Supreme Court No. 96406-8

Court of Appeals, Division II, No. 50867-2-II

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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STATE STATUTORY AUTHORITIES

I. IDENTITY OF PETITIONER

Infrasource Services LLC is a Delaware limited liability company that performs utility construction services. Infrasource requests that this Court accept review of the Court of Appeals' decision, which affirmed the Board of Industrial Insurance Appeals' ("Board") decision upholding citations issued 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The Court of Appeals filed an unpublished decision in this matter on September 11, 2018. A copy of the decision is attached hereto as Exhibit A.

III. ISSUE PRESENTED FOR REVIEW

1. When an employer takes all reasonable measures to have an effective accident prevention program and consistently (a) provides effective training and reinforces that training; (b) provides all necessary safety equipment; (c) performs safety inspections; and (d) administers a progressive disciplinary policy to ensure compliance with those policies, does the employer establish the unpreventable employee misconduct ("UEM") defense to a Washington's Industrial Safety and Health Act ("WISHA") violation?

2. Is a WISHA violation improperly classified as serious when an employer did not know, nor could have known with reasonable diligence, that a supervisor-employee would disregard repeated instructions to follow safety rules?

IV. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

1. Infrasource's Safety Program

Infrasource Services, LLC ("IFS") has a first class safety program that is designed to protect its workers and keep them healthy and safe. IFS regularly trains its employees on its safety rules, monitors employees to ensure they comply with those rules, and counsels or disciplines employees who violate those rules.

2. The Tumwater Project

On September 8, 2014, an IFS crew was installing a gas main at a job site on Capital Boulevard in Tumwater, Washington. (Hearing Testimony of Chad Auckland ("Auckland") at 38)[1]. The crew consisted of foreman Mike Sawyer, fitter[2] Chad Auckland, and Carson Row. (Hearing Testimony of Raul de Leon ("de Leon") at 30).

The crew had been working together for at least a year, and had been working on this particular project for at least a week, without issue. (Auckland at 41). To complete their tasks, crew members needed to work in a trench. (*Id*. at 38). They had all the necessary tools and equipment on site to perform this work safely and in accordance with WISHA

[1] All citations to "Hearing Testimony of…" (followed by name and citation to record) refer to the transcript of the hearing held at the Board of Industrial Insurance Appeals office in Olympia on February 11, 2016, in front of Administrative Law Judge Stewart.

[2] As a fitter, Mr. Auckland was tasked with fusing plastic pipe, "basically just melting the two pieces of plastic together." (Auckland at 38-39).

regulations and IFS's safety rules, including speed shoring[3]. (*Id*. at 45; de Leon at 32). The crew was well-trained on trenching safety and knew that they should not work in any trench over four feet deep unless that trench was properly shielded or shored. (Auckland at 45; de Leon at 31, 33; Hearing Testimony of Alexander Bartells ("Bartells") at 103-105; Hearing Exs. 6-8).

Prior to beginning work that day, the crew conducted a safety meeting, led by foreman Mike Sawyer, and documented this meeting on an IFS Job Hazard Analysis form ("JHA"), as is standard practice on all IFS jobs. (Auckland at 42-43; de Leon at 34; Bartells at 77-81; Hearing Ex. 3). During that meeting, the crew discussed the hazards that they were likely to face on the job, and ways to safely work and mitigate those hazards; hazards such as trenching cave-ins, which can be prevented by properly using shoring. (Hearing Ex. 3; Auckland at 41-43). Messrs. Sawyer, Auckland, and Row had all been previously trained on trenching safety, and Messrs. Sawyer and Auckland had also previously received competent person training; training which delves even further into trenching safety, and the importance of adhering to state regulations and company safety policies. (Auckland at 43-44; Hearings Exs. 6,7,15; Bartells at 66-68).

Despite their extensive training, Messrs. Auckland and Row entered a trench without measuring the trench, and in doing so, violated

[3] Shoring is a system used in trenches to protect against cave-ins.

IFS's safety rules. (Auckland at 39, 44). There were no protective systems in place in that trench, which was over four feet deep, even though these employees knew that protection, such as shoring, must be in use in trenches of that depth. (Auckland at 45; de Leon at 15, 30-32).

3. The Inspection

Raul de Leon, a Compliance Safety Officer for the Department of Labor and Industries, had been driving near the IFS worksite with his supervisor. (de Leon at 11). They stopped because he saw two individuals in a trench; a trench that Mr. de Leon believed was more than four feet deep. (*Id*.) After he and his supervisor identified themselves and conducted an opening conference, Mr. de Leon measured the depth of the trench in the place where the two individuals, Messrs. Auckland and Row, had been standing – the trench was five feet and one inch deep. (*Id*. at 18; Hearing Ex. 1). At the time that Messrs. Auckland and Row were in the trench, the foreman, Mr. Sawyer, was operating an excavator, within sight of the employees in the trench. (de Leon at 26; Auckland at 45-46).

Through his interviews with the crew, Mr. de Leon determined that they had the required safety equipment on-site to properly shore the trench, but, in spite of their extensive training on the subject, neglected to use this equipment. (de Leon at 18, 30-32).

Fortunately, the trench did not cave in, and no one was injured as a result of the employees' failure to properly shore (or otherwise protect) this trench. (de Leon at 29-30).

Following IFS's inspection of this incident, Messrs. Sawyer, Auckland, and Row were all disciplined, and the company conducted retraining for all area employees. (Bartells at 102, 116; Auckland at 51-52). Prior to this incident, none of these employees had been disciplined or had been found to have violated safety rules at IFS. (Bartells at 102; Auckland at 51).

As a result of Mr. de Leon's inspection, the Department issued IFS the Citation, which includes two alleged violations:

- Violation 1, Item 1a ("Item 1-1a") alleges a serious violation of WAC 296-155-657(1) (a) for failing to have proper cave-in protection in a trench deeper than four feet.
- Violation 1, Item 1b ("Item 1-1b") alleges a serious violation of WAC 296-155-655(11)(b) for failing to assure that the designated competent person was acting in a competent manner.

B. PROCEDURAL BACKGROUND

IFS appealed this Citation and Notice of Assessment and a hearing was held in Olympia at the Board of Industrial Insurance Appeals ("Board") before Judge Stewart on February 11, 2016. Following the hearing, both IFS and the Department submitted post-hearing briefs[4] to Judge Stewart, who issued a Proposed Decision and Order ("PD&O") affirming the Citation. IFS filed a timely Petition for Review. The Board

[4] IFS mistakenly titled its Post-Hearing Brief "Petition for Review."

affirmed Judge Stewart's decision in its March 16, 2016 Final Decision and Order affirming the Citation. IFS timely appealed the Board's decision to Thurston County Superior Court. Following a hearing on May 12, 2017, Judge Carol Murphy entered an order affirming the Board's Decision and Order, but finding that IFS met three out of the four elements of its unpreventable employee misconduct defense. (CP 40-43). IFS timely appealed to the Washington State Court of Appeals, Division II, on July 7, 2017, *Infrasource Services LLC v. Dep't of Labor and Indus.*, Thurston County Cause No. 16-2-02150-34, Notice of Appeal to Washington State Court of Appeals, Division II, Dkt. #23. The Court of Appeals filed an unpublished decision in this matter on September 11, 2018.

IV. 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.

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. To interpret WISHA regulations, Washington courts may look to the Occupational Safety and Health Act (OSHA) standards and consistent federal decisions. *Wash. Cedar & Supply Co., Inc. v. Dept. of Labor and lndus.*, 137 Wn. App. 592, 604, 154 P.3d 287 (2007) (citing *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128,

147, 750 P.2d 1257 (1998)). Similar to WISHA, OSHA has a stated purpose to assure worker safety "so far as possible." 29 U.S.C. § 651(b). When Congress drafted OSHA it "quite clearly did not intend to impose strict liability: The duty was to be an achievable one…Congress intended to require the elimination only of preventable hazards." *W.G. Yates & Sons Const. Co. Inc. v. Occupational Safety and Health Review Comm 'n,* 459 F.3d 604, 606 (5th Cir. 2006) (quoting *Horne Plumbing & Heating Co. v. Occupational Safety and Health Review Com'n,* 528 F.2d 564, 568 (5th Cir. 1976)).

WISHA imposes high standards on employers to create safe working conditions, but, like OSHA, it is designed to eliminate *preventable* hazards. When the action of an employee results in a violation, but the employer believes that it has taken every reasonable step to comply with a WISHA standard, the employer may invoke the UEM defense to show that the employee's conduct "was not foreseeable." RCW 49.17.120(5)(a); *BD Roofing, Inc. v. Dep't of Labor & Indust.*, 139 Wn. App. 98, 111, 161 P.3d 387 (2007); *In re Jeld-Wen of Everett*, BIIA 88 W144, 1990 WL 205725 at *5 (1990). This review will provide guidance for employers on what reasonable measures satisfy the WISHA standards so they can effectively maintain a safe and healthful working environment for employees. RCW 49.17.010.

In addition, this review will clarify under what circumstances an employer "knew or could have known" of a violation of a WISHA standard for purposes of classifying a violation as "serious." When a

violation has a "substantial probability that death or serious physical harm could result," the violation is deemed serious, "unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." RCW 49.17.180(6). In particular, the Court will clarify whether knowledge of a violation is imputed to the employer, and result in a "serious" violation, when a supervisor unforeseeably commits a safety violation.

The court of appeals noted that knowledge of a safety violation can be imputed to an employer when a supervisor has actual or constructive knowledge of the violation. *Potelco, Inc. v. Wash. State Dep't of Labor & Indus.*, No. 73226-9-I, 2016 WL 3336802, at *5 (Wash. Ct. App. June 13, 2016) citing *Danis–Shook Joint Venture XXV v. Sec'y of Labor*, 319 F.3d 805, 812 (6th Cir. 2003); *N.Y. State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98, 105 (2d Cir. 1996); *Ga. Elec. Co. v. Marshall*, 595 F.2d 309, 312 (5th Cir. 1979). However, several federal circuit courts that have considered this issue have held that a different question arises when it is the supervisor's own malfeasance that results in a safety violation. *See ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1317 (11th Cir. 2013); *W.G. Yates & Sons*, 459 F.3d at 609; *Pa. Power & Light Co. v. Occupational Safety & Health Review Comm'n*, 737 F.2d 350, 358 (3d Cir. 1984); *Ocean Elec. Corp. v. Sec'y of Labor*, 594 F.2d 396, 403 (4th Cir. 1979). When a supervisor commits a safety violation, the supervisor is no longer the "eyes and ears" of the employer, and "to impute knowledge in this situation would be fundamentally unfair." *ComTran Grp.*, 722 F.3d at

1317. Instead, these courts have held that knowledge is imputed to the employer when the government provides other evidence that the employer could have foreseen the supervisor's violation. *See ComTran Grp.*, 722 F.3d at 1317; *W.G. Yates & Sons*, 459 F.3d at 609; *Pa. Power*, 737 F.2d at 358; *Ocean Elec. Corp.*, 594 F.2d at 403.

This review will provide employers guidance on when the Department will classify a violation as serious because of the employer's knowledge. This will impact how employers structure safety compliance programs and train project supervisors.

Because the WISHA standards are specifically designed to promote the "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.

V. CONCLUSION

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

DATED this 11th day of October, 2018.

FOX ROTHSCHILD LLP

By s/ Gena M. Bomotti
Gena M. Bomotti, WSBA #39330
Attorney for Petitioner Infrasource Services LLC

CERTIFICATE OF SERVICE

I, Monica Dawson, certify that:

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

2. On October 11, 2018, I served a true and correct copy of the foregoing document on the following party, attorney for Respondent, via e-mail and legal messenger, and addressed as follows:

Dane Henager
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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 11th day of October, 2018.

Monica Dawson

EXHIBIT A

Filed
Washington State
Court of Appeals
Division Two

September 11, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

INFRASOURCE SERVICES LLC, Appellant, v. DEPARTMENT OF LABOR & INDUSTRIES, Respondent.	No. 50867-2-II UNPUBLISHED OPINION

BJORGEN, J. — Infrasource Services LLC (IFS) appeals the superior court's order affirming the order of the Board of Industrial Insurance Appeals (Board) determining that the Department of Labor and Industries (Department) properly found that IFS committed serious worker safety violations and that those violations were not the result of unpreventable employee misconduct. IFS argues that (1) the Board's finding of fact 6 is unsupported by substantial evidence, (2) the Board erred by determining that the violations were "serious," (3) the Board erred by determining that the violations were not the result of unpreventable employee misconduct, and (4) the superior court erred by awarding statutory attorney fees to the Department.

We affirm the superior court's order affirming the Board's order and decline to consider IFS's argument regarding statutory attorney fees.

FACTS

On September 8, 2014, Raul de Leon, a compliance safety officer for the Department, was driving by an IFS jobsite and noticed two IFS employees, Chad Auckland and Carson Row, working in an exposed trench. Based on his observations, de Leon suspected that the trench was deeper than four feet.[1] De Leon was concerned about the men working in the exposed trench without the appropriate safety precautions.

After speaking with Mike Sawyer, the foreman and designated competent person of the jobsite, de Leon and his supervisor inspected the trench and determined that the depth of the trench was between four feet six inches and five feet one inch at various points. De Leon did not observe any trench safety protections being used at the jobsite, even though there were safety protections on site used to prevent the trench from caving in. De Leon also noted that Auckland, Row, and the unprotected trench were in plain view of Sawyer, who was operating an excavator near the trench.

Based on the depth of the trench and the lack of safety protection equipment, the Department issued a citation to IFS for violations of WAC 296-155-657(1)(a) (Violation 1-1a), and WAC 296-155-655(11)(b) (Violation 1-1b), imposing a penalty of $2,100. As a result of the violation, Sawyer was fired, Auckland was suspended for five days, and Row was suspended for three days.

IFS appealed the Department's citation to the Board, arguing that the violations were the result of unpreventable employee misconduct. On February 11, 2016, an industrial appeals judge (IAJ) conducted a hearing on the appeal. De Leon and Auckland testified for the Department,

[1] WAC 296-155-657(1)(a) requires certain safety measures when working in trenches over four feet deep.

and IFS's safety director, Alexander Bartells, testified for IFS. IFS submitted several exhibits regarding its training and safety protocols, but did not submit any documentary evidence regarding its employees' disciplinary history or implementation of its safety program.

IFS's disciplinary policy was described as "progressive," consisting of four levels: (1) verbal warning, (2) written warning, (3) suspension without pay, and (4) termination of employment. Administrative Record (AR), Ex. 8 at 9-10. The policy further stated that certain acts could result in immediate termination and that if a disciplinary situation merited retraining, "[a]ll retraining [would] be coordinated through the Safety Department and documented accordingly." AR, Ex. 8 at 9-10.

At the hearing, the Department questioned Auckland regarding IFS's disciplinary policy:

> [Department]: Was this your first violation?
> [Auckland]: Yes.
> [Department]: Okay. And so from your understanding of [IFS]'s disciplinary policy, what's the penalty for a first violation?
> [Auckland]: Well, I received five days off and I believe their discipline is—it varies.
> [Department]: Okay. So it's a variable discipline?
> [Auckland]: Yes.

AR, Transcripts, Verbatim Report of Proceedings (VRP) (Feb. 11, 2016) at 40.

The Department also cross-examined Bartells regarding IFS's disciplinary policy:

> [Department]: So an employee may not know the level of discipline that they get for any particular violation or safety violation?
> [Bartells]: I would say it's fair to say that and, again, it's taken on a case by case basis depending on severity of the situation.

AR, Transcripts, VRP (Feb. 11, 2016) at 117.

On March 16, the IAJ issued a proposed decision and order, consisting in part of the following:

> The evidence presented by the employer does not refute the violation or question the penalty amount and those issues will not be discussed further. [IFS], through

the testimony of Mr. Bartells, has shown that they have a good safety policy and have made adequate efforts to keep their employees, and bystanders, safe. However, there was a failure of their safety plan on this day and the employer cannot show that this occurred because of unpreventable employee misconduct. An employer cannot show that their safety rules are effective in practice when the supervisor on site should have known that this violation was occurring, see *In re John Lupo Construction, Inc.*, Dckt. No. 96 W075 (June 10, 1997). Nothing cited in [IFS]'s brief convinces me that the Lupo case does not apply in this appeal. Mr. Sawyer, the supervisor and competent person, acts as an extension of the employer and he knowingly allowed his subordinates to act in a manner that was in derogation of the company safety rules and the WAC. In addition, Mr. Auckland had recently been trained to be a competent person. The facts surrounding this violation call into question the training provided to the supervisor by [IFS]. A safety program cannot be effective in practice when the person who is given charge of its enforcement is the same person orchestrating its violation.

. . . .

FINDINGS OF FACT

. . . .

2. On September 8, 2014, in Tumwater, Washington, two employees of [IFS] were working in a trench that was greater than 4 feet deep without trenching protection.

3. On September 8, 2014, the supervisor [Sawyer] for [IFS] allowed the two employees to enter the trench when he had a plain view of the surrounding work area.

4. The work activities of the employees of [IFS] on September 8, 2014 exposed them to hazards and injuries from a cave-in of trenching materials.

5. The accuracy of the penalty calculation ($2,100 when considering the gravity of the serious violations with appropriate deductions) was not contested.

6. On September 8, 2014, [IFS] did not effectively enforce its safety rules regarding the use of trenching protection when violations were discovered. Specifically, its supervisor exposed workers to hazards of trenches in excess of 4 feet deep without using trenching protection.

CONCLUSIONS OF LAW

. . . .

2. On September 8, 2014, [IFS] committed a serious violation of WAC 296-155-657(1)(a) as alleged in Item No. 1-1a of Corrective Notice of Redetermination No. 317583649. This violation was appropriately assigned a penalty of $2,100 for a serious violation.

3. On September 8, 2014, [IFS] committed a serious violation of WAC 296-155-655(11)(b) as alleged in Item No. 1-1b of Corrective Notice of Redetermination No. 317583649. This violation was appropriately grouped with Item No. 1-1a.

4. The violations of WAC 296-155-657(1)(a) and 296-155-655(11)(b) were not the result of unpreventable employee misconduct as that term is used in RCW 49.17.120(5).

5. The Department's Corrective Notice of Redetermination No. 317583649 issued on December 17, 2014 with penalties of $2,100, is correct and is affirmed.

AR at 27-29.

IFS then filed a petition for review with the Board, requesting review of the IAJ's order. The Board denied IFS's petition for review, and adopted the order. IFS appealed the Board's decision to the superior court. The superior court affirmed the Board's decision, and awarded the Department statutory attorney fees in the amount of $200. IFS appeals.

ANALYSIS

I. STANDARD OF REVIEW

On an appeal from the superior court, we review the Board's decision for substantial evidence based on the record that was presented to the Board. *Legacy Roofing, Inc. v. Dep't of Labor & Indus.*, 129 Wn. App. 356, 363, 119 P.3d 366 (2005). We determine whether substantial evidence supports the Board's findings, and whether the findings support the Board's conclusions of law. *BD Roofing, Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 98, 106, 161

P.3d 387 (2007); *Potelco, Inc., v. Dep't of Labor & Indus.*, 194 Wn. App. 428, 434, 377 P.3d 251, *review denied*, 186 Wn.2d 1024 (2016). The Board's findings are conclusive if they are supported by substantial evidence when viewed in light of the record as a whole. *Potelco*, 194 Wn. App. at 434.

Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the matter asserted. *Potelco*, 194 Wn. App. at 434. We view the evidence in the light most favorable to the Department as the prevailing party before the Board, and we do not reweigh the evidence on appeal. *Potelco*, 194 Wn. App. at 434. Unchallenged findings are verities on appeal. *Mid Mountain Contractors, Inc. v. Dep't of Labor & Indus.*, 136 Wn. App. 1, 4, 146 P.3d 1212 (2006).

II. FINDING OF FACT 6

IFS assigns error to finding 6, which states,

> On September 8, 2014, [IFS] did not effectively enforce its safety rules regarding the use of trenching protection when violations were discovered. Specifically, its supervisor exposed workers to hazards of trenches in excess of 4 feet deep without using trenching protection.

Br. of Appellant at 16; AR at 28. IFS argues that the safety violations were not foreseeable and that, therefore, its safety program was effectively enforced for purposes of demonstrating the affirmative defense of unpreventable employee misconduct.[2]

"[I]n order for the enforcement of a safety program to be 'effective,' the misconduct could not have been foreseeable." *Wash. Cedar & Supply Co. v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 913, 83 P.3d 1012 (2004) (quoting *In re Jeld-Wen of Everett*, No. 88 W144, 1990 WL 205725 (Wash. Bd. of Indus. Ins. Appeals Oct. 1990)). The burden is on the employer to

[2] IFS does not offer argument regarding whether its supervisor exposed workers to trenches in excess of four feet deep without protection.

present evidence showing that it was implementing its safety program. *BD Roofing*, 139 Wn. App. at 113. An employer cannot demonstrate effective enforcement by the mere existence of a written program. *Id*. Further, evidence of inconsistent penalty enforcement or lack of evidence that a written program is consistently enforced each indicate ineffective enforcement. *See id*. The involvement of a supervisor in a violation gives rise to an inference of lax enforcement of a safety policy. *Potelco*, 194 Wn. App. at 437.

Here, the record provides substantial evidence that IFS failed to effectively enforce its safety program. While IFS presented testimony that it retrains employees after a safety violation where appropriate, it did not present documentation of any retraining. Further, IFS did not present documentation of its implementation or enforcement of its safety policy. More to the point, the Board found, in finding 3, that "the supervisor [Sawyer] . . . allowed the two employees to enter the trench when he had plain view of the surrounding work area." AR at 28. IFS does not challenge finding 3, and it is a verity on appeal. *Mid Mountain Contractors*, 136 Wn. App. at 4. Sawyer was responsible for identifying existing or predictable hazards or dangers. WAC 296-155-655.

Further, IFS's written policy is neither internally consistent nor consistent with legal standards. WAC 296-155-657(1)(a) requires safety precautions with trenches in excess of four feet deep. IFS's safety manual contradicts this law by stating that trenches in excess of five feet deep require shoring or safety precautions. Its safety orientation materials, on the other hand, call for safety precautions with trenches in excess of four feet.

These inconsistencies continue in the policy's implementation. IFS presented evidence that its written policy is a "progressive disciplinary policy" with established penalties. AR, Transcripts, VRP (Feb. 11, 2016) at 117. Both Bartells and Auckland, however, testified that

IFS uses a variable disciplinary policy, despite the IFS's manual stating that it employs a progressive disciplinary policy. Bartells testified that an employee may not know what level of discipline she is facing for a particular violation.

Therefore, finding 6 is supported by substantial evidence because IFS's supervisor was involved in the violation, IFS's written policies contradicted the applicable legal standard and were internally inconsistent, IFS did not document that it consistently enforces its written disciplinary policy, and IFS employees were uncertain as to how they might be disciplined for a particular violation.

IFS also contends that the Board erred by determining that it had not shown effective enforcement of its safety program in practice because the Board previously found that the unpreventable employee misconduct defense was satisfied in another Board decision, *In re: Shake Specialists, Inc.*, No. 99 W0528, 2001 WL 292977 (Wash. Bd. of Ind. Ins. Appeals Jan. 2001). However, in *Shake Specialists*, the Board found that "[n]one of the three employees [involved in the violation] was a supervisor responsible for enforcing the safety rules of Shake Specialists." 2001 WL 292977, at *4.

As stated above, the involvement of a supervisor in a violation gives rise to an inference of lax enforcement of a safety policy. *Potelco*, 194 Wn. App. at 437. Even if IFS had been otherwise consistently administering its disciplinary policy, the supervisor's failure to remove the employees from harm's way shows that it was not effectively enforcing its safety program in practice. Therefore, IFS's argument fails because *Shake Specialists* is factually distinguishable based on the involvement of a supervisor.

Taking all the evidence in the light most favorable to the Department, substantial evidence supports the Board's finding that IFS did not effectively enforce its safety rules in practice.

III. UNPREVENTABLE EMPLOYEE MISCONDUCT

IFS contends that the Board erred by concluding that IFS's violations were not the result of unpreventable employee misconduct in conclusion 4. The Board did not err.

Conclusion 4 states, "The violations of WAC 296-155-657(1)(a) and 296-155-655(11)(b) were not the result of unpreventable employee misconduct as that term is used in RCW 49.17.120(5)." AR at 28. Unpreventable employee misconduct is an affirmative defense. *Wash. Cedar & Supply Co.*, 119 Wn. App. at 911. The Department may not issue a citation to an employer if a violation was the result of unpreventable employee misconduct. RCW 49.17.120(5)(a).

An employer can establish unpreventable employee misconduct by demonstrating:

(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.

RCW 49.17.120(5)(a). The employer bears the burden to establish each element of the affirmative defense. *Potelco*, 194 Wn. App. at 435. Our inquiry is whether the Board's findings support the Board's conclusions of law. *Potelco*, 194 Wn. App. at 434.

In *Potelco*, Division One of our court considered how the participation of a work foreman or supervisor affected an employer's ability to raise the unpreventable employee misconduct defense. 194 Wn. App. at 437. The court reasoned:

> When a supervisor is involved in a violation, "the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision." *Sec'y of Labor v. Archer–W. Contractors Ltd.*, 15 BNA OSHC 1013, at *5 (No. 87-1067, 1991). "[I]n cases involving negligent behavior by a supervisor or foreman which results in dangerous risks to employees under his or her supervision, *such fact raises an inference of lax enforcement* and/or communication of the employer's safety policy." *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1277 (6th Cir. 1987). Supervisor participation in *or failure to enforce a safety rule* weighs against the defense of unpreventable employee misconduct.

Id. (emphasis added).

The Board found in finding 6 that IFS did not effectively enforce its safety rules. As discussed above, the Board's finding is supported by substantial evidence in the record. The affirmative defense of unpreventable employee misconduct requires the employer to demonstrate effective enforcement of its safety program. Because the Board found that IFS failed to effectively enforce its safety program, IFS could not meet its burden to establish each element of the affirmative defense. Conclusion 4 is thus compelled by the Board's findings.

IFS invites us to consider related federal cases in determining what effect a supervisor's participation in a violation has on an employer's ability to argue the unpreventable employee misconduct defense. We decline to consider IFS's invitation because *Potelco* is a Washington case that addresses those same circumstances.

The Board did not err in issuing conclusion 4.

IV. SERIOUS OFFENSE

IFS maintains that the Board erred by determining that the September 2014 violations were "serious." Br. of Appellant at 21. Specifically, IFS argues that because the violations were entirely unforeseeable, IFS could not have known of the violation or circumstances, even with the exercise of reasonable diligence.

> A serious violation exists in a workplace
>
> > 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 workplace, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

RCW 49.17.180(6). Sawyer, as the competent person, was required to perform daily inspections of excavations, adjacent areas, and protective systems for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, or other hazardous conditions. WAC 296-155-655. The competent person is also required to inspect excavation sites prior to the start of work and as needed throughout the shift. WAC 296-155-655.

The Department may show that IFS had constructive knowledge of a violation if it provides "evidence that a violation was in plain view." *Potelco*, 194 Wn. App. at 439. An employer has constructive knowledge of a violation where "the violation was 'readily observable or in a conspicuous location in the area of the employer's crews.'" *Potelco*, 194 Wn. App. at 439-40 (quoting *Erection Co. v. Dep't of Labor & Indus.*, 160 Wn. App. 194, 207, 248 P.3d 1085 (2011)). "Moreover, when a supervisor has actual or constructive knowledge of a safety violation, such knowledge can be imputed to the employer." *Potelco*, 194 Wn. App. at 440.

The Board found that "the supervisor [Sawyer] . . . allowed the two employees to enter the trench when he had a plain view of the surrounding work area," and this unchallenged finding 3 is a verity on appeal. AR at 28. Similarly, the Board found in finding 2 that "two employees of [IFS] were working in a trench that was greater than 4 feet deep without trenching protection," and this unchallenged finding is also a verity on appeal. AR at 28. Further, Sawyer, as the competent person, knowing that the excavation was occurring, had a duty to inspect the site for safety precautions before work started and throughout the shift as needed. Therefore, the

Board properly concluded that the September 2014 violations were serious because IFS had constructive knowledge of the violations and death or serious physical harm could result from them.

V. ATTORNEY FEES

IFS asserts that we should reverse the superior court's award of statutory attorney fees to the Department. IFS provides no reasoning or citation to authorities for its argument. We do not consider issues or arguments unsupported by citation to authority or rational argument. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

CONCLUSION

We affirm the superior court's order affirming the Board's order, and we decline to consider IFS's argument regarding statutory attorney fees.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bjorgen, J.

We concur:

Johanson, J.

Johanson, P.J.

Sutton, J.

Sutton, J.

FOX ROTHSCHILD LLP

October 11, 2018 - 3:34 PM

Filing Petition for Review

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