

NO. 44918-8-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

ACTIVE CONSTRUCTION, INC.,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR & INDUSTRIES**

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I. INTRODUCTION

This is a substantial evidence case arising under the Washington Industrial Safety & Health Act (WISHA), RCW 49.17. The Department of Labor and Industries cited Active Construction, Inc., for failing to have a protective system for its workers in ¶a trench that measured five feet, seven inches deep. WISHA requires employers to provide a protective system for trenches that are four feet or more in depth when the soil is not stable rock. WAC 296-155-657.

Active does not dispute that it did not have a protective system for its workers. Instead, it claims that the trench was less than four feet deep where its worker was working. The Board of Industrial Insurance Appeals, the fact finder here, rejected this argument and found that the trench was over four feet deep. Substantial evidence supports this finding based on the testimony and photographs of the Department inspector, who measured the trench and observed its depth. Substantial evidence also supports the Board's finding that the Department appropriately calculated the penalty, such that the Department did not abuse its discretion in setting the penalty.

Because ample evidence supports the findings of fact, and Active raises no other issue, this Court should affirm.

II. ISSUES

1. Does substantial evidence support the Board's finding that the trench was more than four feet deep when the Department's inspector testified that the trench was more than four feet deep based on his observations and measurements?
2. Does substantial evidence support the Board's finding that the penalty calculation was appropriate, such that the Department did not abuse its discretion in setting the probability rating?

III. STATEMENT OF THE CASE

A. **The Department Inspector Observed an Active Worker Working In a Trench That Was Over Four Feet Deep**

WISHA regulations require an employer to have protective systems in place when a worker is in a trench that is four feet or more in depth, and the soil is not stable rock. WAC 296-155-657; CP 148. In November 2013, Department WISHA inspector Scott McMinimy drove past a worker in a trench. CP 125-26. He returned to the site to investigate potential violations of WISHA trenching requirements. *See* CP 126. He took photographs of the worker, Timothy Torresin, using a shovel in the trench. CP 131, 176, 203. The worker was installing a fire hydrant. CP 191. When the inspector took the photographs, the worker was working on a valve. CP 190. The inspector then asked the worker to exit the trench. CP 132.

The inspector took photographs of the trench and measured the trench's depth. CP 134. The trench was five feet, seven inches deep. CP

137, 298. When asked whether the trench was more than four feet in depths in locations other than where he had measured, the inspector said it was. CP 198. He knew this because the trench “looked uniform one end to the other end.” CP 198. When the worker testified, he did not think that the depth of the trench was four feet or more where he worked with the valve; he said it was less than four feet. *See* CP 215. But the foreman, Mark Lillybridge, testified that the area where the valve was located was “right around four feet.” CP 245.

According to the worker, the trench sloped downward to approximately five feet seven inches on the other end of the trench. *See* CP 217-18. But according to the inspector, the bottom of the trench was “pretty much level.” CP 191. There was only some sloping “right at the east end of the trench” near the valve end. CP 190.¹ The photographs document that the trench was level. CP 44 (the hearing judge found that the photographs show a uniform trench with “some” sloping at the valve end), 296 (Ex. 3), 299 (Ex. 6), 300 (Ex. 7), 302 (Ex. 9).²

The worker also claimed that he was working only near the valve on one end of the trench, which he claimed was at the appropriate depth, and that he did not enter other areas of the trench. *See* CP 210, 215. The

¹ There is also a ramp to exit the trench. CP 194.

² Color copies of the color photographs contained in the certified appeal board record are attached in Appendix 1. Appendix 2 contains the Board’s decision.

inspector testified that the worker was not working solely on the end by the valve. CP 190, 197. Rather, the inspector observed the worker walking back and forth in the trench and he observed the worker located about halfway down the trench. CP 197.

B. Active Did Not Have a Shoring, Benching, or Sloping System To Protect Workers

As noted, WISHA requires a protective system for most trenches that are four feet and over in depth. WAC 296-155-657; CP 148. These include shoring, benching, or sloping systems. CP 123. Shoring systems are supports that are placed to keep the sides from collapsing in on the trench. CP 123; WAC 296-155-650(q), (r), (w). Benching systems are essentially stairs in the trench that relieve the pressure on the side walls to prevent a collapse. CP 123; WAC 296-155-650(d). Sloping is cutting the sides of the trench at an angle to prevent collapse of the trench. CP 123; WAC 296-155-650(t). These systems are designed to hold the soil back and protect workers from cave-ins while they are doing their jobs. CP 264.

According to the inspector, who has been an inspector for three years and has training in trenching safety, Active did not have a shoring, benching, or sloping system in place. CP 121, 123, 135-36. Active does

not contend on appeal that it had such system in place. *See* App's Br. at 1-13.

Indeed there was no shoring. CP 135. There was also no adequate sloping. CP 136. The sides were not at the angle that is required for the soil type C. CP 135-36.

The inspector classified the soil as type C because it was predisturbed soil and because there was quite a bit of sand and gravel and it lacked clay. CP 148-50; *see* WAC 296-155-66401(2)(o). It was predisturbed because it was close to a building and a sidewalk where there would have been excavations. CP 149. He based his soil classification on his visual inspection, the fact that it was predisturbed, and his conversation with the foreman. CP 150.

Active disputed the soil classification, with its foreman testifying it was type B. CP 238. Active appears to have contended that the inspector had to do a manual test in addition to the visual test he performed. *See* CP 261. The inspector, however, testified that there is no specific protocol as to what an inspector has to do for a soil classification. CP 164.³

³ On cross-examination, Active asked the inspector whether he was in compliance with the WAC appendix on soil classification. CP 166. This was objected to because the inspector was asked to draw a legal conclusion and because these rules are for employers to follow, not for inspectors from the Department. CP 166. The objection was sustained. CP 167.

Even if the soil were type B, there would also need to be trench protection systems for type B soil. WAC 296-155-657; WAC 296-155-66403. For sloping in type B soil, for every foot the trench goes up vertically, it has to go out horizontally one foot. CP 170; WAC 296-155-66403 (Table N-1). Unless a sloping system is designed in accordance with written data or engineered design that have been produced to the Department upon request, the steepest slope allowed for type B soil under subsection (2) is 45 degrees from the horizontal. *See* WAC 296-155-657(2), 296-155-66401, 296-155-66403 (Table N-1). The photographs of the trench show that this degree of sloping was not present. CP 296, 299-302. According to the inspector, in the location where the worker was standing in the photographs, one wall was vertical, one was not. CP 189-90.

There was also not a benching system. There were no benches on both sides of the trench, which is required for benching. CP 136; WAC 296-155-66403 (Figure N-9). Additionally, benching cannot be done in type C soil. WAC 296-155-66403.

C. The Department Cited Active for a Serious Violation of WISHA Because of the Danger of Cave-in

The Department cited Active for a serious violation of WISHA because if a trench were to collapse, the most likely thing that would

happen would be a death or hospitalization. CP 150. The inspector recommended a penalty based on penalty calculations set forth in the administrative code, which looks at a variety of factors including the probability an accident could occur and the severity of a potential accident. CP 151; WAC 296-900-14010. Active contests only the probability factor. App's Br. at 11. The factors the inspector considered to set the probability factor were the depth of the trench, the type of soil, the weather conditions, the amount of traffic flow in the area, the number of employees exposed, and whether there was a competent person regarding trenching on site. CP 151-52. The weather was overcast, the traffic was average, one employee was exposed, and there was a competent person on site. CP 151-52. He assigned a medium probability of four out of six. CP 152. This was "[b]ecause of all the factors combining the type of soil, the traffic, the weather, the number of people. Just everything combined." CP 152.

Active's witness, risk manager Michael Draper, disagreed with the probability factor; he rated it a one based on the length of exposure and the weather conditions. CP 275. Active does not contest the severity factor of six, which was based on the fact that if a trench collapsed the worst result would be a death. CP 152; App's Br. at 1-13. After consideration of all the factors, the Department calculated the penalty at \$3,300. CP 162. It

then doubled it to \$6,600 because Active had previously violated the trenching regulation and penalties for repeat violations are doubled. CP 162.

D. The Board Found that the Trench Was Deeper Than Four Feet

Active appealed the Department's citation. CP 46. The Board's hearing judge found that the trench was deeper than four feet. CP 46 (finding of fact (FF) 2). The judge rejected Active's arguments that the area where the worker was working was less than four feet in depth, that the trench was not at a uniform elevation, that the worker did not go into the area where the inspector measured, and he therefore was not exposed to a hazard. CP 43-44. The hearing judge decided that these contentions were not supported by the weight of the evidence and that the Department established worker exposure to the hazard of trench excavation with a depth exceeding four feet without proper shoring by a preponderance of the evidence. CP 44.

The hearing judge pointed to the photographic evidence that showed the worker working in an area of the trench that appears deeper than four feet and emphasized that it was not credible that the trench sloped enough for it to decrease from 67 inches in depth to less than 48 inches at the valve end:

The photographs admitted as exhibits show a trench that is virtually uniform along its length, with some sloping at the valve end. No shoring is visible in the photograph. Mr. Torresin, is depicted in Exhibit Nos. 1 and 2 working in the trench near the valve end, but on the deep end of the valve end toward the sidewalk. In the photograph, he is clearly beneath surface level nearly up to his mid-back to shoulder level. Mr. McMinimy described Mr. Torresin as being obscured up to his shoulder level and described Mr. Torresin as 6 feet 9 inches in height. Mr. Torresin testified he was 6 feet 5 inches in height. The exhibits show Mr. Torresin, a very tall man, at a quite deep area of the trench which appears deeper than 4 feet. A number of items are depicted in the trench including a shovel and a box/block at the far, deeper end of the trench. Although, Mr. Torresin testified these items could be/or were placed in the trench from above, he admitted to using a shovel in working on the valve. One could infer that Mr. Torresin's memory may have been inexact as to his precise movements in the trench on that day. In weighing Mr. Torresin's testimony, which was self-serving, this is little to no evidence that the trench was 4 feet or less in depth at any point along its length when properly measured, including, or excluding the concrete or asphalt at the top. It is not credible that the trench as depicted in the photographic exhibits sloped enough for it to decrease in depth from 67 inches down to less than 48 inches at the valve end.

CP 44.

The hearing judge found that "Active Construction Co., Inc., intentionally disregarded their employees' safety when Mr. Torresin entered the trench without protection and performed work on the valve."

CP 46 (FF 4).

The hearing judge found that "the probability that an accident could occur was very high rated 4 on a scale of 1 to 6 and could have

resulted in severe permanent disability or death” CP 46 (FF 4). The hearing judge found that the penalty was “appropriately calculated at \$6,600.” CP 46 (FF 5). The hearing judge affirmed the citation in the proposed decision and order. CP 47.

Active petitioned the three-member Board for review. CP 13. The Board denied review and the proposed decision became the decision of the Board. CP 9. Active appealed to superior court. CP 1. The superior court decided that substantial evidence supported the Board’s finding and affirmed. CP 380-81.

IV. STANDARD OF REVIEW

A. WISHA Standard of Review

In a WISHA appeal, this Court directly reviews the Board’s decision based on the record before the agency. *Legacy Roofing, Inc. v. Dep’t of Labor & Indus.*, 129 Wn. App. 356, 363, 119 P.3d 366 (2005). The Board’s findings of fact are conclusive if they are supported by substantial evidence when viewed in light of the record as a whole. *Mowat Constr. Co. v. Dep’t of Labor & Indus.*, 148 Wn. App. 920, 925, 201 P.3d 407 (2009); RCW 49.17.150(1).

This Court reviews whether the Board’s findings of fact support its conclusions of law. *Pilchuck Contractors, Inc. v. Dep’t of Labor & Indus.*, 170 Wn. App. 514, 517, 286 P.3d 383 (2012). WISHA statutory

provisions and regulations must be interpreted in light of WISHA's stated purpose of ensuring safe and healthful working conditions for all Washington workers. *See Elder Demolition, Inc. v. Dep't of Labor & Indus.*, 149 Wn. App. 799, 806, 207 P.3d 453 (2009) (citing RCW 49.17.010). This Court gives substantial weight to the Department's interpretation of WISHA. *See Wash. Cedar & Supply Co. v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 913, 83 P.3d 1012 (2003).

The WISHA penalty amount is reviewed for an abuse of discretion. *Danzer v. Dep't of Labor & Indus.*, 104 Wn. App. 307, 326, 16 P.3d 35 (2000). A fact finder abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Kelley v. Centennial Contractors Enters., Inc.*, 169 Wn.2d 381, 386, 236 P.3d 197 (2010).

B. Substantial Evidence

Appellate courts give deference to the fact finder's (here, the Board's) findings of fact because the fact finder is in the best position to weigh disputed facts and determine the credibility of witnesses. *Bartel v. Zuckriegel*, 112 Wn. App. 55, 62, 47 P.3d 581 (2002). This is especially true when the fact finder is an agency addressing issues within its area of expertise. *See Wash. Cedar & Supply Co.*, 119 Wn. App. at 914.

Therefore, the Court of Appeals must uphold the Board's findings of fact if they are supported by substantial evidence. See *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 112, 937 P.2d 154 (1997), *amended*, 943 P.2d 1358 (1997). Evidence is substantial if it is sufficient to convince a fair-minded person of the truth of the declared premise. *Ino Ino*, 132 Wn.2d at 112.

The Court of Appeals does not weigh evidence or make credibility determinations on appeal. *In re Marriage of Greene*, 97 Wn. App. 708, 714, 986 P.2d 144 (1999). Likewise, the reviewing court will not substitute its judgment for that of the fact finder even though it may have resolved a factual dispute differently. *Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003).

V. ARGUMENT

A. **WISHA Requires an Employer To Provide a Protective System for Trenches Four Feet or Deeper**

Employers are statutorily mandated to comply with all rules and regulations the Department promulgates under WISHA. *Superior Asphalt & Concrete Co. v. Dep't of Labor & Indus.*, 121 Wn. App. 601, 604, 89 P.3d 316 (2004); RCW 49.17.060(2). The Department cited Active for a serious violation of WISHA. See CP 46; RCW 49.17.180(6). RCW 49.17.180(6) provides that a serious violation exists when there is a

substantial probability that death or serious physical harm could result from the employer's practices:

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.

To make a prima facie case of a serious violation of a specific rule under WISHA, the Department bears the initial burden of proving at the Board the following elements:

(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; (4) the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition; and (5) there is a substantial probability that death or serious physical harm could result from the violative condition.

Express Const. Co. v. Dep't of Labor & Indus., 151 Wn. App. 589, 597-98, 215 P.3d 951 (2009). Active contests only the element that the employees were exposed to, or had access to, the violative conditions. App's Br. at 1-2, 9.⁴

In this case, the Department cited Active for one violation of WAC 296-155-657(1)(a), which states:

⁴ Active references case law regarding the actual or constructive knowledge element, however, it makes no argument that the Department did not prove knowledge. See App's Br. at 6-7. Likewise it did not raise a knowledge argument at the Board or superior court. See CP 13-21, 90-100, 313-25.

Each employee in an excavation shall be protected 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.

Under this regulation, a protective system must be used for trenches four feet or deeper unless the trench is in stable rock. WAC 296-155-657(1)(a). Under WAC 296-155-657(2) and (3), an employer must use a shoring, sloping, or benching system. Active does not contend that it provided a shoring, sloping, or benching system, and indeed the photographic exhibits show it did not. App's Br. at 1-13; CP 296, 299-302. Rather, Active's theory is that the worker Torresin only worked near the valve end of the trench, this part of the trench was less than four feet deep, and therefore there was no exposure to a hazard. See App's Br. at 1-2, 9-10. This argument fails for two reasons.

First, the fact finder rejected Active's version of the facts and found that the entire trench was over four feet deep. CP 43-44, 46. Second, even assuming Active is correct that one portion of the trench was less than four feet deep, the worker was either in the zone of danger in the trench or in close proximity to the zone of danger in the trench and therefore was exposed to the violative conditions.

B. Substantial Evidence Supports the Finding That the Trench Was Over Four Feet Deep

1. The Inspector Testified That the Trench Was Over Four Feet Deep, Providing Substantial Evidence for the Board's Finding

Substantial evidence supports the Board's finding of fact no. 2 that the trench was over four feet deep. *See* CP 46. The Department's inspector measured the trench's depth at five feet, seven inches. CP 137. When asked whether the trench was more than four feet in depth in locations other than where he had measured, the inspector said it was. CP 198. He knew this because the trench "looked uniform one end to the other end." CP 198. This evidence is sufficient to convince a fair-minded person that the trench was over four feet deep. *See Ino Ino*, 132 Wn.2d at 112.

Active's own witness, the foreman, also testified that the area where the valve was located was "right around four feet." CP 245. A reasonable inference from this testimony is that worker was in a trench that was four feet deep. The Court of Appeals views the evidence and all reasonable inferences from the evidence in the light most favorable to the prevailing party. *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006).

Active points to the worker's testimony about the depth of the trench and asserts that the worker was "in the best position to identify and testify to trench facts." App's Br. at 9. Active asserts that the "[w]eight of the testimony to those who were present onsite and familiar with the trench's actual dimensions should be given deference." App's Br. at 10. This mistakes the standard of review. To accept the testimony of the worker over the testimony of the inspector would be to reweigh the evidence and make credibility determinations. The Court does neither on the substantial evidence standard of review. *Greene*, 97 Wn. App. at 714. Rather, it views the evidence in the light most favorable to the Department. *See Korst*, 136 Wn. App. at 206.

Active asserts that the record reflects that the trench did not maintain the same elevation in all areas. App's Br. at 10 (citing to page 76 of the transcript—CP 191). In fact, at CP 191, the inspector did not agree that the trench materially sloped.⁵ He said "[i]f you are talking about the bottom of the trench, it was pretty much level." CP 191. He also ascertained that the trench was over four feet deep in areas where he did not measure because it "looked uniform one end to the other end." CP

⁵ There was some sloping right at the end of the trench where the valve end was, but not throughout the trench. CP 190-91, 198. The hearing judge assessed the photographs and testimony and said that "the photographs admitted as exhibits show a trench that is virtually uniform along its length, with some sloping at the valve end." CP 44.

198. In any event, to the extent there was testimony that the trench did not have the same elevation throughout the trench, the fact finder could disregard this testimony and accept the testimony of the inspector that the depth was uniform throughout. The Court of Appeals does not disturb this weighing of evidence under the substantial evidence standard of review. *Greene*, 97 Wn. App. at 714.

Active also asserts that the hearing judge erred in the interpretation of the photographs. App's Br. at 10. It claims, "In reality, the photographs demonstrate that there is an angle toward the building and sidewalk" App's Br. at 10. Contrary to Active's assertion, the photographs do not show the elevation gain that Active claims. CP 296 (Ex. 3), 299 (Ex. 6), 300 (Ex. 7), 302 (Ex. 9). More importantly, the fact finder stated, "It is not credible that the trench as depicted in the photographic exhibits sloped enough for it to decrease in depth from 67 inches down to less than 48 inches at the valve end." CP 44. The fact finder viewed the photographs and made a credibility determination. This is sufficient to convince a fair-minded person that there was not the extent of elevation gain in the trench that Active asserts. *See Ino Ino*, 132 Wn.2d at 112. To the extent there is any question what the photographs showed, the fact finder could reasonably rely on the testimony of the inspector to make his determination of the depth of the trench. Taking the inferences

in the light most favorable to the Department, ample evidence supports the finding that the trench was more than four feet deep. *See Korst*, 136 Wn. App. at 206. Accordingly, Active exposed an employee to the violative condition of a hazardous trench, and the Board properly affirmed the Department's citation for the violation of the trenching regulation.⁶

2. The Soil Classification Is Irrelevant To Establishing a Violation Here Because Active Had No Protective Systems Suitable for Any Type of Soil

Active appears to raise an issue about soil classification. *See App's Br.* at 10. Under WAC 296-155-657, an employer has to provide a protective system for trenches four feet in the depth when the trench is not in stable rock. The soil classification is relevant to the benching or sloping protective systems. WAC 296-155-66403.

The inspector testified that the soil was type C. CP 148-50. This provides evidence sufficient to persuade a fair minded person that the soil was type C. *See Ino Ino*, 132 Wn.2d at 112. Active says that the foreman provided clarification of the soil classification. *App's Br.* at 10. On substantial evidence review, the appellate court does not weigh the testimony between the inspector and the foreman; rather it assumes the

⁶ Active asserts that the foreman Lillybridge "reiterated that at no point in time did the replacement project require any employee to actually enter the trench." *App's Br.* at 9. This makes no sense as the inspector saw the worker in the trench, the worker admitted he was in the trench, and the foreman himself testified that a worker would be in the trench to work on the fire hydrant project. CP 190, 210, 242.

testimony of the inspector is correct. *See Korst*, 136 Wn. App. at 206; *Greene*, 97 Wn. App. at 714.

Active asserts, “As pointed out in the Proposed Decision and Order, McMinimy recalled his limited understanding of the relation between soil classification and slope angle and was unable to state he followed a specific protocol when ‘identify’ (sic) the soil at issue.” App’s Br. at 10 (citing CP 39, 169-70). Neither the hearing judge stated nor the inspector testified that the inspector had a limited understanding of the slope angle for the soil classifications at issue in this case. CP 39, 169-70.

The inspector classified the soil as type C because it was predisturbed soil and because there was quite a bit of sand and gravel and it lacked clay. CP 148; *see* WAC 296-155-66401(2)(o). Below, Active suggested that the inspector needed to perform a manual test in addition to a visual test. *See* CP 261. Active’s argument is relevant to, if anything, how the fact finder weighs the evidence, which is beyond the appellate role of this Court to consider. Active cites no authority holding that a Department safety inspector must perform a particular test on the soil before concluding that the soil is a particular type. To the contrary, WISHA places on *employers* an affirmative duty to protect their workers in the ways required by the rules. *See* RCW 49.17.060 (“Each employer” shall protect its employees from recognized hazards and comply with the

WISHA rules and regulations); WAC 296-155-66401(3) (requiring employers to classify the soil type through visual and manual analyses by a competent person); *In re Garney Constr., Inc.*, 2002 CCH OSHD ¶ 32,670, 2003 WL 21693001, at *6-*8 (No. 02-2134, 2003) (ALJ) (discussing the employer's duty to perform soil tests under the analogous federal regulation).⁷

But in any event, whether the soil was type B or C, Active did not provide a protective system for its workers. Active does not contend that it provided a protective system suitable for type B soil. *See* App's Br. at 1-13. There was no shoring. CP 135. There was no proper benching. CP 136. The pictures of the wall reveal it was not sloped to the degree necessary for either type B or type C soil. CP 296, 299, 300, 302; *see also* CP 136, 170; WAC 296-155-66403 (Table N-1). The testimony was that one wall was vertical and therefore not sloped. CP 189-90. Thus, regardless of the soil type, substantial evidence supports finding that Active violated WAC 296-155-657(1)(a), as the Board found. *See* CP 46.

⁷ Similarly, testimony from the inspector that he was to follow the WAC procedures for soil determination should be disregarded as it contains a legal conclusion and is incorrect because the appendix on soil classification is for employers. *See* WAC 296-155-66401; CP 166.

C. Even Assuming a Portion of the Trench Was Under Four Feet Deep, Active Still Exposed the Worker to a Hazard

Even assuming Active's contention that the area where the worker worked was less than four feet is correct, Active's argument that the worker was not exposed to the violative conditions fails. *See* App's Br. at 1-2. To prove that workers had access to a violative condition requires the Department to 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) (quoting *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 147, 750 P.2d 1257 (1988)) (emphasis omitted). In the case of an unprotected trench, this test is met if the workers work inside the trench within proximity of the unprotected portion that is more than four feet deep (*i.e.*, near the "zone of danger" of the hazardous condition). *Mid Mountain*, 136 Wn. App. at 7. In *Mid Mountain*, the portion of the trench where the workers were working was less than four feet deep and the employer contended it was more than five feet away from the zone of danger. *Id.* at 3, 5. The court rejected this argument because the worker had access to the zone of danger, although he was not in it, he was working within close proximity, and it was reasonably likely that he could have walked the short distance and been

within the zone of danger. *Id.* at 7. Thus, *Mid-Mountain* requires only that the worker be in close proximity to the zone of danger. *Id.*

There is no requirement that in order to prove a violation, the Department must prove that an employee was within the portion of the unprotected trench that was more than four feet deep. In applying the “zone of danger” test, the court in *Mid Mountain* explicitly rejected that argument. 136 Wn. App. at 5 (“It is irrelevant that Mid Mountain’s employees were in a portion of the trench less than four feet in depth.”).

Active relies on *Secretary of Labor v. Fishel Co.*, 18 BNA OSHC 1530, 1998 WL 558885 (ALJ) (No. 97-102,1998), and *Eartherly Construction Co. v. Tennessee Department of Labor & Workforce Development*, 232 S.W.3d 731 (Tenn. Ct. App. 2006), to support its theory that the worker did not enter into its alleged deep end of the trench and therefore there is no violation. App’s Br. at 8-9. *Fishel* is one administrative law judge’s assessment of the zone of danger. Under the facts of that case, the employee was 14 feet away from the hazard of the backhoe where it loaded the wall of the trench, and the administrative law judge found that this was not in the zone of danger and therefore there was no violation. *Fishel*, 1998 WL 558885, at *4. Notably this diverges from Washington case law, which does not require the worker to be in the zone of danger if the worker could have access to it when working in close

proximity to it. *Mid Mountain*, 136 Wn. App. at 7 (“Although McCollaum was not actually within the zone of danger, he was working within close proximity, and it is reasonably likely that he could have walked the short distance and been within the zone of danger.”). This Court should not follow a single ALJ’s application of federal law when Washington law is more protective. See *Aviation West Corp. v. Dep’t of Labor & Indus.*, 138 Wn.2d 413, 423-24, 980 P.2d 701 (1999) (Washington law may be more protective than federal law).

In *Eartherly*, one end of the trench was “sufficiently shallow and properly sloped so that additional protective measures were not required before employees were permitted in the trench,” but the other end required the installation of the protective measures. *Eartherly*, 232 S.W.3d at 733. The trench was 22 feet long. *Eartherly*, 232 S.W.3d at 732. So under those facts, the Tennessee court apparently thought there would be no violation if the employees could not enter the deeper end. *Id.* at 733. The facts of this case are different with a much shorter trench. CP 296, 299, 300, 302. But in any event, to the extent this Tennessee case is counter to *Mid-Mountain*’s requirement that a worker is covered when working in proximity to a zone of danger, this Court should disregard it as inconsistent with Washington law.

Active asserts that the “uncontroverted testimony is that Mr. Torresin only entered the trench to work on the valve and never entered nor required access to the area of the trench measuring over four feet.” App’s Br. at 9. To the contrary, this testimony was controverted. First, the inspector’s testimony was that the trench was more than four feet deep. *See* CP 137, 198. Second, the inspector testified that the worker was not working solely on the end by the valve. CP 190, 197. Rather, the inspector observed the worker walking back and forth in the trench and also observed the worker located about halfway down the trench. CP 190, 197. This movement in the trench shows that he was in the zone of danger, or, at the very least, working in close proximity to it. Contrary to Active’s assertion, substantial evidence in the record supports that Active did not take the appropriate steps to ensure that no employees entered the trench at over four feet or to ensure that no employees worked in the zone of danger or in close proximity to it. *Contra* App’s Br. at 11.

D. The Department Did Not Abuse Its Discretion in Setting the Penalty

Active challenges the probability level of four that the Department and Board assigned to the violation. App’s Br. at 11. Because this was not an abuse of discretion and Finding of Fact 4 is supported by substantial evidence, the penalty should be affirmed.

RCW 49.17.180(7) authorizes the Department to set a penalty amount for a WISHA violation, “giving due consideration to the appropriateness of the penalty with respect to the number of affected employees of the employer being charged, the gravity of the violation, the size of the employer’s business, the good faith of the employer, and the history of previous violations.” Active contests only the “probability” factor used to determine the “gravity” of the violation. App’s Br. at 11-13.

The Department applied the formula in WAC 296-900-14010 to determine the penalty amount here. That regulation provides that the Department determine the “gravity” of a violation by multiplying the violation’s severity by its probability. WAC 296-900-14010. Both the severity and probability scales range from one to six, with one being the lowest. *Id.* A probability rating describes the likelihood of an injury occurring. *Danzer*, 104 Wn. App. 323.

When determining probability, WISHA considers a variety of factors, including: frequency and amount of exposure, number of employees exposed, number of times the hazard is found in the workplace, employee proximity to hazards, working conditions, employee skill level and training, employee awareness of the hazard, the nature of the work, protective equipment use, and other mitigating or “contributing

circumstances.” WAC 296-900-14010; *Danzer*, 104 Wn. App. at 323. The WAC expressly provides that the Department applies these factors “depending on the situation.” WAC 296-900-14010.

Active contends that the probability rating must be reduced to one because “[t]he record reflects that McMinimy observed an alleged exposure of only one employee for mere minutes supporting a reduction of the probability score.” App’s Br. at 12. It first should be noted that of course the inspector would only observe the worker in danger for “mere minutes”; the inspector’s role is to protect workers, he is not going to wait an hour before telling the worker to leave the trench just to allow a higher penalty.

It is correct that the Department may consider “amount of exposure” when setting the probability score. WAC 296-900-14010. However, this is just one factor that the Department may choose to weigh “depending on the circumstances.” WAC 296-900-14010. It may also consider “[h]ow close an employee is to the hazard, i.e., the proximity of the employee to the hazard.” WAC 296-900-14010. Here the worker was in a trench that was five feet, seven inches deep; a fact that the inspector considered in determining probability. CP 137, 151. The trench regulation is designed to protect against the walls of the trench caving in. WAC 296-155-657(1)(a). Certainly, the Department can weigh the height

of the trench walls and the worker's exposure the danger of walls that high when calculating the probability factor. CP 151.

Besides the depth of the trench, the Department also considered other relevant factors, including the type of soil, the weather conditions, and the amount of traffic flow in the area, the number of employees exposed, and whether there was a competent person regarding trenching on site. CP 151-52. The type of soil was C. CP 148. This is the loosest soil. *See* WAC 296-155-66401. The weather was overcast, the traffic was average, one employee was exposed, and there was a competent person on site. CP 151. The inspector assigned a medium probability of four out of six based on "all of the factors combining the type of soil, the traffic, the weather, the number of people. Just everything combined." CP 152. Here the Department weighed the factor of the worker exposure together with other factors and decided that the circumstances best resulted in a four probability rating. The Department has not considered any factors on untenable grounds, and therefore this Court cannot revisit the Department's weighing of the factors.

The court reviews the Department's penalty amount for abuse of discretion. *Danzer*, 104 Wn. App. at 326. In determining whether an abuse of discretion occurred the Court does not make credibility determinations or weigh evidence. *In re Marriage of Fahey*, 164 Wn.

App. 42, 62, 262 P.3d 128 (2011), *review denied*, 173 Wn.2d 1019 (2012). There is no abuse of discretion when the Department considers the factors in RCW 49.17.180(1) and the decision is not manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *See Danzer*, 104 Wn. App. at 327; *Kelley*, 169 Wn.2d at 386. Substantial evidence supports the Board's findings of a probability rating of four and that the penalty was appropriately calculated. *See CP 46*.

VI. CONCLUSION

For the above reasons, the Department asks this Court to affirm the trial court's decision.

RESPECTFULLY SUBMITTED this 4th day of November, 2013.

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Appendix 1



Board of Industrial Insurance Appeals
 In re: **ACTIVE CONSTRUCTION**
 Docket No. **11W1051**
 Exhibit No. **1**
 ADM. **7-2-11** REG.

CP 294



Board of
Industrial Insurance Appeals

In re: ACTIVE CONST.

Docket No. 11 N 1051

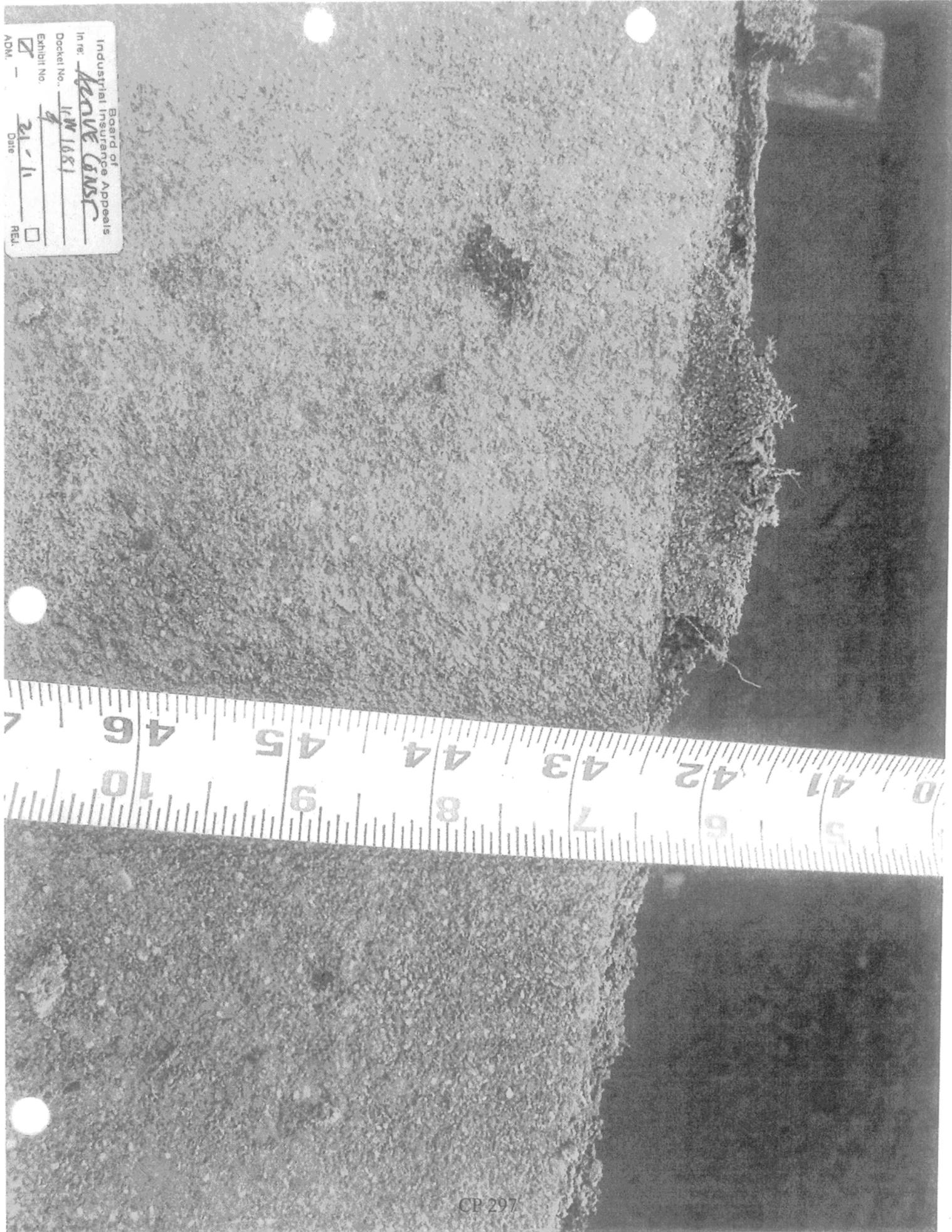
Exhibit No. 2

ADM. REL.

Date 7-21-11



Board of Industrial Insurance Appeals
 In re: **KAWA CONST.**
 Exhibit No. 5
 ADM. DE 7-21 REL.



Board of
Industrial Insurance Appeals

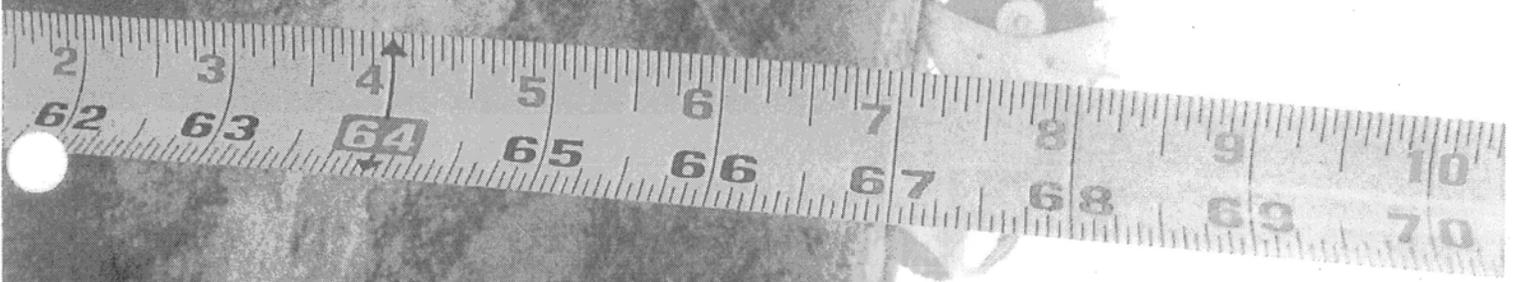
In re: ROOVE GWSF

Docket No. 11W 1681

Exhibit No. _____

ADM. REL.

Date 21-11



Board of Industrial Insurance Appeals
In re: ACDUC CON FT.
Docket No. 11M1081
Exhibit No. 5
 ADM. 7-21
 REG.



Board of
Industrial Insurance Appeals

In re: ACOVE CONST.

Docket No. 11W1051

Exhibit No. 6

ADM. 21-11 Date

REL.



Board of Industrial Insurance Appeals

In re: ACI VE CMST.

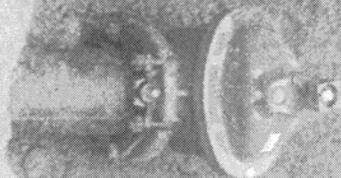
Docket No. 11W1081

Exhibit No. 7

Date 7-21-11

ADM. REG.

Board of Industrial Insurance Appeals
In re: REMOVE GAST
Docket No. 11M1087
Exhibit No. 3
Date 2-14
ADM. REL.



Board of Industrial Insurance Appeals
In re: ACNUE GMSI
Docket No. 11 W 1081
Exhibit No. 9
ADM. Date 2-1-11 REC.





Board of
Industrial Insurance Appeals
In re: ARM VE CORP ST
Docket No. 11W 1081
Exhibit No. 10
 ADM. 7-2-11 REC.

Appendix 2

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: ACTIVE CONSTRUCTION CO., INC.) DOCKET NO. 11 W1081
2 CITATION & NOTICE NO. 314619081) PROPOSED DECISION AND ORDER

3 INDUSTRIAL APPEALS JUDGE: William P. Gilbert
4

5 APPEARANCES:

6 Employer, Active Construction Co., Inc., by
7 AMS Law, P.C., per
8 Aaron K. Owada

9 Department of Labor and Industries, by
10 The Office of the Attorney General, per
11 David I. Matlick, Assistant

12 The employer, Active Construction Co., Inc. (Active Construction), filed an appeal with the
13 Department of Labor and Industries Safety Division on January 19, 2011, from Corrective Notice of
14 Redetermination No. 314619081, issued by the Department of Labor and Industries on January 13,
15 2011. The Department transmitted the appeal to the Board of Industrial Insurance Appeals on
16 January 27, 2011. In the Corrective Notice of Redetermination, the Department affirmed Citation
17 and Notice No. 314619081, issued on December 6, 2010. In the Citation and Notice, the
18 Department alleged a repeat serious violation of WAC 296-155-657(1)(a) and assessed a penalty
19 of \$6,600. Corrective Notice of Redetermination No. 314619081 is **AFFIRMED**.

20 **PROCEDURAL AND EVIDENTIARY MATTERS**

21 On March 1, 2011, the parties agreed to include the Jurisdictional History in the Board's
22 record. That history establishes the Board's jurisdiction in this appeal.

23 **PRELIMINARY MATTERS**

24 At the July 21, 2011 hearing, the parties stipulated to withdrawal of the affirmative defense of
25 unpreventable employee misconduct and the issue of the citation being a repeat violation.

26 **ISSUE(S)**

- 27 1. Whether the employer committed the violations alleged in Citation and
28 Notice No. 314619081;
29 2. If so, were the violations serious or general; and
30 3. If serious, what is the proper penalty which may be assessed?

32

EVIDENCE PRESENTEDScott McMinimy

Scott McMinimy is a safety and compliance officer with DLI with three years experience. He had exposure to excavating work in his prior employment. On November 10, 2010, Mr. McMinimy was driving to an inspection site when he observed a man in a trench. He could see the man's shoulders and head but did not see any shoring. He stopped and took a picture of the man in the trench while in his car. Mr. McMinimy walked toward the man and asked him to get out of the trench, and the man complied. He asked the man who was in charge. Then Mr. McMinimy contacted the foreman and held an opening conference.

Mr. McMinimy conducted a further investigation taking additional photographs and taking measurements. Explaining Exhibit No. 3, Mr. McMinimy said he did not consider the portion of the trench on one side that looks like a shelf lower than the road surface to be benching. The reason he gave was the type of soil was class C soil, which cannot be benched. Also benching would have to occur on both sides of the trench, not just one as shown in Exhibit No. 3. Mr. McMinimy further testified he did not feel the trench was properly sloped for the soil classification because the sides, although not perfectly vertical, were not at the angle required. Mr. McMinimy testified he observed no shoring system in place.

Mr. McMinimy measured the width of the trench as 42 ½ inches. He testified that he measured the depth of the trench as 67 inches as shown in Exhibit No. 5. Mr. McMinimy interviewed the person he found in the trench, a Mr. Torresin, and the onsite foreman and competent person, Mr. Lillybridge. Mr. McMinimy then issued a citation for a serious violation.

Mr. McMinimy calculated the penalty for the citation utilizing the provisions of the WAC. He calculated a probability factor on a scale from 1 to 6, noting the weather as overcast, the traffic as average, the one employee exposed, and the presence of a competent person on site. Utilizing these factors, he assigned a probability factor of 4.

Mr. McMinimy assigned a 6 to the severity factor based upon the worst occurrence that could result from the condition, namely a fatality. Multiplying 6 times 4, he obtained a gravity score of 24. There was a size adjustment, for companies between 26 and 100 employees, due to the number of employees Active Construction had, which was 55. The result of this adjustment was the base penalty of \$5,500 was reduced by \$2,200. Mr. McMinimy testified he assigned an adjustment factor of good faith with a value of average based on the company's cooperation and

1 his knowledge of their history with violations of this type. The assignment of a score of average on
2 the good faith adjustment made no monetary difference in the penalty assessed.

3 Mr. McMinimy testified the company had been cited one time before. Active construction in
4 the past 3 years had nine inspections with 2 repeat serious violations and 3 serious violations.

5 Mr. McMinimy testified he did not take into consideration the experience factor for the
6 company even though the company had a low experience factor. Mr. McMinimy made no
7 adjustment up or down based on the company's history.

8 Mr. McMinimy testified there was an additional penalty adjustment upwards based on the
9 fact that there was a repeat of a prior final citation by the company within the last three years; this
10 increases the penalty from \$3,300 to \$6,600.

11 On cross-examination, Mr. McMinimy admitted he was never a competent person with
12 respect trenching or excavation. He testified he was familiar with or at least had seen Appendix A
13 of the soil classifications for the WISHA rules regarding trenching excavation. Mr. McMinimy
14 admitted he had done a visual test to determine soil classification, but there was no specific
15 protocol that was required. Mr. McMinimy admitted there were several tests to determine whether
16 or not the soil classification was A, B or C. He stated he had not performed any of the manual tests
17 to determine soil classification. Mr. McMinimy admitted he did not have a level on his camera when
18 he took photographs of the site. He testified he saw only one employee in the trench and observed
19 the employee for approximately 2 minutes. Mr. McMinimy admitted that Active Construction did
20 have an accident prevention program.

21 On redirect examination, Mr. McMinimy said he saw the employee walking back and forth in
22 the trench.

23 Timothy Torresin

24 Mr. Torresin is a journeyman pipe layer for Active Construction. He testified he has received
25 safety training regarding trenches. He testified he was present when the trench in question was
26 dug. Mr. Torresin testified he was doing hydrant replacement and the entire pipe was an 8-inch
27 main, 3 feet of cover was required over top of it, and everything was at a 3 foot, 8 inch depth on the
28 job. Mr. Torresin understands that shoring is required for trenches over 4 feet in depth. He testified
29 he worked in the trench on November 10, 2010, in the area immediately next to the valve seen in
30 Exhibit No. 3, but not in other areas of the trench, including the area where the compliance officer
made his measurement.

32

1 He testified the depth of the trench in the area he was working was less than 4 feet in depth
2 and he had measured it with a measuring tape.

3 On cross-examination, Mr. Torresin estimated he was in the trench less than five minutes
4 when he was asked to exit by Mr. McMinimy.

5 Mark Lillybridge

6 Mr. Lillybridge is a foreman with Active construction. He has been foreman for nine years
7 and worked in the construction trades for 25 years. He testified he has had on-site training, shop
8 training, and competent person classes reference trenching. His training included soil
9 classification. Mr. Lillybridge was working on a loader near the trench in question when the
10 inspector first arrived. As the competent person for the job site on this occasion, Mr. Lillybridge
11 *determined and classified the soil as Class B soil.*

12 He identified the teeth marks of the excavator in Exhibit No. 9. Mr. Lillybridge testified that
13 the soil was not pre-disturbed because it had not been touched in years and there were no other
14 *new looking utility lines.*

15 Mr. Lillybridge testified the only reason for Mr. Torresin to be in the trench was to hook up
the valve, other preparatory and excavating work could be done from the surface.

17 He said that at the time he observed the area around the valve it was at a depth of
18 approximately 4 feet.

19 On cross-examination Mr. Lillybridge testified that if an Active Construction employee was
20 going to be working in a trench that was more than 4 feet in depth and consisted of Class B soil, it
21 would be standard procedure to employ either benching, shoring, or a one-by-one sloping system.
22 Mr. Lillybridge admitted he did not measure the trench that morning with his own tape measure. He
23 did not do a safety inspection of the trench that morning after it was excavated.

24 Michael R. Draper

25 Mr. Draper is the Risk Manager for Safety Solutions a company he started eleven years ago.
26 He acts as an expert witness in the area of construction safety. He has experience as a WISHA
27 compliance officer.

28 Mr. Draper contracts with Active Construction. He wrote their accident prevention program.
29 Mr. Draper testified he was familiar with Appendix A of the trenching and excavation standards.

30 Mr. Draper explained the most often utilized soil test was the thumb test where you press
your thumb into a clump of soil from the spoils pile. Mr. Draper testified the regulations require both
32

1 a visual and manual test because soils can be deceptive in appearance especially if they are
2 saturated. Mr. Draper testified when he was a WISHA compliance office he used a pocket
3 penetrometer to determine soil classification.

4 Mr. Draper testified the shoring measures were only required if the trench was 4 feet or
5 greater in depth. Mr. Draper opined there would be no hazardous exposure to a worker who was
6 working in a particular area of a larger trench if that area were less than 4 feet in depth. Mr. Draper
7 opined that in examining Exhibit No. 9, the sides of the trench were at an angle.

8 Mr. Draper indicated a proper measurement of the trench height would not include the
9 concrete portion at the top because the regulation speaks to available soils to engulf an employee,
10 it does not include the concrete asphalt on top.

11 Mr. Draper opined he would score this violation as a 5 by 2, or 5 by 1 given the factors
12 testified to by Mr. Torresin and Mr. McMinimy. Mr. Draper opined he would score Active
13 Construction's good faith as excellent.

14 On cross-examination, Mr. Draper admitted he was the designated site safety manager for
15 this project and wrote the site-specific safety plan for the company. He further admitted he did not
take his own measurements of the trench on the day of the violation.

17 DISCUSSION

18 This is a workplace safety case and as such, the burden is on the Department to prove a
19 violation and the appropriateness of any resulting penalty. *In re Olympia Glass Co.*, BIIA
20 Dec. 95 W445 (1996).

21 In this case the employer was cited with a serious repeat violation of
22 WAC 296-155-657(1)(a).

23 WAC 296-155-657(1)(a), provides in pertinent part:

- 24 1) Protection of employees in excavations.
- 25 (a) Each employee in an excavation shall be protected from cave-ins
26 by an adequate protective system designed in accordance with
27 subsections (2) or (3) of this section except when:
- 28 (i) Excavations are made entirely in stable rock; or
29 (ii) Excavations are less than 4 feet (1.22m) in depth and
30 examination of the ground by a competent person provides
no indication of a potential cave-in.

32

1 The first issue, as framed by Employer's counsel, is whether the employee was exposed, at
2 all, to a hazard because the portion of the trench where the worker was situated during his work did
3 not exceed 4 feet in depth.

4 The Department presented the testimony of one witness, Mr. McMinimy. On November 10,
5 2010, Mr. McMinimy was driving to an inspection site when he observed a man in a trench. He
6 testified he could see the man's shoulders and head, but did not see any shoring. Mr. McMinimy
7 measured the width of the trench as 42 ½ inches. He testified he measured the depth of the trench
8 as 67 inches as shown in Exhibit No. 5. The depth measurement was taken at only one point along
9 the entire depth of the trench. Mr. Torresin immediately complied with Mr. McMinimy's request to
10 exit the trench. Mr. McMinimy interviewed Mr. Torresin, and the onsite foreman and competent
11 person, Mr. Lillybridge. Mr. McMinimy then issued a citation for a repeat serious violation pursuant
12 to WAC 296-155-657(1)(a).

13 To the extent that the employer's argument is advancing the proposition that Mr. Torresin's
14 exposure was de minimus because he was in the trench only a short time, that argument has been
15 rejected by the board in *In re Frank Coluccio Const.*, Dckt. No. 92 W298 (May 26, 1998). In
16 *Coluccio* the Board stated, "Either there is exposure to a hazard (in this case a potential cave-in), or
17 there is no exposure. Whether there is exposure to a hazard does not depend on the duration of
18 the exposure. See *In re Watertite Gutter Co.*, Dckt. No. 90 W242 (June 1992)." *Coluccio* at 4.
19 (Emphasis in original). The Employer argues that since Mr. Torresin was not in an area of the
20 trench that exceeded 4 feet, there was no exposure.

21 WAC 296-900-180 defines a hazard as, "Any condition, potential or inherent, which can
22 cause injury, death, or occupational disease." Following the reasoning in *Coluccio* and applying the
23 definition provided in WAC 296-900-180 it would appear that trench hazard exposure is a binary
24 proposition. Consequently, entry into a trench that fails overall to comply with the applicable safety
25 standard is in and of itself an exposure to hazard. Therefore, on this basis the employer's
26 argument there was no exposure in this case would fail.

27 However, the employer argued vigorously, at hearing, that the area where Mr. Torresin was
28 working was less than 4 feet in depth and he was, therefore, not exposed to hazard. Mr. Torresin
29 so testified and based this on his own measurement, which he did not record. Mr. Torresin denied
30 going into the area of the trench measured by Mr. McMinimy. The employer also stressed the
31 trench in question was not at a uniform elevation, thus changing the depth along its length. These
32

1 contentions are not supported by the weight of the evidence. The photographs admitted as exhibits
2 show a trench that is virtually uniform along its length, with some sloping at the valve end. No
3 shoring is visible in the photograph. Mr. Torresin, is depicted in Exhibit Nos. 1 and 2 working in the
4 trench near the valve end, but on the deep end of the valve end toward the sidewalk. In the
5 photograph, he is clearly beneath surface level nearly up to his mid-back to shoulder level.
6 Mr. McMinimy described Mr. Torresin as being obscured up to his shoulder level and described
7 Mr. Torresin as 6 feet 9 inches in height. Mr. Torresin testified he was 6 feet 5 inches in height.
8 The exhibits show Mr. Torresin, a very tall man, at a quite deep area of the trench which appears
9 deeper than 4 feet. A number of items are depicted in the trench including a shovel and a
10 box/block at the far, deeper end of the trench. Although, Mr. Torresin testified these items could
11 be/or were placed in the trench from above, he admitted to using a shovel in working on the valve.
12 One could infer that Mr. Torresin's memory may have been inexact as to his precise movements in
13 the trench on that day. In weighing Mr. Torresin's testimony, which was self-serving, there is little to
14 no evidence that the trench was 4 feet or less in depth at any point along its length when properly
15 measured, including, or excluding the concrete or asphalt at the top. It is not credible that the
16 trench as depicted in the photographic exhibits sloped enough for it to decrease in depth from
17 67 inches down to less than 48 inches at the valve end.

18 Moreover, if the only work being done was on the valve and work along the full length of the
19 trench was not required to connect the valve to the replacement hydrant on the sidewalk (deeper
20 side) one is left to speculate why this trench was dug at its 67 inch depth at all. Based on the
21 foregoing, I find that the Department has established worker exposure to a hazard of trench
22 excavation depth exceeding 4 feet without proper shoring by a preponderance of the evidence.

23 The next issue is the appropriateness of the penalty.

24 Under RCW 49.17.180(7), the Department is required to assess all civil
25 penalties based upon "due consideration" of their appropriateness
26 based upon the following factors: "the number of affected employees of
27 the employer being charged, the gravity of the violation, the size of the
28 employer's business, the good faith of the employer, and the history of
29 previous violations." The Department must apply these factors when
30 assessing penalties in failure to abate cases, much as it would for any
WISHA violation: *Long Manufacturing Co.*, 4 OSHC 1154 (1975-76),
aff'd 554 F.2d 903 (8th Cir. 1977); *George T. Gerhardt Co.*, 4 OSHC
1351 (1976-77).

Olympia Glass Co. at 4.

32

1 Mr. McMinimy testified he calculated the penalty for the citation utilizing the provisions of the
 2 applicable WAC provision. He calculated a probability factor on a scale from one to six, noting the
 3 weather as overcast, the traffic as average, the one employee exposed, and a competent person
 4 present on site. Utilizing these factors, he assigned a probability factor of 4.

5 Mr. McMinimy assigned a 6 to the severity factor based upon the worst occurrence that
 6 could result from the condition, namely a fatality. Multiplying 6 times 4, he obtained a gravity score
 7 of 24. There was a size adjustment, for companies between 26 and 100 employees, due to the
 8 number of employees Active Construction had, which was 55. The result of this adjustment was
 9 the base penalty of \$5,500 decreased by \$2,200. Mr. McMinimy testified he assigned an
 10 adjustment factor of good faith with a value of average based on the company's cooperation and
 11 his knowledge of their history with violations of this type. The assignment of a score of average on
 12 the good faith adjustment made no monetary difference in the penalty assessed.

13 Mr. McMinimy testified the company had been cited once before. In the past three years,
 14 Active Construction had 9 inspections with 2 repeat serious violations and 3 serious violations. The
 15 parties stipulated the current violation was a repeat violation and there was no affirmative defense.
 16 7/31/11 Tr. at 175. This is also established by Exhibit No. 11; this document shows a repeat
 17 serious violation for violation of WAC 296-155-657(1)(a), the same regulation at issue here. The
 18 2008 citation was also for a trenching violation.

19 Mr. McMinimy testified he did not take into consideration the experience factor for the
 20 company even though the company had a low experience factor. Mr. McMinimy made no
 21 adjustment up or down based on the company's history.

22 Mr. McMinimy testified there was an additional penalty adjustment upwards, based on the
 23 fact that there was a repeat of a prior final citation by the company within the last three years. The
 24 repeat violation increased the penalty from \$3,300 to \$6,600.

25 The employer urges in its argument that the Department should have assessed a probability
 26 factor of 1. Their own safety expert testified he would have assessed a probability factor of 1 or 2.

27 The evidence supports Mr. McMinimy's determination of the penalties according to the
 28 appropriate factors in WAC 296-900-14010, Table 3 and WAC 296-900-10415, table 5.

29 FINDINGS OF FACT

- 30 1. On November 10, 2010, a compliance safety and health officer from the
 Department of Labor and Industries conducted an inspection of the
 Active Construction Co., Inc., location at 6th Avenue and N. Fife Street,
 32

1 Tacoma, WA 98409. On December 6, 2010, the Department issued
 2 Citation and Notice No. 314619081, alleging the following violations:
 3 Item No. 1-1, a repeat serious violation of WAC-296-155-657(1)(a), with
 a penalty of \$6,600; for a total proposed penalty of \$6,600.

4 On December 9, 2010, Active Construction Co., Inc., mailed its appeal
 5 from Citation and Notice No. 314619081, to the Safety Division of the
 6 Department of Labor and Industries. On December 27, 2010, the
 7 Department reassumed jurisdiction. On January 12, 2011, the
 8 Department issued an extension of the re-assumption process. On
 9 January 13, 2011, the Department issued Corrective Notice of
 10 Redetermination No. 314619081 and affirmed Citation and Notice
 No. 314619081. On January 19, 2011, the employer filed an appeal
 with the Department and, on January 27, 2011, the employer's appeal
 was transmitted to the Board of Industrial Insurance Appeals.

11 On January 28, 2011, the Board issued a Notice of Filing of Appeal for
 12 the appeal under Docket No. 11 W1081.

- 13 2. On November 10, 2010, Active Construction Co., Inc., failed to
 14 implement any protective systems to protect employees in a trench at
 15 their excavation site in 6th Avenue and N. Fife Street, Tacoma, WA
 98409. The excavations were not in areas made entirely in stable rock.
 The excavation trenches were deeper than 4 feet.
- 16 3. On June 27, 2008, Active Construction Co., Inc., was cited by the
 17 Department of Labor and Industries for a violation of 296-155-657(1)(a).
 This citation became a final order.
- 18 4. On November 10, 2010, at approximately in the early morning hours a
 19 safety inspector with the Department advised Active Construction Co.,
 20 Inc., through Mr. Lillybridge, the competent person on site, that the
 21 excavation required a trench box to protect employees entering the
 22 trench from the hazard of cave-ins. During the inspection, Mr. Torresin
 23 an employee of Active Construction Co., Inc., was found in the trench,
 24 without the trench box for protection, working on a valve. The
 25 probability an accident could occur was very high rated 4 on a scale of 1
 26 to 6 and could have resulted in severe permanent disability or death for
 27 a severity rating of 6, yielding a gravity rating of 24. The employer had
 28 an "average" history regarding workplace safety and its good faith was
 "fair." The company employed less than 100 workers. Active
 Construction Co., Inc., intentionally disregarded their employees' safety
 when Mr. Toressin entered the trench without protection and performed
 work on the valve.
- 29 5. On November 10, 2010, Active Construction Co., Inc., committed a
 30 violation of WAC 296-155-657(1)(a). The violation was appropriately
 31 designated a repeat serious violation. The penalty, for the violation
 contained in Corrective Notice of Redetermination No. 314619081,
 Item 1-1, is appropriately calculated at \$6,600.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.
2. On November 10, 2010, Active Construction Co., Inc., committed a repeat serious violation of WAC 296-155-657(1)(a).
3. Corrective Notice of Redetermination No. 314619081, issued January 13, 2011, is correct, and is affirmed.

DATED: SEP 16 2011



 William P. Gilbert
 Industrial Appeals Judge
 Board of Industrial Insurance Appeals

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No. 44918-8-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

ACTIVE CONSTRUCTION, INC.,

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF LABOR &
INDUSTRIES,

Respondent.

CERTIFICATE OF
SERVICE

STATE OF WASHINGTON
NOV -5 PM 1:14
COURT OF APPEALS

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's Brief of Respondent and this Certificate of Service in the below described manner:

**Original and one copy
Via First Class United States Mail, Postage Prepaid to:**

Mr. David Ponzoha
Court Administrator/Clerk
Court of Appeals, Division Two
950 Broadway, Suite 300
Tacoma, WA 98402

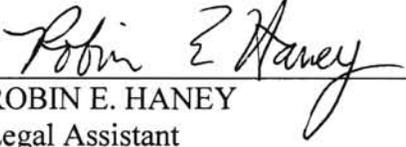
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Copy

Via First Class United States Mail, Postage Prepaid to:

Aaron K. Owada
AMS Law PC
975 Carpenter Road NE, Suite 201
Lacey, WA 98516

DATED this 4th day of November, 2013.


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