Supreme Court No. 101465-1

Court of Appeals, Division I, No. 83515-7-I

SUPREME COURT OF THE STATE OF WASHINGTON

INFRASOURCE SERVICES LLC,
Plaintiff/Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,
Defendant/Respondent.

PETITIONER INFRASOURCE SERVICES LLC'S PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

I. IDENTITY OF PETITIONER

Infrasource Services LLC ("Infrasource") is a Delaware limited liability company that performs utility construction services. Infrasource requests that this Court accept review of the decision issued by the Court of Appeals. In its order, the Court of Appeals reversed the Superior Court's decision, which had vacated the citation issued to Infrasource by the Washington State Department of Labor and Industries ("Department").

II. THE COURT OF APPEALS' DECISION

The Court of Appeals filed an unpublished decision in this matter on October 17, 2022. A copy of the decision is attached hereto as Exhibit A.

III. ISSUES PRESENTED FOR REVIEW

Should the order of the Court of Appeals be reversed and the underlying citation be vacated, when the Department failed its burden to show that the ditch at issue was greater than four feet in depth and therefore required cave-in protection?

IV. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

1. The Infrasource Marysville Crew

On June 6, 2019, an Infrasource crew was installing gas pipe by dropping fused pipe into a ditch at a job site at 5825 83rd Ave in

Marysville, Washington. Clerk's Papers ("CP") 352, 355. The crew consisted of foreman Peter DeGraaf, and helpers Ben Grubenhoff, Mike Iverson, and Jeremy Wilkinson. CP 501. The Infrasource crew working at this site does not dig ditches; rather, the property owner for the project hires a contractor to dig the ditches. CP 491, 592-593.

2. The Inspection

Dan Andemariam, a Compliance Safety and Health Officer with the Department, was driving by a new housing development and saw "a head pop out of a hole" and decided to investigate further. CP 352. He parked across the street from where the Infrasource crew was working, took some photos from that vantage point, and opened an inspection. CP 353. In one photo Mr. Andemariam took, Exhibit 1, Mr. DeGraaf, Mr. Wilkinson, and Mr. Iverson are shown standing and looking down on Mr. Grubenhoff who appears to be located in a ditch. CP 355, 502-503, 553.

Exhibit 1, CP 677

The crew was not scheduled to work in that part of the ditch on the day of the inspection. In fact, the crew performed their duties for that day without entering the ditch. CP 540. However, at the moment captured in Exhibit 1, Mr. Grubenhoff entered the ditch for "a couple of minutes" only to pull a guide wire through a conduit that had become bunched up. CP 509, 542, 677. The ditch in this area went in two perpendicular directions, forming a right-angle corner. *See* CP 677, 682 (Exhibits 1, 6). This is the only time and location where Mr. Grubenhoff was in the ditch. CP 556, 570, see also CP 681, 682 (Exhibits 5, 6).

Mr. Andemariam proceeded to measure various locations of the ditch to determine whether the ditch was four feet or greater in depth such

that cave-in protection would be required under WAC 296-155-657(1)(a). One such location was across a driveway from where the Infrasource crew was pictured in Exhibit 1. CP 437, 677. Mr. Andemariam took several photos of his measurements of the ditch at this location using a two-by-four to capture a discernible measurement of the depth of the ditch. CP 441-442; *see also* CP 678-679, 692-695 (Exhibits 2-3, 16-19). It is undisputed that no one on the crew entered the ditch at this location, that Mr. Andemariam did not see any of the crew in the ditch at this location, and that the crew was not working in that area on the day of the inspection. CP 442, 514-515. The citation under appeal is not based on Mr. Andemarium's measurements of the ditch in this location.

Mr. Andemariam then took measurements of the ditch on the side of the driveway where the Infrasource crew was working. This time, however, he did not use a two-by-four to capture a discernible. CP 443-4. Rather, he took photos of his tape measure from a bird's eye perspective. CP 445-6; *see also* CP 683, 696-7 (Exhibits 7, 20, 21).

Exhibit 7

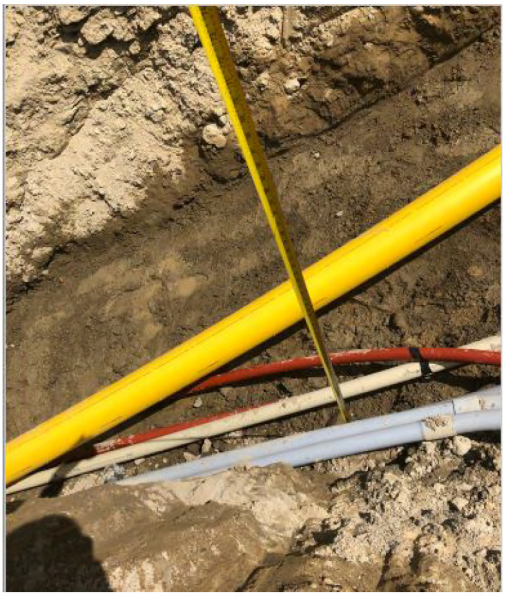

Exhibit 20

Exhibit 21

While Mr. Andemariam *testified* he recalled the ditch being deeper than four feet where he measured (CP 373, 683, 696-7; Exhibits 7, 20, 21), Mr.

Andemariam's photos at this location are essentially useless in demonstrating the depth of the ditch in that location because one cannot discern the edge of the ditch at all in the photos, much less in relation to the measuring tape.

Also, Mr. Andemariam took measurements of the ditch not where Mr. Grubenhoff was actually standing (*see* Exhibit 1), but at a different location. CP 677, 683, 696-7. Indeed, Mr. DeGraaf testified the portion of the ditch Mr. Andemariam measured was not the section where Mr. Grubenhoff was standing, and that Mr. DeGraaf measured the relevant portion where Mr. Grubenhoff was standing as less than four feet deep. CP 531-532. Mr. DeGraaf's testimony is corroborated by photographic evidence: the photos of the "fin forms" (shoring) that were installed after the inspection, show the top edges of the shoring panels are higher than the edge of the ditch where Mr. Grubenhoff was pictured standing. These fin forms measure four feet high. *Compare* CP 689, 698 (Exhibits 13, 22, pictured below) *with* CP 677 (Exhibit 1).[1] *See also* CP 545-546 (Mr. DeGraaf testifying that no adjustment to the bottom of the ditch had been

[1] Before the Superior Court, the Department alleged that Mr. Grubenhoff testified that he and Mr. DeGraaf measured the ditch after Mr. Andemariam's inspection and found that some areas of the job site were more than 4 feet deep. However, Mr. DeGraaf clearly testified that the area of the ditch where he (Mr. DeGraaf) measured it to be over four feet deep was not the same area where Mr. Grubenhoff was standing. (CP 531) (Q: And that's the same area where Mr. Grubenhoff was in the trench, correct? A: No, ma'am.).

made since the date of the inspection at the time the photos at Exhibit 13 and 22 were taken). The far side of the ditch was secured by a cement retaining wall where Mr. Grubenhoff was standing. *See* CP 677 (Exhibit 1).

Exhibit 13, CP 689

Exhibit 22, CP 698

Exhibit 1, CP 677

As a result of Mr. Andemariam's inspection, the Department issued Infrasource a Citation and Notice of Assessment, which included three alleged violations, two of which were grouped together as Items 1-1a and 1-1b:

- Violation 1, Item 1-1a ("Item 1-1a") alleges a repeat serious violation of WAC 296-155-657(1)(a) for failing to have proper cave-in protection in a ditch four feet or greater in depth.
- Violation 1, Item 1-1b ("Item 1-1b") alleges a repeat serious violation of WAC 296-155-655(11)(b) for failing to ensure that the designated competent person was acting in a competent manner.
- Violation 2, Item 1 ("Item 2-1") alleges a serious violation of WAC 296-155-655(10)(b) for failing to ensure that there was at least 24 inches between the edge of the excavated material and the ditch.

Violation 1, Items 1-1a and 1-1b, is based on the premise that the section of the ditch where Mr. Grubenhoff was standing (CP 677; Exhibit 1) was four feet or greater in depth, despite the depth of the ditch being indiscernible in any of the photo exhibits.

B. PROCEDURAL BACKGROUND

After issuing the citation, the Department reassumed jurisdiction and reduced the penalty for grouped Violation 1, Items 1-1a and 1-1b from $12,000 to $6,000 as a reflection of the low probability of injury. CP 349, 373-376. The Department made no changes to Violation 2, Item 1.

Infrasource appealed the entire Citation (Violation 1, Items 1-1a and 1-1b, and Violation 2, Item 1) and a hearing was held via Zoom before the Board of Industrial Insurance Appeals ("Board") on November 16 and 17, 2020. The hearing judge's Proposed Decision & Order ("PD&O") affirmed Items 1-1a and 1-1b as revised by the Department after reassumption, and vacated Item 2-1. In regard to Item 2-1, the hearing judge found that the Department failed to meet its burden to establish that a violation occurred by failing to take a measurement of the distance from the spoils pile to the edge of the ditch and given the photographic evidence indicating there was no violation of the cited standard. *See* CP 101 (PD&O at 16:14-25). This was despite Mr. Andemariam's testimony that he recalled the spoils pile being closer than the required distance from the edge of the ditch.

Infrasource timely filed a Petition for Review of the PD&O to the Board and urged the Board to review and vacate Items 1-1a and 1-1b because, like Item 2-1, the Department similarly failed to establish that the

alleged violations occurred and other evidence in the record indicates there was no violation of the cited standards. The Board denied the Petition for Review, adopting the PD&O as the Board's final order.

Infrasource timely appealed to the Superior Court. CP 1-3. Following briefing from both parties and oral argument, on November 15, 2021, the Superior Court found that Findings of Fact numbers 5, 8, 9, 11, 18 and 19 and Conclusion of Law number 2 of the Board's Decision and Order were not supported by substantial evidence in the record. CP 882-883. Accordingly, the Superior Court reversed the Board's decision and vacated the Citation. *Id*.

The Department timely appealed to the Washington State Court of Appeals, Division I, on December 6, 2021, *Infrasource Services LLC v. Dep't of Labor and Indus.*, King County Cause No. 21-2-03755-7, Notice of Appeal to Washington State Court of Appeals, Division I, Dkt. #19 W1242. CP 885. The Court of Appeals filed an unpublished decision in this matter on October 17, 2022.

V. ARGUMENT

Under RAP 13.4(b)(4), a petition for review will be granted if the petition involves an issue of substantial public interest that the Supreme Court should consider. This petition for review involves such issues.

The Washington Industrial Safety and Health Act ("WISHA"), an Act created for the "public interest," strives "to assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the State of Washington." RCW 49.17.010.

The Court of Appeals reversed the Superior Court's Order finding the Board's Decision and Order was not supported by substantial evidence in the record. *See* Exhibit A. Findings of the Board must be supported by substantial evidence when considering the record as a whole. RCW 49.17.150(1). The Board's findings of fact are therefore reviewed to determine whether they are supported by substantial evidence and whether those findings support the conclusions of law. *Martinez Melgoza & Assoc., Inc. v. Dep't of Labor & Indus.*, 125 Wn. App. 843, 847-48, *review denied* 155 Wn.2d 1015 (2005). Substantial evidence exists when there is a sufficient quality of evidence to persuade a fair-minded, rational person that a finding is true. *State v. Hill*, 123 Wn.2d 641, 644 (1994). Conclusions of law must be appropriate based on the factual findings. *Danzer v. Dep't of Labor and Indus.*, 104 Wn. App. 307, 319 (2000). Courts review questions of law de novo. *Monroe v. Soliz*, 132 Wn.2d 414, 418 (1997).

Courts must review the Board's findings of fact to determine whether they are supported by substantial evidence when viewed in light

of the record as a whole. *Mowat Const. Co. v. Dep't of Lab. & Indus.*, 148 Wn. App. 920, 925 (2009) (citing RCW 49.17.150(1)). Following this standard of review, the Superior Court fully considered the materials submitted in support of and in opposition to Infrasource's appeal of the Board's Decision and Order and concluded the Board's findings of fact were not supported by substantial evidence in the record and that the conclusions of law were therefore not supported. CP 854, 866, and 882-883. The Superior Court then correctly vacated the Citation. The same standard of review applies here, and, after consideration of the record, this Court could likewise come to the same conclusion as the Superior Court.

Review of this matter will clarify what evidence is required in order to be considered "substantial" evidence. That is, what quantum of evidence is sufficient to persuade a fair-minded person that the Department's assertion of a violation is correct, particularly where, as here, the Department's own photographic evidence does not corroborate the inspector's testimony that a violation existed, as compared to the employer's testimony and conclusive photographic evidence that demonstrates no violative condition existed. *J.E. Dunn Nw.*, 139 Wn. App. 35, 43, 156 P.3d 250 (2007). Because the WISHA standards are specifically designed to promote "public interest," clarification on these

issues related to WISHA compliance involves issues of substantial public interest that the Supreme Court should determine. RCW 49.17.010.

VI. CONCLUSION

Infrasource respectfully requests that the Court accept Infrasource's Petition for Review because this review involves matters of substantial public interest.

I hereby certify that the foregoing contains 2,108 words in accordance with RAP 18.17.

DATED this 16th day of November, 2022.

FOX ROTHSCHILD LLP

By: *s/ Skylar A. Sherwood*
Skylar A. Sherwood, WSBA #31896
Attorney for Appellant Infrasource Services LLC

CERTIFICATE OF SERVICE

I, Courtney R. Brooks, certify that:

1. I am an employee of Fox Rothschild LLP, attorneys for Appellant in this matter. I am over 18 year of age, not a party hereto, and competent to testify if called upon.

2. On November 16, 2022, I served a true and correct copy of the foregoing document on the following party, attorney for Respondent, via US Mail and addressed as follows:

Paul Weideman
800 5th Avenue, Ste. 2000
Seattle, WA 98104-3188
Email: Paul.Weideman@atg.wa.gov

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Seattle, Washington, this 16th day of November, 2022.

Courtney R. Brooks

EXHIBIT A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

INFRASOURCE SERVICES, LLC, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	DIVISION ONE No. 83515-7-I UNPUBLISHED OPINION

DWYER, J. — The Department of Labor and Industries (the Department) appeals from the superior court order vacating a citation issued to InfraSource Services, LLC (InfraSource) for failing to install required cave-in protection in a trench four feet or greater in depth. Because substantial evidence supports the Board of Industrial Insurance Appeal's (the Board's) findings that the unprotected trench was four feet or greater in depth, we reverse the order of the superior court and reinstate the decision of the Board.

I

InfraSource is a company that installs gas piping. In June 2019, an InfraSource plat crew was tasked with installing and connecting gas piping in an existing trench at the housing development located at 5825 83rd Avenue, Marysville, Washington.

On June 6, 2019, Dan Andemariam, a Department Compliance Safety and Health Officer, was conducting site surveillance in Marysville when he "saw a head pop out of a hole." The "hole" was in fact an excavated trench. On that day, the trench did not have in place any trench boxes, fin forms, or other shoring material designed to prevent cave-ins.

Four InfraSource workers were present on site. Three of the workers were standing near the trench and the other was in the trench itself. The InfraSource employee standing in the trench was identified as Benjamin Grubenhoff. Grubenhoff told Andemariam that he was instructed by his foreman, Peter DeGraaf, to enter the trench so as to ensure that a guide wire did not snag or bunch up. At the time Andemariam arrived, Grubenhoff had been in the trench for no more than five minutes.

Andemariam measured the depth of the trench in two locations using his tape measure. He also took photographs of those measurements. Based on his measurements, Andemariam determined that the trench was greater than four feet deep.

Andemariam returned to the worksite a few days later. By that time, InfraSource had installed fin forms along the walls of the trench. These fin forms measured four feet high by eight feet long. Andemariam took photographs of the trench with the shoring plates installed.

The Department issued a citation to InfraSource for three violations of the Washington Industrial Safety and Health Act[1] (WISHA). Specifically, the

[1] Ch. 49.17 RCW.

Department alleged that InfraSource had committed a serious repeat violation of WAC 296-155-657(1)(a),[2] a serious repeat violation of WAC 296-155-655(11)(b),[3] and a serious violation of WAC 296-155-655(10)(b).[4] The total monetary penalty assessed for these violations was $8,000.

InfraSource appealed, contending that it had not committed any violations and, in the alternative, that any violations were the result of unpreventable employee misconduct. Following a hearing, Industrial Appeals Judge William Andrew Myers issued his proposed decision and order. Therein, Judge Myers concluded that, "On June 6, 2019, InfraSource committed repeat serious violations of the provisions of WAC 296-155-657(1)(a) and of WAC 296-155-655(11)(b) as alleged." Conclusion of Law 2. InfraSource petitioned for review, arguing that the Department failed to prove that the trench was four feet or

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[2] (a) You must protect each employee in an excavation from cave-ins by an adequate protective system designed in accordance with subsections (2) or (3) of this section except when:

(i) Excavations are made entirely in stable rock; or

(ii) Excavations are less than 4 feet (1.22m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

[3] Where the competent person finds evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, you must remove exposed employees from the hazardous area until the necessary precautions have been taken to ensure their safety.

[4] You must protect employees from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection must be provided by placing and keeping such materials or equipment at least two feet (.61 m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

This allegation was dismissed by the Board. The Department does not challenge that decision.

greater in depth. The Board adopted Judge Myers' findings and conclusions in full as its decision.

InfraSource appealed this decision to the King County Superior Court. The superior court found that key findings of fact and a key conclusion of law were not supported by substantial evidence. The superior court therefore reversed the Board's order and vacated all penalties assessed to InfraSource.

II

The Department contends that the decision of the superior court should be reversed, because, contrary to the superior court's ruling, substantial evidence supports the Board's findings and conclusions that InfraSource employees had access to an unprotected trench greater than four feet in depth. We agree.

We review a decision of the Board based on the record before the agency. Cent. Steel, Inc. v. Dep't of Labor & Indus., 20 Wn. App. 2d 11, 21, 498 P.3d 990 (2021), review denied, 199 Wn.2d 1020 (2022). We "review findings of fact to determine whether they are supported by substantial evidence and, if so, whether the findings support the conclusions of law." J.E. Dunn Nw., Inc. v. Dep't of Labor & Indus., 139 Wn. App. 35, 42-43, 156 P.3d 250 (2007) (citing Inland Foundry Co. v. Dep't of Labor & Indus., 106 Wn. App. 333, 340, 24 P.3d 424 (2001)). Evidence is substantial if it is sufficient to convince a fair-minded person of the truth of the stated premise. Cent. Steel, 20 Wn. App. 2d at 22. We do not reweigh evidence but instead construe the evidence in the light most favorable to the party that prevailed in the administrative proceeding—here, the Department. Cent. Steel, 20 Wn. App. 2d at 22.

The purpose of WISHA is to "assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington." RCW 49.17.010. The Department of Labor and Industries is charged with the authority to impose citations and penalties against employers for violating WISHA regulations. RCW 49.17.050, .120, .180. At the administrative level, the Department bears the initial burden of proving the existence of the cited violations. WAC 263–12–115(2)(b); SuperValu, Inc. v. Dep't of Labor & Indus., 158 Wn.2d 422, 433, 144 P.3d 1160 (2006).

To establish a violation of a WISHA regulation, the Department must prove 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; [and] (4) the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition."

SuperValu, Inc., 158 Wn.2d at 433 (alteration in original) (quoting Wash. Cedar & Supply Co. v. Dep't of Labor & Indus., 119 Wn. App. 906, 914, 83 P.3d 1012 (2004)). "To establish employee access, the Department must show by '*reasonable predictability* that, in the course of [the workers'] duties, employees will be, are, or have been in the zone of danger.'" Mid Mountain Contractors, Inc. v. Dep't of Labor & Indus., 136 Wn. App. 1, 5, 146 P.3d 1212 (2006) (alteration in original) (quoting Adkins v. Alum. Co. of Am., 110 Wn.2d 128, 147, 750 P.2d 1257 (1988)); accord Shimmick Constr. Co. v. Dep't of Labor & Indus., 12 Wn. App. 2d 770, 785, 460 P.3d 192 (2020).

WISHA's rules on excavations apply to "[a]ny person-made cut, cavity, trench, or depression in the earth's surface, formed by earth removal." WAC 296-155-650(2). WAC 296-155-657(1)(a) states that employers

> must protect each employee in an excavation from cave-ins by an adequate protective system . . . except when:
> (i) Excavations are made entirely in stable rock; or
> (ii) Excavations are less than 4 feet (1.22m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

At issue here is whether the Department met its burden to demonstrate that the trench was four feet or greater in depth and therefore required cave-in protection.

Construing the evidence in the light most favorable to the Department, the evidence presented to the Board was sufficient to demonstrate that the trench was four feet or greater in depth. Among the exhibits admitted by the Industrial Appeals Judge are three photographs depicting Andemariam's measurement of the trench at the precise spot where Grubenhoff was standing. At the hearing before the Board, Andemariam reviewed these photographs and testified that "I believe if you were to focus in on the tape measure, you would see that it's approximately 5 feet in depth." Andemariam also testified that he independently recalled that the trench "was greater than 4 feet and slightly deeper than 5."

InfraSource contends that these photographs, and Andemariam's corresponding testimony, were "fatally flawed" because the angle of the photographs does not make it sufficiently clear where the top of the trench was with respect to the tape measure. InfraSource did not challenge the admissibility of the photographs, nor does it do so on appeal. As such, its argument is best

suited to the trier of fact, not to an appellate court. Once a photograph has been admitted, the opposing party "may, of course, attempt to show its flaws, inaccuracies, or alteration." 5C KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 901.21, at 315 (6th ed. 2016). Ultimately, however, it is for the finder of fact to determine what a photograph depicts. See Hansel v. Ford Motor Co., 3 Wn. App. 151, 160, 473 P.2d 219 (1970) (whether photograph depicted a mechanical defect was an issue for the jury).

Furthermore, the Board heard testimony from two InfraSource employees who also indicated that the trench was four feet or greater in depth. Benjamin Grubenhoff, the worker who had been standing in the trench, recognized the photograph depicting him in the trench as "[t]he spot that the ditch was too deep." Grubenhoff also testified that after Andemariam's inspection, he and DeGraaf measured the trench and found that "[s]ome areas of the job site were unsafe" because "[t]he trench was more than 4 feet" deep. Additionally, DeGraaf testified that he and field safety coordinator Jeremy Ophus took independent measurements in order to determine the size of shoring panels needed. Those measurements also indicated that the trench was over four feet deep.[5] The Board found Grubenhoff's and DeGraaf's testimony especially compelling and we will not disturb that determination.

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[5] "Q. . . . Mr. De Graaf, would you agree with me that one of the measurements you took of this trench with Mr. Ophus indicated that the trench was over 4 feet in depth?

A. Yes."

"Q. Did you previously testify in this case that on the left side of the shoring jack the trench was not over 4 feet in depth when you and Mr. Ophus measured it, on the right side of the shoring jack it was over 4 feet in depth?

A. Yes, ma'am."

InfraSource's argument to the contrary is rife with attacks on the evidence presented to the Board as "unconvincing" (Br. of Resp't at 17), "unreliable" (Br. of Resp't at 21), "contradicted by other evidence" (Br. of Resp't at 22), and "not persuasive" (Br. of Resp't at 24).[6] Essentially, InfraSource asks us to reconsider the weight of the evidence presented to the Board. We decline to do so.

Substantial evidence supports the Board's findings that the existing trench located at 5825 83rd Avenue, Marysville, Washington was greater than four feet in depth and that InfraSource failed to have any cave-in protection in place. The Board's findings support its determination that InfraSource committed repeat serious violations of WAC 296-155-657(1)(a) and 296-155-655(11)(b). The Superior Court erred when it overturned the decision of the Board.

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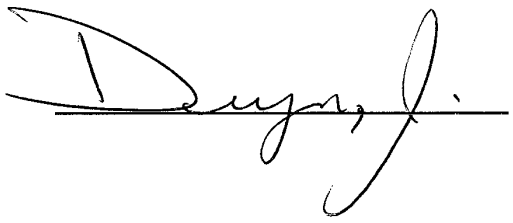
[6] InfraSource also asserts that there was no showing that its employees had access to another part of the trench that was indisputably hazardous, as none of its employees were present in that area. We disagree.

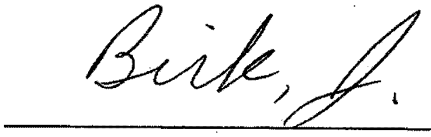
As an initial matter, the Board found that the area where Grubenhoff was *actually* present was greater than four feet deep. We hold today that substantial evidence supports that finding.

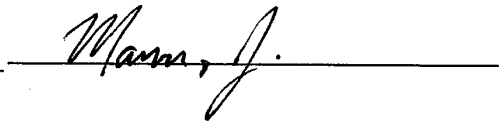
Even if we had not so held, there is substantial evidence to support a finding that InfraSource employees had access to the portion of the trench that it agrees was four feet or greater in depth. Contrary to InfraSource's argument, the proper standard is whether the employees had access to the hazard, not whether they were actually present in the hazardous area. Mid Mountain Contractors, 136 Wn. App. at 6. Andemariam testified that InfraSource was "fitting pipes all along that street" and that Grubenhoff informed him that after InfraSource fit the pipe, Grubenhoff "goes in [the trench] to make sure that the pipe is not banging against the wall." DeGraaf also testified that there were some connections that needed to be made inside the trench. The photographs taken of the indisputably hazardous area depict InfraSource's yellow piping in the trench. From this evidence, a reasonable fact finder could infer that InfraSource's employees had access to an area of the trench four feet or greater in depth.

Reversed.



WE CONCUR:





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