

NO. 44918-8-II
COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE COURT
NO. 44918-8-II
APPELLANT'S REPLY BRIEF

ACTIVE CONSTRUCTION INC., a Washington Corporation;

Appellant,

v.

WASHINGTON STATE DEPARTMENT
OF LABOR & INDUSTRIES,

Respondent,

Appeal from Superior Court of Pierce County

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The Appellant, respectfully submits a Reply Brief in response to the Respondent's Trial brief. The Appellant seeks review of the Superior Court decision affirming a Washington Industrial Safety and Health ("WISHA") Decision and Order of the Board of Industrial Insurance Appeals (the "Board") involving the Department of Labor and Industries (the "Department") citations for trench and shoring violations. CABR p. 21-30)¹.

II. COUNTER STATEMENT OF ISSUES

A. Where the Department focuses only on the observations of the compliance officer to determine the trench was four feet, has the Department failed to meet the burden to establish exposure to a hazard by disregarding the employee at issue was not working in a point at the trench measuring above four feet, nor can the trench in itself be considered a hazard and as WISHA does not impose strict liability, does the substantial weight of the record demonstrate the Board erred in finding the Department established all prima facie elements of the violation as required by RCW 49.17.180(6)?

B. Where the Department incorrectly relied upon speculation to determine the duration of alleged exposure and the inspector had no personal knowledge of duration of work, does the substantial weight of the record demonstrate the Board erred in finding the Department correctly calculated the penalty amount for the Violation?

¹ References to the Certified Appeal Board Record are hereby referred to as "CABR." References to the record transcripts will be referred to as "Tr."

III. COUNTER ARGUMENT

1. **Where the Department focuses only on the observations of the compliance officer to determine the trench was four feet, the Department failed to meet the burden to establish exposure to a hazard by disregarding the employee at issue was not working in a point at the trench measuring above four feet, nor can the trench in itself be considered a hazard and as WISHA does not impose strict liability, where the substantial weight of the record demonstrates the Board erred in finding the Department established all prima facie elements of the violation as required by RCW 49.17.180(6).**

The Appellant respectfully asserts the Board erred when affirming the Corrective Notice of Redetermination Number 314619081. (CABR 29-30).

The Washington Industrial Safety and Health Act (hereinafter “WISHA”) is required to be as effective as the federal OSHA counterpart, Washington courts will consider decisions interpreting OSHA to protect the health and safety of all workers. *Adkins v. Aluminum Company*, 110 Wn.2d 128, 147 (1988). Federal case law has interpreted statutes substantially similar to RCW 49.17.180(6).

In order to prove that an Appellant violated an OSHA standard, the Secretary must prove that (1) the standard applies to the working conditions cited; (2) the terms of the standard were not met; (3) employees were exposed or had access to the violative conditions; and (4) the Appellant either knew of the violative conditions or could have known

with the exercise of reasonable diligence. *Gary Concrete Prods., Inc.*, 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD.

If any one element of HECK is missing, the Department's citation *must* be vacated. (*Emphasis added*).

In the case of *Secretary of Labor v. Fishel Co.*, the court found an employee's presence *in a trench was not in itself* considered exposure to an unsafe condition. 18 O.S.H. Cas. (BNA) ¶ 1530 (O.S.H.R.C.A.L.J. Aug. 28, 1998). (*Emphasis added*). In *Fishel*, where there was no evidence that the employee went beyond the encapsulation or any portion of the trench that exceeded statutory height and where the court determined that the employee would not enter the zone of danger there could not be exposure where there would be no reason to enter the "unsafe" portion of the trench. 18 O.S.H. Cas. (BNA) ¶ 1530 (O.S.H.R.C.A.L.J. Aug. 28, 1998).

Furthermore, in the case of *Eatherly Const. Co v. Tennessee Dept. of Labor*, the court again reiterated lack of cave-in protection did not constitute a violation of the regulation with the caveat that without protection, no employee could enter the specific trench section. 232 S.W.3d 731, 737 (Tenn. Ct. App. 2006).

Based upon the Findings in *Secretary of Labor v. Fishel Co.* and *Eatherly Const. Co v. Tennessee Dept. of Labor*, the Appellant

respectfully asserts the IAJ has erred in the Proposed Decision and Order when stating “consequently, entry into a trench that fails to overall to comply with the applicable safety standard is in and of itself an exposure to a hazard.” (PD&O p. 26, lines 24-25 & *Id.*).

In the present case, the Respondent argues the trench at issue was over four feet by relying upon the measurement taken by the compliance and the fact that it “looked uniform.” (Respondent Brief, p. 15). The substantial weight of the record indicates the trench was not uniform in depth. The compliance officer did not take a depth measurement along the entire trench. However, Mr. Torresin did do so and would be in the best position to identify and testify to trench facts. (Tr. p. 100, line 23).

The record reflects the trench at issue did not maintain the same elevation in all areas (Tr. p. 76, lines 1-19). Mr. Mark Lillybridge (hereinafter “Mr. Lillybridge”) is a Foreman for the Appellant. (Tr. p. 114, lines 17-26). As a trained competent person, Mr. Lillybridge provided clarification of the soil classification at issue (Tr. p. 122-123, lines 21-26 & 1-9).

Familiarity of the regulations requires knowledge of the relationship between soil classification and angles to determine sufficient slope requirements. As pointed out in the Proposed Decision and Order, Mr. McMinimy recalled his limited understanding of the relation between

soil classification and slope angle and was unable to state he followed a specific protocol to “identify” the soil at issue. (PD&O p. 2, lines 11-12, p. 3, lines 13-15; Tr. p. 54-55, lines 17-26 & 1-20).

The Respondent seeks to diminish the Appellant’s arguments by repeatedly indicating the Appellant is requesting the Court to make credibility assessments. Appellant respectfully asserts the Board erred in ignoring photographs which is substantial weight issue not one of credibility. (PD&O p. 7, lines 3-10). In reality, the photographs demonstrate that there is an angle towards the building and sidewalk and the Compliance Officer did not measure the length of the trench. Thus, the Compliance Officer’s measurement of 5’ 7” is meaningless because Mr. Torresin did not work in that area. Because of the angle of the ground, there was no objective evidence that the depth of the trench was the same by the valve and where the Officer took his one and only measurement.

Where the Department has failed to demonstrate exposure to a hazard and the record clearly reflects the Appellant had taken appropriate steps to ensure no employees entered the trench at over four feet, Violation 1-1 must be vacated.

2. **Where the Department incorrectly relied upon speculation to determine the duration of alleged exposure and the inspector had no personal knowledge of duration of work, the**

substantial weight of the record demonstrates the Board erred in finding the Department correctly calculated the penalty amount for the Violation.

Under WAC 296-900-14005, WISHA will assess monetary penalties “when a citation and notice is issued for a serious, willful, or egregious violation.” (WAC 296-900-14005). WISHA calculates the base penalty by deferring to a specific amount dictated by statute or by utilizing the more common gravity method. (WAC 296-900-14010). The gravity or “weight” of the violation is established by multiplying severity by probability. *Id.* Severity rates are expressed in whole numbers ranging from the lowest “one” to the highest “six.” Rates under severity are based on the most serious injury, illness or disease that could be reasonably expected to occur due to a hazardous condition. *Id.* At issue is the probability rate that unlike the severity rate reflects “the *likelihood* of any injury, illness, or disease occurring.” *Id.* (Emphasis added). Similar to the severity rating scale, the probability scale is also based upon a whole number system ranging from the lowest “one” to the highest “six.” When determining probability, the following factors are considered: 1) frequency and amount of exposure, 2) number of employees exposed, 3) instances or numbers of times the hazards is identified in the workplace and 4) how close an employee is to the hazard, 5) weather and other working conditions, 6) employee skill level and training, 7) employee awareness of

hazard, 8) pace, speed and nature of the task or work, 9) use of personal protective equipment and 10) other mitigating or contributing circumstances. *Id.*

The record reflects Mr. McMinimy observed an alleged exposure of only one employee for mere minutes supporting a reduction of the probability score (Tr. p. 71). Referring to the aforementioned arguments in Section A, where employees had no need and did not enter the trench at issue where areas were greater than four feet, the current probability score assessed is incorrect.

The Appellant respectfully asserts that the IAJ erred when deferring to the probability score assessed by the compliance officer without referring to where such a conclusion is supported in the record. (PD&O p. 8, lines 27-28).

Assuming arguendo, where the Department can establish the prima facie elements to establish the violations, the citation at issue must be recalculated to reflect a probability score of 1.

VI. CONCLUSION

Based on the foregoing, the Appellant respectfully requests the court to reverse the Board's Decision and Order and/or remand the matter with direction as herein supported.

RESPECTFULLY SUBMITTED this 4th day of December, 2013.

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CERTIFICATE OF SERVICE

I, Kasey Johansen, hereby certify under penalty of perjury under the laws of the State of Washington that on December 4, 2013, I filed with the Court of Appeals Division II, via legal messenger:

1. APPELLANT'S REPLY BRIEF

and that I further served a copy via legal messenger upon:

Anastasia Sandstrom, AAG
Office of Attorney General
800 5th Avenue, Suite 2000
Seattle, WA 98104

SIGNED in Seattle, Washington on December 4, 2013.


Kasey Johansen, Paralegal