NO. 96406-8

SUPREME COURT
STATE OF WASHINGTON

INFRASOURCE SERVICES LLC,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

DEPARTMENT OF LABOR & INDUSTRIES ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Infrasource Services LLC exposed its workers to dangerous conditions in a trench in violation of work place safety regulations. A foreperson was next to the trench, observing the workers. Under Washington law, the foreperson's knowledge is imputed to the employer. The Board of Industrial Insurance Appeals found that Infrasource knew of the violation because the foreperson observed it and because it was in plain view. Having found this, the Board concluded the violation was a serious violation. It also rejected Infrasource's unpreventable employee misconduct defense. Infrasource now requests review on these issues, which this Court should reject for three reasons.

First, Infrasource asks this Court to review an issue related to foreperson knowledge but the company did not raise the issue at the administrative level, at the superior court, or at the Court of Appeals. Because it was not raised previously, this Court should not consider it.

Second, Infrasource asks for a more rigorous test for knowledge under the Washington Industrial Safety and Health Act (WISHA) than Washington law provides. It argues that the Board must find that the foreperson's involvement in the safety violation was foreseeable to the employer. This is not the test. WISHA imputes knowledge to an employer if a supervisory agent witnesses a work place safety violation. Contrary to

Infrasource's argument, the Department does not have to demonstrate that a violation was foreseeable to show that the employer had knowledge of it. Rather, foreseeability is relevant only to the affirmative defense of unpreventable employee misconduct, which the employer has the burden of proving. Infrasource's request to change Washington law contradicts the broad remedial purposes of WISHA to protect workers.

Third, Infrasource suggests that the case raises an issue about unpreventable employee misconduct, but does not present any argument on the issue and the Court should therefore not consider it.

No issue of substantial public interest is raised by a case in which all of the petitioner's arguments are either inconsistent with Washington law or were not preserved. This Court should deny review.

II. ISSUE

The Petition presents two issues, neither of which warrant this Court's review.

1. To establish a serious violation of WISHA, the Department of Labor and Industries must show that the employer knew or with reasonable diligence could have known of the violation. Infrasource knew about the violation through its foreperson and, in addition, the violation was in plain view. Does substantial evidence support finding that

Infrasource knew of the violation for purposes of establishing it as a serious violation, regardless of whether the violation was foreseeable?

2. Unpreventable employee misconduct is an affirmative defense that the employer must establish by showing, among other things, that it has effectively enforced its safety program as written, in practice and not just in theory. Infrasource provided no evidence of disciplining employees before the violations at issue, Infrasource's own foreperson participated in the violations, and Infrasource communicated the incorrect safety standard to its employees in its safety manual. Does substantial evidence support the Board's finding that the program was not effective in practice?

III. STATEMENT OF THE CASE

A. Infrasource Crewmembers Worked in a Trench Under the Supervision of an Infrasource Foreperson Without a Cave-In Prevention System

Infrasource performs natural gas pipe installations and often has employees work in trenches as part of its business. *See* AR Bartells 55; AR Auckland 38.[1] In September 2014, an Infrasource crew worked on a gas main project in Tumwater. AR Auckland 38. The project involved

[1] "AR" refers to the administrative record in the certified appeal board record. The record is not consecutively numbered so the brief references witness testimony by "AR" followed by the witness's last name.

excavating and installing pipe sections in a trench. AR Auckland 38-39. An Infrasource foreperson supervised the crew. AR de Leon 12.

When working on the project, two workers entered the trench without measuring its depth. AR Auckland 44. Washington regulations require employers to protect workers from potential cave-ins for trenches that are four feet deep or more by using a protective system to prevent collapse. *See* WAC 296-155-657. The trench exceeded four feet in depth, and Infrasource placed no protective system against cave-ins while the crewmembers worked in it. AR Auckland 39; AR de Leon 16. While the workers were in the trench, their foreperson operated an excavator close by. AR de Leon 32-33.

Infrasource exposed both workers to a potential cave-in from disturbed soils. AR de Leon 18. If a cave-in occurred, the soils would engulf the men, resulting in broken bones, collapse of the chest cavity, or death. AR de Leon 27-28.

B. The Board, Superior Court, and Court of Appeals Affirmed the Department's Citation

A Department inspector investigated the work site after observing the workers in the unprotected trench. AR de Leon 11. Because Infrasource's trenching violations placed its workers at risk for serious bodily harm, the Department issued a citation for trenching violations. AR

de Leon 27-28; AR 32-33. At hearing, Infrasource raised the affirmative defense of unpreventable employee misconduct. To support its defense, Infrasource provided evidence of training and safety meetings. Exs 5-8. But Infrasource could not dispute that it provided its employees with a manual that stated shoring in a trench is required only if a trench is deeper than five feet, even though Washington's standard is four feet. Ex 5 at 35; WAC 296-155-657(1)(a). Infrasource also provided scant evidence of discipline related to its safety program as required by the unpreventable employee misconduct defense.

The Board affirmed the citation. AR 3, 28-29. To determine whether the violation was serious, the Board considered whether Infrasource knew or should have known about the violation. RCW 49.17.180. It found that "[o]n September 8, 2014, the supervisor for Infrasource allowed the two employees to enter the trench when he had a plain view of the surrounding work area." AR 28. It found that Infrasource's actions called into question the training that the company had provided to the foreperson supervisor. AR 27. The Board also found that Infrasource did not effectively enforce its safety rules regarding use of trenching protections, and concluded it did not meet the defense of unpreventable employee misconduct. AR 3, 28.

Infrasource appealed to superior court, which affirmed the Board. CP 42. Infrasource then appealed to the Court of Appeals. The Court of Appeals held that the Board correctly found that the company had knowledge because the violation was in plain view and because the supervisor knew of the violation. *Infrasource Serv. LLC v. Dep't of Labor & Indus.*, No. 50867-2, slip op. at 11 (Wash. Ct. App. Sept. 11, 2018) (unpublished). The Court of Appeals also held the Board correctly found that Infrasource did not prove unpreventable employee misconduct. Slip op. at 8. This was because Infrasource's supervisor observed the violation, the company's written policies contradicted the applicable legal standard, Infrasource did not document that it consistently enforced its written disciplinary policy, and its employees were unsure about how the company might discipline them for a particular violation. Slip op. at 8.

IV. REASONS WHY THE PETITION SHOULD BE DENIED

Infrasource's petition identifies two issues but neither warrants review. First, Infrasource raises an issue about how to determine knowledge to determine whether a violation is serious that it did not raise at the Board, the superior court, or Court of Appeals, thus waiving the argument. Both WISHA and RAP 2.5 bar Infrasource from raising this new issue on appeal.

Moreover, even if this issue were preserved, review is not warranted because Infrasource's proposed foreperson knowledge test contradicts WISHA. The Court construes WISHA statutes and regulations "liberally to achieve their purpose of providing safe working conditions for workers in Washington." *Frank Coluccio Constr. Co. v. Dep't of Labor & Indus.*, 181 Wn. App. 25, 36, 329 P.3d 91 (2014). Neither the plain language of the knowledge statute, RCW 49.17.180(6), nor the relevant case law requires the Department to prove foreseeability to impute a supervisor's knowledge to the employer. Foreseeability goes to the affirmative defense of unpreventable employee misconduct under RCW 49.17.120, not knowledge under RCW 49.17.180. For these reasons, the federal law to which Infrasource points does not apply in Washington.

Second, it asks the Court to review the Board's determination that Infrasource failed to demonstrate the affirmative defense of unpreventable employee misconduct. But it gives no reason for the Court to review this issue and the Court should deny review.

A. Infrasource's Objection to Imputing a Supervisor's Knowledge to an Employer Shows No Issue of Substantial Public Interest Because it Relies on Federal Law That Is Inconsistent with Washington Law

To prove a "serious" violation of WISHA at the Board, the Department must show that the employer "knew or, through the exercise

of reasonable diligence, could have known of the violative condition[s]." *Wash. Cedar & Supply Co., Inc. v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 914, 83 P.3d 1012 (2003); RCW 49.17.180(6). The requisite knowledge may be imputed to the employer through a supervisory agent—such as a crew foreperson. *Potelco, Inc. v. Dep't of Labor & Indus.*, 194 Wn. App. 428, 440, 377 P.3d 251, *review denied*, 186 Wn.2d 1024 (2016).

Infrasource acknowledges that knowledge may be imputed to an employer through a supervisory agent such as a foreperson. Pet. 8-9. This is reasonable because "a corporate employer can, of course, only act through its agents . . . and the supervisor acts as the 'eyes and ears' of the absent employer." *ComTran Grp., Inc. v. Dep't of Labor*, 722 F.3d 1304, 1317 (11th Cir. 2013). But Infrasource argues the Court should follow the approach of some federal circuits construing federal law, which have adopted a stricter test for imputing knowledge when a foreperson has participated in a safety violation. Pet. 9. In those circuits, it is not enough to show that the foreperson observed the violative conduct. Rather, the federal government must also produce evidence to show that the employer could have foreseen the supervisor's violation. Pet. at 9 (citing, *e.g.*, *ComTran Grp.*, 722 F.3d at 1317).

Infrasource's issue does not merit review for two reasons: first, Infrasource did not raise it below, and second, the argument contradicts Washington law.

1. Infrasource did not raise its foreperson knowledge argument below, and so the Court should not consider the issue

Infrasource seeks to impose a standard that requires additional evidence about foreseeability when it did not raise this argument at the administrative level as required by WISHA. Infrasource's petition for review in this Court is the first time the company raised an argument about its proposed foreperson knowledge test. *See* Appellant's Br. 21; Reply 4; Trial Br. 18-19; Trial Br. Reply 37-38; AR 19. This is fatal to the petition because WISHA requires a party to raise objections at the Board for judicial consideration. RCW 49.17.150(1) ("No objection that has not been urged before the board shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."); *Prezant Assocs., Inc. v. Washington State Dep't of Labor & Indus.*, 141 Wn. App. 1, 10 n.4, 165 P.3d 12 (2007) (could not argue for first time on appeal that Department did not establish that a contractor was an agent). "Unlike the permissive language in RAP 2.5(a), RCW 49.17.150 mandates [raising objections at the Board.]" *Dep't of Labor & Indus. v. Nat'l Sec. Consultants, Inc.*, 112 Wn. App. 34, 37, 47

P.3d 960 (2002). Because Infrasource did not object to non-application of its proposed test at the administrative level, it cannot raise it now.

There are numerous reasons why a party must exhaust administrative remedies by raising issues at the administrative level. By not raising the objection at the Board, Infrasource deprived the Department of the opportunity to present evidence on the issue before the fact-finder. The exhaustion requirement ensures development of a record, as well as facilitating the exercise of administrative expertise, allowing correction of errors, and preventing circumvention of procedures. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 866, 947 P.2d 1208 (1997). Infrasource failed to exhaust its administrative remedies when it did not raise its foreperson knowledge test at the Board.

Similarly, RAP 2.5 prevents new issues from being raised for the first time on appeal absent manifest constitutional error. *Buecking v. Buecking*, 179 Wn.2d 438, 454-55, 316 P.3d 999 (2013). Infrasource does not contend, nor could it, that its foreperson knowledge test involves a manifest error of constitutional import.

For all these reasons, the Court should not consider Infrasource's newly raised issue.

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2. The Board's approach to foreperson knowledge is consistent with Washington law

The Board's approach to finding employer knowledge when a supervisory agent observed the conduct—regardless of the level of the agent's participation in the violation—adheres to Washington law. Infrasource seeks to add another element to the supervisory imputation test based on federal case law. Pet. 9. But Washington has not taken this approach.

RCW 49.17.050(2) requires the Department to adopt occupational health and safety standards that are at least as effective as those adopted under the federal Occupational Safety and Health Act. Courts often look to federal case law when interpreting WISHA. *See Asplundh Tree Expert Co. v. Dep't of Labor & Indus.*, 145 Wn. App. 52, 60, 185 P.3d 646 (2008). But Washington may have standards that are more protective. *Aviation W. Corp. v. Dep't of Labor & Indus*., 138 Wn.2d 413, 424, 980 P.2d 701 (1999). And resort to federal case law is inappropriate when Washington WISHA law provides controlling precedent. *See Express Const. Co. v. Dep't of Labor & Indus.*, 151 Wn. App. 589, 599 n.8, 215 P.3d 951 (2009).

Washington law does not require the Department to show foreseeability of a supervisor's misconduct when establishing imputed

employer knowledge. *See Potelco*, 194 Wn. App. at 440. The statute about knowledge, RCW 49.17.180(6), requires only that the employer knew or, through the exercise of reasonable diligence, could have known of the violative conditions. There is no statutory requirement for the Department to prove, or for the Board to find, that the actions of the employer's foreperson were foreseeable.

In fact, placing a foreseeability burden on the Department contradicts Washington law because foreseeability goes to an employer's unpreventable employee misconduct defense, which in Washington is the employer's burden to prove. RCW 49.17.120. As the Court in *BD Roofing, Inc. v. Washington State Department of Labor & Industries* first held, to meet this affirmative defense, an employer must show that its "employees' misconduct was an isolated occurrence and was not foreseeable." 139 Wn. App. 98, 111, 161 P.3d 387 (2007). This test is well recognized in Washington. *W. Oilfields Supply v. Dep't of Labor & Indus.*, 1 Wn. App. 2d 892, 907, 408 P.3d 711 (2017); *Potelco*, 194 Wn. App. at 435; *Wash. Cedar & Supply Co.,* 119 Wn. App. at 912.

Case law affirms that proof of foreseeability is unnecessary in Washington to prove that an employer knew or could have known about the violation under RCW 49.17.180. In *Potelco*, the foreperson was directly involved in the commission of the violation (unlike here where the

foreperson only observed it). 194 Wn. App. at 432. Even so, the Court of Appeals had no difficulty determining that the Board correctly found that the employer had knowledge through its foreperson. *Potelco,* 194 Wn. App. at at 440. It did not require proof of foreseeability of the foreperson's misconduct. *See id*. This approach is necessary to preserving and promoting WISHA. An employer could otherwise claim a foreperson is "involved" in a violation when the foreperson observes an employee's misconduct and then avoid being charged with imputed knowledge for serious violations. After all, in that event, the foreperson has not stopped the safety violation from happening. Thus, when a foreperson observes or participates directly in a violation, under Washington law, the foreperson's knowledge is imputed to the employer. *Potelco*, 194 Wn. App. at 440. Adding additional requirements for proving employer knowledge would undermine the purpose of WISHA to ensure worker safety. RCW 49.17.010.

In any event, other federal courts do not require the additional proof of foreseeability sought by Infrasource here. *E.g.*, *Danis-Shook Joint Venture XXV v. Sec'y of Labor*, 319 F.3d 805, 812 (6th Cir. 2003). And even those federal courts that have adopted a foreseeability test do not require proof of foreseeability under the facts presented here. The *ComTran Group* line of cases distinguishes between forepersons actively

participating in a violation and forepersons who are merely bystanders. When a foreperson is a bystander, the *ComTran Group* line of cases does not require the government to show foreseeability. *See ComTran Grp.*, 722 F.3d at 1311-18.

Here, the foreperson was a bystander because he was not in the trench. AR de Leon 32-33. So even if the *ComTran Group* test applied in Washington, it would not apply to the facts here. And even if it applied, the foreperson's actions were foreseeable because Infrasource failed to train him properly. The company offers no argument to contradict this finding of the Board. AR 27. This Court should deny review where Infrasource's proposed foreperson knowledge test, aside from being inconsistent with Washington law, is inapplicable under the facts of the case.

The Board properly followed Washington law in finding employer knowledge in part based on the knowledge of Infrasource's foreperson. This Court should deny review.

B. Infrasource's Substantial Evidence Challenge Does Not Present Issues of Substantial Public Interest

In this case, the appeals at the superior court and Court of Appeals were resolved through application of the substantial evidence standards. The Board had two bases for finding knowledge based on the record:

imputation of foreperson knowledge and application of the plain view doctrine. Besides imputation of foreperson knowledge, the Department may also establish knowledge if a violation is readily observable or in a conspicuous location in the area of the employer's crews (i.e. "plain view"). *Erection Co. v. Dep't of Labor & Indus.*, 160 Wn. App. 194, 207, 248 P.3d 1085 (2011). When a violation is in the open and visible to any bystander, an employer constructively knows of that violation. *Potelco*, 194 Wn. App. at 440.

Here, the record shows that Infrasource's foreperson was present at the scene, and the violation was in plain view, so substantial evidence supports the Board's finding of employer knowledge. AR de Leon 32-33. And even if Infrasource's argument that the foreperson's knowledge should not be imputed to Infrasource had any merit, the trial court and Court of Appeals still properly affirmed the Board decision because the violation was in plain view, and this alone establishes the employer's knowledge of the violation. Infrasource does not contest the Court of Appeals' determination that the violation was in plain view, thus conceding the issue.

Furthermore, the mere fact that this is a WISHA case does not show that review should be granted. Infrasource suggests that because RCW 49.17.010 finds it is "in the public interest for the welfare of the

people of the state of Washington" "to assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington" that this matter is one of significant public interest. *See* Pet. 6. But by this reasoning, every WISHA case would meet the criteria for review in RAP 13(b)(4), and that is surely not the law. And whether the findings in this case are supported by substantial evidence is not an issue of broad public import that warrants this Court's review.

C. Infrasource Offers No Reason to Review the Issue of Unpreventable Employee Misconduct, and None Exists

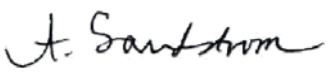
Infrasource asks the Court to review the Board's determination that Infrasource failed to demonstrate the affirmative defense of unpreventable employee misconduct. But it offers no argument about why that issue warrants this Court's review, and the Court should reject that issue on that basis alone. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Infrasource's defense does not raise an issue of broad importance because it is unique to the facts of this case and Infrasource does not suggest there is any conflict about this defense in the courts that justifies this Court's review.

V. CONCLUSION

Infrasource's argument regarding the foreseeability of a foreperson's actions was not preserved below, contradicts WISHA and Washington case law, and is unsupported by the facts. Infrasource's suggestion that it established unavoidable employee misconduct also fails as Infrasource neither supported this suggestion with argument nor established that the Board's finding lacked substantial evidence. Neither of Infrasource's arguments demonstrate an issue of substantial public interest. This Court should deny review.

RESPECTFULLY SUBMITTED this 13th day of December, 2018.

ROBERT W. FERGUSON
Attorney General



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SUPREME COURT OF THE STATE OF WASHINGTON

INFRASOURCE SERVICES, LLC, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department of Labor & Industries' Answer to Petition for Review and this Certificate of Service in the below described manner:

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Supreme Court of the State of Washington

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DATED this 13th day of December, 2018.

SHANA PACARRO-MULLER
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