board should deny Amazon’s motion because they have not met their statutory burden of proof to obtain a stay of abatement.

This appeal follows an inspection of Amazon’s warehouse in Kent, Washington, in response to an employee complaint. Like the Amazon Dupont warehouse, where the Board denied a near-identical Motion for Stay of Abatement in July 2021 (Docket No. 21W0156). The Kent warehouse has some of the highest injury rates of any warehouse in the U.S.¹ And, like the citation in Dupont, this citation alleges ergonomic violations under the safe place

¹ Declaration of Adamson, Harrison and Rempel at 2-3.

1 standard/general duty clause of WISHA relating to the both the pace of work expected of
2 Amazon employees, and the almost total absence of engineering and administrative controls
3 typically found in other warehouses to protect workers from work-related musculoskeletal
4 disorders (WMSDs) such as back and shoulder injuries.

5 Amazon is requesting that it be allowed to do almost nothing to lower its injury rates
6 over the course of the several years this matter is likely to be in the court system. This matter is
7 currently set for hearing for most of January and February 2023 (it has been consolidated with
8 three other similar citations). Because of the national media attention these cases have received
9 and the nature of the issues, it is probable that, if these cases are litigated, they will ultimately
10 be resolved by the Washington Supreme Court. Therefore, there is unlikely to be a final order
11 requiring abatement for at least four years. Thus, the Board is being asked to decide whether
12 Amazon's employees will be given any additional protections from serious injuries over the
13 next four or more years.

14 Amazon also claims (Memorandum at 2, and elsewhere) that it is already implementing
15 many of the Department's suggested methods of abatement. Putting aside the fact that the
16 Department disputes this statement because it is inconsistent with what the Department
17 observed, if true, Amazon cannot meet its burden to demonstrate good cause because they are
18 arguing that they should not continue doing what they claim they are already doing.

19 Amazon also argues that the 2011 amendments to the WISHA that establish the Stay of
20 Abatement process are unconstitutional as a violation of due process (Memorandum at 2-3, and
21 elsewhere). As the Board knows, it lacks jurisdiction to invalidate a statute. And, all statutes
22 are presumed be constitutional.
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1 At several points in its memorandum Amazon alleges that the violations do not exist
2 and there are no ergonomic violations at this warehouse. Amazon has apparently forgotten that
3 the issues in this appeal are being argued nationally in the media as well as before the Board.
4 When talking to their shareholders or arguing that there is no need for their workers to join a
5 union, Amazon has repeatedly made public statements over the past year acknowledging an
6 unacceptably high injury rate at its warehouses, and, specifically the type of ergonomic injuries
7 at issue in this matter.²

9 What is most striking about Amazon's motion is what it does not contain:

10 1. Amazon does not (and cannot) deny that the Kent warehouse has an extremely high
11 number of MSD (ergonomic) injuries every year.

12 2. Amazon has not provided any evidence from medical or ergonomic experts either
13 that the alleged violations in this citation do not exist, or that there will not be serious injuries
14 while this litigation is pending. This is especially striking because Amazon insisted that its
15 team of ergonomists and attorneys accompany the Department's inspection team during this
16 inspection.

17 3. Last year, in its Motion for Stay of Abatement for the Dupont warehouse, Amazon
18 told the Board that it is was in the process of testing various methods of abatement at other
19 warehouses, and would be implementing them as applicable soon. Obviously, if they had
20 successfully abated some of the alleged violations in the Citation at the Kent warehouse, there
21 would be declarations to that effect.
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² The Board can take judicial notice of the many media stories both about this citation and the Dupont
citation, and Amazon's public response to both these citations and media and other governmental and stockholder
inquiries regarding the high number of ergonomic injuries in their warehouses across the U.S.

1 In contrast, while not required to do so at this stage of the proceedings, the Department
2 has provided declarations from both medical and ergonomic experts supporting each of the
3 alleged violations in this matter.

4 As explained below in more detail, for these reasons, Amazon has not met its statutory
5 burden of proof by demonstrating good cause and that there will not be serious injuries at this
6 worksite if its Motion to Stay Abatement is granted.

8 **II. FACTUAL SUMMARY AND BACKGROUND**

9 This WISHA appeal is one of four appeals currently pending at the Board relating to
10 ergonomic inspections at Amazon warehouses. Two of the inspections are of a warehouse in
11 Dupont, and the third is of a warehouse in Sumner. In July 2021, the Board denied Amazon’s
12 Motion for stay of abatement at the Dupont warehouse. No stay was sought for the Sumner
13 warehouse.

14 In this inspection of the Kent warehouse, the Department conducted three site visits.
15 The first was in September and consisted mainly of a walk-around to determine which areas
16 should be inspected and to interview employees. The second visit in December followed
17 negotiations with Amazon regarding the scope of the inspection, who would be present, what
18 type of data would be collected, and the date of the inspection. The third visit in early January
19 followed the Department obtaining a King County Superior Court order ordering Amazon not
20 to interfere with the inspection and specifically allowing the Department and its experts to
21 collect data documenting the ergonomic violations at issue in this matter.

22 The Department has collected more data to document these violations than in any
23 previous ergonomics inspection. In addition to collection injury data, videotaping, interviewing
24 and observing workers, lumbar motion monitors were attached to workers which, as their name

1 implies, provide detailed data regarding the impact on the low back of the lifting and twisting
2 required in many of the jobs at this worksite.

3
4 **III. ARGUMENT**

5 When the Department issues a citation, an appeal does not automatically stay an
6 employer's obligation to abate the violations. RCW 49.17.120(1). Rather, an employer must
7 move to stay the abatement requirement pending the outcome of the appeal. The standard for
8 granting a stay is set forth in RCW 49.17.140(4)(e):

9 The Board shall grant a stay of abatement for a serious, willful, repeated serious
10 violation, or failure to abate a serious violation where there is *good cause* for a
11 stay *unless* based on the preliminary evidence it is more likely than not that a stay
12 would result in death or serious physical harm to a worker.

13 (emphasis added). The statute sets forth a two-prong test. An employer must first demonstrate
14 there is good cause to grant a stay. If the employer fails to demonstrate good cause, the stay
15 request must be denied. If the employer demonstrates that good cause exists to grant the stay,
16 then it must next demonstrate that death or serious physical harm to a worker is not more likely
17 to actually occur should the stay be granted. For the reasons expressed below, Amazon has
18 failed to meet its burden to demonstrate either statutory prong.

19 **A. Amazon Has Not Shown Good Cause Exists To Grant a Stay of Abatement.**

20 Good cause is not established here because Amazon's main arguments are that they
21 already have an ergonomics program in place and the following "over the top" statement:

22 Instead, what the Division seeks is nothing short of a fundamental redesign and retrofit
23 of most aspects of a roughly 1.1 million square foot facility before it ever proves any of
24 its allegations and without any consideration to the feasibility, effectiveness, or
25 potential consequences of the proposed changes.³

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³ Amazon's Memorandum at 3-4.

1 The fact that Amazon felt that it was necessary to describe the Department’s abatement
2 requests in such an obviously false manner speaks volumes as to their lack of an ability to meet
3 their burden of demonstrating good cause. The attached Declaration of Richard Goggins
4 describes in detail the type of interim abatement requested by the Department while this
5 litigation is pending. It does not remotely resemble a “fundamental redesign and retrofit” of the
6 Kent warehouse. Nor has produced any evidence that the Department has made unreasonable
7 demands regarding abatement of this citation. Significantly, Amazon is already required to
8 abate near-identical violations at the Kent and Sumner warehouses. Yet, they do not allege that
9 the Department has made unreasonable demands in the ten months since the Board’s order in
10 Dupont.
11

12 Amazon also attacks the citation and alleged violations as unsubstantiated.⁴ Of course,
13 all WISHA citations, by their nature, contain unsubstantiated allegations. The Department is
14 expected to substantiate the allegations in the citation at hearing, not in the body of the
15 Citation. The citation provides the employer with notice of the alleged violations. Neither
16 RCW 49.17 nor this Board has require the Department to prove the alleged violations to defeat
17 a Motion for Stay of Abatement.
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19 Nor do Amazon’s pleadings otherwise meet their burden to demonstrate good cause.
20 The Department’s WISHA citation to Amazon alleges violations of the general duty
21 clause/safe place standard. Specifically, these are ergonomic violations based on the extremely
22 high workplace musculoskeletal disorders (WMSD) injury rates suffered by Amazon’s
23 employees at this warehouse. Amazon’s workers have a substantially higher incidence of
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⁴ Amazon Memorandum 2-3 and elsewhere.

1 WMSD injuries than other warehouse employers. Declaration of Adamson, Harrison and
2 Rempel at 2-3.

3 In describing the WMSD injury rates at the Kent warehouse, L&I ergonomist Richard
4 Goggins noted:

5
6 On page 3 of their Memorandum, Amazon states that “ergonomic injury rates” at Kent have been
7 “substantially reduced over the past five years.” While Amazon has seen a recent decrease in
8 injuries at Kent, I would not characterize it as a substantial reduction. Soon after the facility
9 opened in 2016, the injury rate there grew to be much higher than the rate for the warehousing
10 industry in Washington State. Their musculoskeletal disorder (ergonomic injury) rate was up
and down between 2017 and 2021, rather than a steady decline that one would expect with a
concerted effort to fix hazards. Worryingly, musculoskeletal disorders (MSDs) have been the
single largest category of injuries over the past several years, accounting for almost 2 out of
every 3 workers compensation claims in most years.

11 **In 2021 alone, there were 119 MSDs at the Kent warehouse** resulting in 4,644 days of time
12 loss, the equivalent of losing 13 full time workers for an entire year. Several individual claims
13 were for injuries so severe that the affected workers lost more than a year’s worth of working
14 days.... The strongest predictor of future musculoskeletal injuries is past musculoskeletal
injuries, since damage to muscles, tendons, ligaments and nerves is slow to heal and can often
become chronic. (emphasis added).⁵

15 Violation 1-1 alleges a violation of the general duty clause (WAC 296-800-11005)
16 (also known as the safeplace standard). Because alleged violation 1-1 is of the general duty
17 clause, and neither RCW 49.17 nor the WAC specify abatement, the abatement obligations are
18 set by case law and the citation. The case law under the general duty clause requires that
19 employers abate violations by taking measures that will materially reduce the hazard.⁶ The
20 Citation gives Amazon a great deal of freedom in developing an abatement plan and
21 implementing it. It requires Amazon to evaluate what engineering and administrative controls
22 are feasible to address this issue and to report its findings to the Department. The Department
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26 ⁵ Declaration of Goggins at 8.

⁶ Rothstein, Occupational Safety and Health Law, 2015 Edition, Section § 6.9 pp. 295-296.

1 recognizes the unique situations in ergonomic cases that require employers to carefully
2 determine the best methods to abate these hazards.

3 Amazon also argues in several places that it is already doing what the Department is
4 requesting (which the Department disputes). If true, this would be the opposite of “good cause”
5 because an employer cannot object to being ordered to continue doing what they are already
6 doing.

7
8 Most of Amazon’s pleadings describe their ergonomics program, the people they have
9 hired to address this issue, and how they are implementing their program. The glaring omission
10 in their pleadings is any refutation of either the data gathered by the Department and its experts
11 or any argument as to why the conclusions drawn from data are incorrect. The Department has
12 presented overwhelming evidence that demonstrates that the Kent warehouse has an extremely
13 high injury rate, and that it is a certainty that there will be many serious injuries during the
14 course of this litigation if Amazon’s motion is granted. Yet, Amazon’s only response to the
15 citation is a description of its process.

16
17 The lack of refutation of the Department’s data is especially striking in this matter.
18 Amazon insisted that its ergonomists and attorneys accompany the Department’s experts and
19 inspectors. They watched as every measurement was taken. Yet, there is not one sentence in
20 their pleadings criticizing the methodology used by the Department in collecting or analyzing
21 data. Further, the Kent inspections took place in September, December, and early January.
22 Amazon has had several months to gather its own data, analyze it, and form conclusions.

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25 **1. Amazon’s criticisms of the Department’s inspection are both incorrect, and**
26 **do not establish “good cause.”**

1 Amazon alleges at page 5 (and elsewhere) that the Department did not ask Amazon
2 about their current safety practices and what steps they have taken to address its MSD injuries.
3 This is simply not true; and turns what really happened during this inspection on its head. As
4 noted in Richard Goggins' declaration, he asked for this information and Amazon refused, in
5 writing, to produce it, arguing that it was "overly broad."
6

7 Additionally, during the course of this inspection the Department and its experts were
8 constantly accompanied by a team of Amazon's attorneys, ergonomists, and management.
9 And, because the Amazon representatives were interfering with almost every aspect of the
10 inspection and refused to allow the Department to collect necessary data, the Department had
11 to obtain a superior court order enjoining Amazon from further interference with the
12 inspection, and ordering Amazon to allow the Department and its experts to collect data.
13

14 At no point during this inspection did any of the Amazon representatives who were
15 present at every work process that was inspected say anything like "This employee is not
16 lifting this package in the manner in which they were trained to do so." Nor did anyone from
17 Amazon ever say "You are not getting an accurate picture of how this job is supposed to be
18 performed. We have a stepstool (or other equipment) right here that we expect employees to
19 use when accessing this shelf" or similar comments. Nor did Amazon ever state that they had
20 reconsidered, and were now willing to provide the information about their safety efforts they
21 had previously refused to provide. And, this is consistent with the declarations provided by
22 Amazon. They focus on process and policy, and do not give examples of where Amazon has
23 abated hazards.
24

25 Further, at the closing conference in this matter, the Department made the offer it
26 always makes at closing conferences of encouraging the employer to provide more information

1 that could change the proposed citation which was given to Amazon at the closing
2 conference. Amazon followed up on this opportunity and provided new information regarding
3 the Covid violation which is not part of this motion. However, it did not provide any additional
4 information regarding the ergonomic violations.

5 Amazon also makes several other specific criticisms of the Department's inspection
6 (i.e. they criticize a recommendation regarding pallet transfer stations and argue that the
7 Department copied and pasted from abatement suggestions from the Dupont citation that are
8 not applicable to the Kent warehouse). All of these criticisms are specifically responded to in
9 Mr. Goggins' declaration, and will not be repeated here.

10 For all of the above reasons, Amazon's criticisms of the Department's inspection
11 process should be disregarded by the Board, and does not constitute good cause to grant their
12 motion.
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15 **2. Amazon does not have good cause to refuse to address the impact of the pace**
16 **of work required of its warehouse employees.**

17 On page 9 of their brief and elsewhere, Amazon argues that the required high pace of
18 work does not contribute to WMSD injuries, and claims that the Department is merely making
19 conclusory statements without proof. Again, this is simply not true. In the Department's
20 response to Amazon's near-identical motion last June for the Dupont warehouse, the
21 Department submitted a declaration from Drs. Rempel and Harrison explaining the link
22 between the high pace of work and injuries because it does not allow sufficient muscle
23 recovery time. Amazon has had almost a year to obtain expert medical opinions refuting this
24 argument. Apparently, they cannot find medical experts who disagree with Drs. Rempel and
25 Harrison. Regardless, in their current Declaration, Drs. Rempel, Harrison, and Adamson note:
26

1 Amazon's assertions regarding efforts to reduce the high rate of injuries do not touch
2 on the issues of the pace of work required of its employees; the role of the quota
3 system; the hours worked (especially over-time); and provision of breaks. These factors
4 are very important contributors to muscle fatigue and injury. When the muscles of the
5 shoulders, arms, back or legs are fatigued, and a worker is compelled to continue
6 working, they are at increased risk of injury. When muscles are fatigued and the worker
7 continues performing the same task, they will modify their work postures and motions,
8 and load other muscles to compensate - muscles that are not appropriate for the loads
9 handled.

6 Contrary to Amazon's argument that they maintain a safe work environment at BFI4,
7 our quantitative risk assessments throughout the facility identified repetition and
8 frequency as hazards in the models, with inadequate recovery time based on the pace of
9 work for the loads handled. Indeed, we have documented that excessive pace with
10 consequent excessive repetition and frequency of tasks pose a serious risk of WRMSDs
11 at BFI4. Most tellingly, the high injury rates at BFI4 bely Amazon's assertion that
12 "productivity measurements allow associates to work comfortably and safely." If this
13 were the case, we would expect an average (or lower) injury rate at BFI4. We find it
14 curious that Amazon has not acknowledged the high injury rate at BFI4, as a simple
15 and logical inference would be that their "productivity" measurements are not
16 protecting employees from the risk of serious harm.

12 The hours of work shift (10) and requirement for mandatory overtime for some work
13 practices exceeds the norm for the standard risk assessment tool that we employed.
14 Amazon safety and ergonomic experts should be aware of this important risk factor;
15 obviously the more time employees are exposed to an ergonomic hazard, the greater the
16 risk of WRMSDs. Amazon's statement that this is a "comfortable work environment"
17 suggests lack of awareness of injury rates, fatigue, and pain experienced by workers.⁷

16 Amazon's refusal to address the pace of work at the Kent warehouse is especially
17 disturbing because the Department noted that the pace of work at Kent was even higher than at
18 the Dupont warehouse.⁸ Goggins also noted that:

19 In combination with the high pace of work and physical demands of many of the jobs,
20 10-hour shifts and mandatory overtime increase the risk for injury. Shorter duration shifts
21 and making overtime optional could help to reduce risk by allowing workers more
22 recovery time. Recent media reports have pointed out that Amazon now has a surplus of
23 employees who were hired to meet the increase in demand during the pandemic.
24 Improving working conditions could help Amazon to retain enough of these employees
25 to be able to offer shorter shifts and avoid overtime.⁹

26 ⁷ Declaration of Harrison, Rempel and Adamson at 9.

⁸ Goggins Declaration at 2.

⁹ Goggins Declaration at 7.

1 It is especially troublesome that, for some jobs at Kent, the pace of work was so fast
2 that the NIOSH Lifting Standards that Amazon, OSHA and the Department all use, could not
3 be used. Harrison, Rempel and Adamson noted several times that “The Revised NIOSH Lift
4 Index could not be calculated because the average lift rate of 15.6 lifts per minute exceeded the
5 allowable lift rate for any duration of time; thus, the lift is considered unsafe.”¹⁰
6

7 The Board can also take judicial notice of the fact that the issues surrounding the
8 required pace of work at Amazon’s warehouses and their link to injuries has become the
9 subject of a national debate over the last few years. Yet, despite this national attention,
10 Amazon has yet to produce any medical evidence refuting the arguments presented here
11 regarding the links between Amazon’s required pace of work and WMSD injuries.
12

13 **3. Amazon’s proposal to address WMSD injuries is woefully inadequate and**
14 **does not demonstrate “good cause.”**

15 If Amazon had data and analysis to demonstrate that the conclusions drawn by the
16 Department in issuing this citation were incorrect, surely they would have provided the Board
17 with this information, and it would be their primary argument regarding “good cause.” Instead,
18 all Amazon provides is conclusory statements that the violations do not exist, that they will
19 prevail at hearing, and a description of their internal ergonomic process.
20

21 “Good cause” would typically involve claims of economic or technical infeasibility,
22 neither of which Amazon alleges (nor could they). Instead, Amazon alleges it has already
23 instituted a comprehensive ergonomics program. As noted in the Declaration of Harrison,
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¹⁰ Harrison, Rempel and Adamson at 6.

1 Rempel, and Adamson, most of what Amazon has done is encourage behavioral changes by its
2 employees such as stretching and improving their lifting techniques:

3 The May 5, 2022 declaration of Mr. Brown outlines their “ergonomics program” to
4 address the high injury rate. But the program as described is primarily a body
5 mechanics program and not a well-developed ergonomics program. The DOSH
6 investigation (Case File) reports that management’s focus at BFI4 is on lifting
7 techniques and stretching. These are not components of a well-developed ergonomics
8 program and do not address the hazards at BFI4. Although the program described by
9 Mr. Brown refers to a review of injury rates to identify and target high risk jobs, the
10 response appears to be more coaching. Although Mr. Brown refers to basing
11 interventions on the well-known, standard occupational health and safety understanding
12 of hierarchy of interventions (elimination of risk, engineering controls, administrative
13 controls, then behavioral controls such as worker training and PPE), it does not appear
14 to be followed in the list of interventions that he provides which includes the “Safety
15 School”, the “Working Well Program” and Athletic Trainers who “coach” the
16 employees while they work.

17 Review of the monthly safety meeting notes at the Kent warehouse reveals that at each
18 meeting the primary method of preventing musculoskeletal disorders was to educate
19 workers on body mechanics and there was very little attention to engineering controls.
20 Training workers on body mechanics, e.g., gripping method and lifting techniques, such
21 as lift with your shoulder back or lift with your legs and don’t bend your back, have not
22 been shown to decrease musculoskeletal disorders. The body mechanics approach shifts
23 the responsibility for preventing musculoskeletal injuries to workers.¹¹

24 Amazon’s above statements in their current declarations are consistent with what they

25 told the media they were going to do following the Dupont warehouse inspection last year.

26 They said they are going to encourage more exercise by workers and “coach” them to be safer.

27 <https://www.seattletimes.com/business/amazon/amazons-relentless-pace-is-violating-the-law->

28 [and-injuring-warehouse-workers-washington-state-regulator-says/](https://www.seattletimes.com/business/amazon/amazons-relentless-pace-is-violating-the-law-and-injuring-warehouse-workers-washington-state-regulator-says/) . They have not bought

29 standard equipment such as lifts; and they have specifically stated they are not going to alter

30 the pace of work expected of employees or their discipline program if workers are not working

31 fast enough. See: [https://www.seattletimes.com/business/amazon/amazon-to-maintain-pace-of-](https://www.seattletimes.com/business/amazon/amazon-to-maintain-pace-of-warehouse-work-despite-regulators-citation/)

32 [warehouse-work-despite-regulators-citation/](https://www.seattletimes.com/business/amazon/amazon-to-maintain-pace-of-warehouse-work-despite-regulators-citation/) .

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¹¹ Declaration of Harrison, Rempel and Adamson at 4.

1 Nor can Amazon argue that there is uncertainty as to how to reduce these injuries. In
2 addition to the sources cited in the attached declarations, there is a great deal of published
3 guidance that provide detailed recommendations as to how to reduce musculoskeletal disorders
4 in similar workplaces.

5 Amazon's refusal to abate while this matter is pending is the behavior the Legislature
6 was attempting to stop when it enacted this statutory amendment following Tesoro's 2011
7 refusal to institute any changes at its Anacortes refinery while its appeal was pending following
8 the death of seven employees. If this case goes to hearing, it will be the first ergonomics case
9 ever heard by the Board. It will probably be several years before there is a final order from an
10 appellate court.

11 It is important that the Board only grant Stays of Abatement when the employer meets
12 their statutory burden of demonstrating both "good cause" and that, "based on the preliminary
13 evidence, it is more likely than not that a stay" will not "result in death or serious physical
14 harm to a worker." Stays of abatement should be granted only in those rare situations where an
15 employer can truly demonstrate "good cause" by producing evidence that the abatement
16 required by the Department is financially onerous or would otherwise create a great hardship
17 for the employer. Here, "good cause" has not been established, and the request for a Stay of
18 Abatement should be denied.

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22 **4. The Board does not have jurisdiction to address Amazon's arguments that**
23 **the Stay of Abatement statutory amendments to RCW 49.17 are**
24 **unconstitutional.**

25 In a tacit admission that they cannot meet either element of their burden of proof, a
26 large percentage of Amazon's memorandum argues that the Stay of Amendments to the

1 WISHA are both unconstitutional and unfair.¹² They specifically argue that the statute violates
2 their due process rights and the unfairness of requiring abatement in ergonomic/general duty
3 citations. In denying motions for stay of abatement of similar ergonomic general duty clause
4 violations, the Board has implicitly previously rejected near-identical arguments by McGee
5 Aviation and United Parcel Service (UPS) (coincidentally, both of those cases also involved
6 allegations regarding the pace of work). As the Board has long held, quasi-judicial agencies
7 lack jurisdiction to invalidate statutes as requested by Amazon.
8

9 While the Department is not going to respond in any detail on the merits of arguments
10 not before the Board, it notes that Amazon's due process arguments are flawed because the
11 Board's Stay of Abatement process provides due process to employers by allowing them to
12 provide evidence and legal argument before they have to abate the violations.
13

14 **B. The Preliminary Evidence Establishes That It Is More Likely Than Not That A Stay**
15 **Would Result In Serious Injury or Death to Employees.**

16 Even if the Board determines that Amazon has demonstrated that "good cause" exists
17 to grant a stay of abatement, the stay should still be denied because Amazon cannot meet its
18 burden to demonstrate it is more likely than not that a stay would not result in serious injury or
19 death to employees. Pursuant to RCW 49.17.140(4), the Board must determine whether the
20 preliminary evidence submitted here establishes that it is more likely than not the granting of a
21 stay will result in serious injury or death to employees.
22

23 Amazon's pleadings do not refute or deny the Department's findings that the Kent
24 warehouse has some of the highest WMSD injury rates in the U.S. Adamson, Rempel and
25 Harrison at 2. Because their injury rates are so high, it is undisputable that, if their motion is
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¹² Memorandum, pages 12-16 and elsewhere.

1 granted, there will be hundreds of serious injuries at this worksite while this litigation is
2 pending.

3 To put Amazon’s ergonomic injury rate in perspective, if the Department ever found a
4 large construction company with this rate of falls from elevation per month, or minor
5 amputations per month, orders of immediate restraint shutting down the company would be
6 issued as well as willful violations.

7
8 The fact that the Department has found a history of past serious injuries makes this case
9 different from the typical Motion for Stay of Abatement in WISHA cases. In many other cases,
10 such as where the citation requires guarding of a piece of equipment or that a respirator be
11 worn when workers are exposed to certain toxins, there may not be proof of prior injuries
12 related to the alleged violations. But, here, where there is a large amount of proof of prior
13 serious injuries, and the employer has addressed the cause of the violations, it will always be
14 close to impossible for the employer to meet their burden to demonstrate that there will not be
15 serious injuries while the appeal is pending.

16
17 Here, there will undoubtedly be many serious injuries while this case is pending at the
18 Board, and, possibly, in the appellate courts. The attached declarations of Goggins, Harrison,
19 Adamson, and Rempel respond in detail to the Declarations and arguments submitted by
20 Amazon as to what abatement is required, why it is feasible, and they spend several pages
21 explaining why there will likely be serious injuries if this matter is not stayed. Those
22 declarations are incorporated herein, and will not be further repeated here.

23
24 In contrast to the declarations of Adamson, Harrison, Rempel, and Goggins, Amazon
25 has not submitted any medical or expert ergonomic testimony to support its argument that there
26

1 will not be serious injuries if their motion is granted. For this reason alone, their motion for
2 stay of abatement fails.

3 Because they cannot dispute their high level of serious injuries, Amazon appears to
4 argue that low back, shoulder and other WMSDs injuries are not “serious injuries.”¹³ Amazon
5 is apparently unaware of the thousands of industrial insurance cases this Board has heard
6 involving workers who have incurred these injuries. And, for these reasons, over the last few
7 years, the Board has denied most requests for stay of abatement in ergonomic cases.

8
9 Most significantly, in a citation issued to Alaska Airlines’ wholly owned subsidiary,
10 McGee Air Services, in June 2018, the Board denied McGee’s motion for stay of abatement
11 (see, *McGee Air Services*, Docket No. 18 W0029). The Department’s arguments in *McGee*
12 were the same as in this matter, namely that their rate of lifting injuries was both unacceptably
13 high and much higher than the average in their industry. Mc Gee argued that it would cost
14 them \$4 million to abate the alleged violations. The Board’s Order in *McGee* specifically
15 rejected Amazon’s argument that lifting and other WMSD injuries are not “serious” injuries
16 for purposes of stays of abatement.

17
18 Amazon also makes a cynical argument based on the Department’s ability to issue an
19 Order of Immediate Restraint under RCW 49.17.130. “In addition, if the Division believed that
20 there is “a substantial probability that death or serious physical harm” will occur at BFI4, it has
21 separate authority under RCW 49.17.130 to issue an order of “immediate restraint.”¹⁴
22

23 The Department only utilizes this statutory authority when there is an immediate threat
24 of severe bodily harm and the employer refuses to comply with the relevant WAC rule (i.e. a
25

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¹³ Memorandum at 17.

¹⁴ Memorandum at 17.

1 refusal to move a tower crane away from overhead energized power lines). The Department
2 has never issued an Order of Immediate Restraint for ergonomic violations. These orders are
3 usually only issued when there is an imminent threat of hospitalization or death.

4 Finally, in assessing the likelihood of serious injury, the Board must consider the fact
5 that this matter may be pending both at the Board and in the appellate courts for several years
6 based on the history of ergonomic litigation at the federal level. Avoiding abatement for years
7 while a case is on appeal is the harm the Legislature attempted to prevent in passing this
8 amendment to RCW 49.17.

9
10 For all of the above reasons, Amazon has failed to demonstrate it is unlikely that a
11 serious injury will occur during the pendency of its appeal if a stay is granted.

12 13 **IV. CONCLUSION AND RELIEF REQUESTED**

14 In July 2021, this Board correctly rejected near-identical arguments for a Stay of
15 Abatement at Amazon's Dupont warehouse. And, the Board has previously rejected near-
16 identical arguments by Alaska Airlines/Menzies Aviation and United Parcel Service. In the 11
17 months since the Department has briefed this issue, Amazon has made many public statements
18 regarding improvements they plan to make to improve safety at their warehouses. Yet, in their
19 Motion for Stay of Abatement all they can describe is their process; and they cannot point to
20 substantive changes. The Department is asking them to make simple feasible changes that will
21 reduce their injury rate.

22
23 Amazon has not met its two-prong burden to establish that good cause exists to grant a
24 stay of abatement, and that serious injury is not more likely to occur should a stay be granted.
25 And, it has become clear they will not take substantive steps to address these injuries unless
26

1 ordered to do so by this Board. Therefore, for the foregoing reasons, the Department
2 respectfully requests that the Board deny Amazon's Motion for Stay of Abatement.

3 For purposes of insuring that there is some lessening of the injury rate during the years
4 this matter may be in litigation, the Department is willing to accept interim actions by Amazon
5 that may not fully satisfy the standard of abatement of a general duty clause violation as
6 defined by the federal courts, but will likely result in a meaningful reduction in serious
7 WMSD-related injuries. Put simply, partial abatement is better than no abatement.

8
9 The Department is requesting that Amazon be ordered to abate these violations as
10 required on the citation and described in the Declarations, and take reasonable feasible steps to
11 lessen the number of serious injuries that will otherwise occur before a final order is entered in
12 this matter.

13
14 DATED this 16th day of May, 2022.

15 ROBERT W. FERGUSON
16 Attorney General



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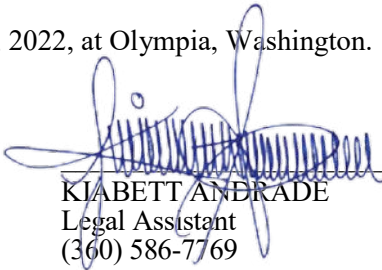
CERTIFICATE OF SERVICE

I certify that I caused a copy of this document to be served or placed in the mail for service on all parties or their counsel of record on the date below as follows:

- Filed electronically:
 Executive Secretary
 Board of Industrial Insurance Appeals
<https://fortress.wa.gov/biia/efiling>
- US Mail Postage Prepaid via Consolidated Mail Service
 Jason Mills
 Morgan, Lewis & Bockius LLP
 300 S. Grand Ave, Ste 2200
 Los Angeles, CA 90071-3132

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 16th day of May, 2022, at Olympia, Washington.



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