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DIVISION II

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STATE OF WASHINGTON

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No. 50867-2-II

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

INFRASOURCE SERVICES LLC,

Plaintiff/Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Defendant/Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

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.

Citation and Notice No. 317583649 (“Citation”) arises from an incident where a few of IFS’s well-trained employees made an anomalous mistake. IFS had no reason to expect that these employees would violate the requirements of Washington’s Industrial Safety and Health Act (“WISHA”) and IFS’s safety rules. Accordingly, IFS respectfully requests that the Court vacate the Citation, as both alleged violations were the result of unpreventable employee misconduct.

II. ASSIGNMENTS OF ERROR

IFS respectfully asserts that the Superior Court erred in affirming Findings of Fact No. 6 and in adopting Conclusions of Law Nos. 2-5 as set forth in the Board’s Decision and Order, because those facts were not supported by substantial evidence and did not in turn support the conclusions of law. IFS also respectfully asserts that the Superior Court erred in granting statutory attorneys’ fees to the Department as the prevailing party. Specifically:

Assignment of Error No. 1: The Superior Court erred in adopting Finding of Fact No. 6.

Statement of Issues Pertaining to Assignment of Error No. 1:

Did the Superior Court err in adopting Finding of Fact No. 6 when substantial evidence shows that IFS effectively enforced its safety program as written in theory as well as in practice?

Assignment of Error No. 2: The Superior Court erred in adopting Conclusion of Law No. 2.

Statement of Issues Pertaining to Assignment of Error No. 2:

Did the Superior Court err in adopting Conclusion of Law No. 2 when substantial evidence shows that the violation of WAC 296-155-657(1)(a) was the result of unpreventable employee misconduct, and that IFS did not, and with the exercise of reasonable diligence, could not have known of the violation?

Assignment of Error No. 3: The Superior Court erred in adopting Conclusion of Law No. 3.

Statement of Issues Pertaining to Assignment of Error No. 3:

Did the Superior Court err in adopting Conclusion of Law No. 3 when substantial evidence shows that the violation of WAC 296-155-655(11)(b) was the result of unpreventable employee misconduct, and that IFS did not, and with the exercise of reasonable diligence, could not have known of the violation?

Assignment of Error No. 4: The Superior Court erred in adopting Conclusion of Law No. 4.

Statement of Issues Pertaining to Assignment of Error No. 4:

Did the Superior Court err in adopting Conclusion of Law No. 4 when substantial evidence shows that violations Item No. 1-1a and 1-1b were the

result of unpreventable employee misconduct?

Assignment of Error No. 5: The Superior Court erred in adopting Conclusion of Law No. 5.

Statement of Issues Pertaining to Assignment of Error No. 5:

Did the Superior Court err in adopting Conclusion of Law No. 5 when substantial evidence shows that the violations were the result of unpreventable employee misconduct, and as such, the Citation and related penalty should be vacated, or in the alternatively, downgraded from a “serious,” to a “general,” violation with no associated penalty?

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

1. The Incident

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 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

¹ All citations to “Transcript 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.

site to perform this work safely and in accordance with WISHA regulations and IFS's safety rules, including speed shoring. (*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 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).

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).

2. The Worksite and the Inspection

On September 8, 2014, an IFS crew was installing a gas main at a job site on Capital Boulevard in Tumwater, Washington. (Transcript of Chad Auckland's Testimony, February 11, 2016, ("Auckland") at 38). The crew consisted of foreman Mike Sawyer, fitter² Chad Auckland, and Carson Row. (Transcript of Raul de Leon's Testimony, February 11, 2016, ("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 regulations and IFS's safety rules, including speed shoring³. (*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; Transcript of Alexander Bartells's Testimony, February 11, 2016 ("Bartells") at 103-105; Hearing Exs. 6-8).

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).

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

Prior to beginning work that day, the crew conducted a safety meeting, led by Mr. 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 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).

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).

B. PROCEDURAL BACKGROUND

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.

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 briefs⁴ to Judge Stewart, who issued a Proposed Decision and Order (“PD&O”) affirming the Citation. IFS filed a timely Petition for Review. The Board 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 this Court on July 7, 2017, and now urges the Court to review and vacate Violation 1, Items 1-1a and 1-1b because both occurred as a result of unpreventable employee misconduct.

⁴ IFS mistakenly titled its Post-Hearing Brief “Petition for Review.”

IV. ARGUMENT

A. STANDARD OF REVIEW

When reviewing Board rulings, this Court sits in the same position as the Superior Court and reviews the Board's decision directly. *Dep't of Labor and Indus. v. Tyson Foods, Inc.*, 143 Wn. App. 576, 581, 178 P.3d 1070 (2008); *J.E. Dunn Nw., Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 35, 42, 156 P.3d 250 (2007). The Board's findings must be supported by substantial evidence when considering the record as a whole. RCW 49.17.150(1). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person that a finding is true. *Martinez Melgoza & Assoc., Inc. v. Dep't of Labor & Indus.*, 125 Wn. App. 843, 847-48, 106 P.3d 776 (2005). Conclusions of law must be appropriate based on the factual findings. RCW 49.17.150; *Martinez Melgoza*, 125 Wn. App. at 847-48. Courts review questions of law, such as the Board's interpretation of a statute, de novo. *Stuckey v. Dep't of Labor and Indus.*, 129 Wn.2d 289, 295, 916 P.2d 399 (1996).

B. THE CITATION SHOULD BE VACATED BECAUSE THE VIOLATIONS WAS THE RESULT OF UNPREVENTABLE EMPLOYEE MISCONDUCT

The Department may not issue a citation if unpreventable employee misconduct ("UEM") caused the violation. RCW 49.17.120(5)(a). UEM "addresses situations in which employees disobey safety rules despite the employer's diligent communication and enforcement," and "defeats the Department's claim, even when the Department has proven all the elements of a violation...." *Asplundh Tree*

Expert Co. v. Wash. State Dept. of Labor and Indus., 145 Wn. App. 52, 62, 185 P.3d 646 (2008). The defense applies “when an unsafe action or practice of an employee results in a violation.” *In re Jeld-Wen of Everett*, BIIA Dec., 88 W144 at 11 (1990). Here, Items 1-1a and 1-1b should be vacated because they are the result of the unforeseeable and unpreventable misconduct of Messrs. Auckland, Row, and Sawyer.

Two well-trained employees entered an excavation deeper than four feet, without cave-in protection or a safe means of access and egress, in violation of the applicable WACs and IFS’s safety rules, and another well-trained employee, their foreman, allowed them to do so, even though they all knew that in doing so, they were violating WISHA regulations and IFS’s safety rules.

To establish the affirmative defense of UEM, an employer must show:

- (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 Superior Court correctly found that IFS had satisfied the first three elements of this affirmative defense, and IFS does not dispute those findings. The sole issue on appeal - whether IFS effectively enforces its safety program as written in practice and not just in theory – should be answered in the affirmative by this Court.

An employer's safety program is effective in practice when the employer shows a consistent pattern of safety meetings, inspections, and frequent reminders regarding safety compliance. *In re Exxel Pacific, Inc.*, BIAA Dec., 96 W182 at 20 (1998). The actions an employer takes to discipline employees for safety violations are also indicative of the effectiveness of its safety program. *See Id.* at 25. In short, a program is effective when an employee's misconduct was an isolated occurrence and was not foreseeable. *BD Roofing, Inc. v. Dept. of Labor and Indus.*, 139 Wn. App. 98, 111, 161 P.3d 387 (2007). IFS exhibited that its safety program is effective in theory as well as in practice.

1. IFS Consistently Provides Effective Safety Training and Reinforces that Training

There is no questions that the employees were adequately trained in IFS's safety rules – they all testified to such, as did the Department's own inspector. (Auckland and 45; de Leon ant 31, 33; see also Bartells at 103-105; Hearing Exs. 6-8). All IFS employees attend an in-person, new employees training for at least half of a day when they are first hired. (Bartells at 59-60). That training covers every aspect of a new employee's job, including the applicable safety rules. (*Id.*). Among other things, IFS

trains its employees on the safety requirements for working in trenches. At new hire orientation, IFS teaches its employees that in Washington, trenches deeper than our feet must be protected. (Bartells at 60; Auckland at 51; Hearing Ex. 8 at p.46). IFS is a utility contractor that works primarily on underground gas service. (Bartells at 55). Therefore, trench safety is critical to the safety and success of IFS and its employees.

New hire orientation is only the beginning of an employee's safety training at IFS. The company provides continual safety training to its employees through, among other things, competent person training⁵, monthly safety trainings, weekly site specific safety meetings, and tool box talks⁶, all which provide IFS employees with information, skills, and resources to work safely. (de Leon at 31; Auckland at 42-43, 47-52; Bartells at 57-61, 66-77, 94-1010). In addition, every day, as well as before every job, foreman must conduct a pre-job safety meeting with the crew, using the Job Hazard Analysis form (Auckland at 42-44; Bartells at 75-81; Hearing Ex. 3). During these meetings, crews identify the hazards associated with a job and then discuss how they will mitigate those hazards and work safely. (Auckland at 42; Bartells at 75-81).

⁵ IFS offered, and Messrs. Sawyer and Auckland attended, competent person training, an in-depth, in-person training class which covers, among other things, trenching hazards, shielding and shoring requirements, and the duties of a competent person. (Hearings Exs. 6, 7, 15; Bartells at 66-68; Auckland at 43-44). Mr. Sawyer was designated as a then competent person on the job site that day, and as well trained to fill this role, though he failed to do so when he allowed Messrs. Auckland and Row to enter a trench that was not properly protected. (de Leon at 25-26).

⁶ A "tool box talk" is a weekly training or safety reminder on a designated safety topic delivered by different IFS employees. (Bartells at 64; *See* Hearing Ex. 9 – an example of a tool box talk).

IFS also holds monthly safety committee meetings. (Bartells at 72-73). The safety committee consists of a rotating group of employees who gather to discuss and promote safety and to further develop IFS's safety culture.⁷ IFS also has a safety leadership team, made up of employees from the executive team, front line leadership, and foreman, to further educated and instill the safety program and culture in all employees, and to assure that all employees have the training, tools, and knowledge they need to work safely. (Bartells at 73-74).

2. IFS Consistently Provides All Necessary Safety Equipment

This IFS crew had all the necessary tools and equipment on site to perform the work safety and in accordance with WISHA regulations and IFS safety rules. (Auckland at 45; de Leon at 32). The fact that they failed to use their tools and extensive training properly on this isolated incidence when they had never failed to do so before was completely unforeseeable.

3. IFS Consistently Performs Safety Inspections and Administers Discipline

Regular visits to job sites by trained, full-time safety officers are evidence that an employer takes steps to discovery and correct safety violations. *See Legacy Roofing Inc. v. Wash. State Dep't of Labor & Indus.*, 128 Wn. App. 356, 365 (2005). IFS goes to great lengths to monitor its employees and ensure that they follow all safety rules. IFS employs two safety managers, whose main job duties are to perform safety

⁷ Hearing Ex. 10 is a sample of IFS's safety committee meeting minutes, which are produced and posted following each safety committee meeting. (Bartells at 72-73).

audits on IFS crews. (Bartells at 58-59)⁸. In addition, IFS crews are periodically auditing by IFS superintendents, IFS upper management, inspectors from IFS's Quality Assurance and Quality Control departments, and safety and quality inspectors from Puget Sound Energy (the company for which IFS performs most of its work). (Bartells at 98-99). Overall, a crew will be audited *at least once a week* through a random, unannounced safety inspection. (Auckland at 49; Bartells at 99).

If a safety violation is discovered, the violation is promptly corrected, work stops as necessary, and the crew's superintendent or area safety manager is notified, so that violators can be disciplined as needed. (Bartells at 85-87). Every IFS employee can, and is expected to, stop work if the employee believes that something unsafe is happening at the job site. (Auckland at 49; Bartells at 93). However, IFS is not just reactive; rather, if the company discovers a safety violation, it uses such incidents as learning opportunities for all employees, holding safety stand down meetings or retraining. (Bartells at 80-93). Further, for certain incidents, IFS follows an after action review process with management and line personnel to determine the root cause of the problem and carry out preventative measures designed to keep employees safe. (Bartells at 91-93).

Before this incident, IFS never observed Mr. Sawyer, Mr. Auckland, or Mr. Row, in violation of *any* IFS safety rules. IFS's safety

⁸ Hearing Exs. 11-12 are examples of Job Site Evaluations conducted during just a few of Mr. Bartells' safety audits of Mr. Sawyer's crews.

personnel were alarmed to learn of this incident because they knew that these employees were well-trained in trenching safety. Mr. Auckland, the only crew member available to testify, recognized that he and his crew were entirely responsible for this violation. (Auckland at 44). There was simply no way IFS could have predicted that Messrs. Auckland and Row would enter a trench without the appropriate safety equipment, or that Mr. Sawyer would not stop them from doing so. In other words, this incident was completely unforeseeable, despite the fact that IFS effectively enforces its safety program in practice by consistently holding safety meetings and trainings and consistently inspecting crews for compliance, and consistently disciplining violators as necessary.

4. The Defense of Unpreventable Employee Misconduct Applies to A Foreman's Actions

An employer may sustain the UEM defense, even when a supervisory employee is involved in the violation. In the PD&O, Judge Stewart relied on the Board's decision in *In re: John Lupo Construction, Inc.* to support his decision that the unpreventable employee misconduct defense cannot be applied to foremen. However, that case is distinguishable from the instant case. First, in that case, there was evidence that the supervisor knowingly instructed his subordinate to be on the roof without fall protection, and the judge therefore reasoned that "a safety program cannot be effective in practice when the person who is given charge of its enforcement is the same person orchestrating the violation." Dkt. No. 96 W075 at *1 (June 10, 1997). In this case, there is

no evidence that Mr. Sawyer was the one orchestrating the violation. Further, there is no evidence that he instructed Mr. Auckland and Mr. Row to enter the trench without using the proper equipment, which was present on site. Additionally, in that case, the judge explained, “A supervisor, *in a small business operation*, acts as an extension of the employer.” *Id.* (emphasis added). IFS is a large national employer, and not a “small business operation” in which a supervisor “acts like an extension of the employer.” 1997 WL 450274, Dkt. No. 96 W075 (BIIA June 10, 1997). IFS does not consider Mr. Sawyer, or any of its foreman, to be an extension of the employer. In fact, IFS foreman are union members. (Bartells at 75:16-18). In addition, unlike in *John Lupo*, there is not allegations or evidence here that Mr. Sawyer, IFS foreman, “directed subordinates to act in a manner that is in derogation of the safety rules” or that he was “orchestrating” the violation of those rules. *Id.* Thus, the analysis applied in *In re: John Lupo Construction, Inc.* is not persuasive here.

In the absence of state decisions on the issue of whether the defense of unpreventable employee misconduct applies to foremen, Washington courts will interpret WISHA regulations by looking to OSHA regulations and consistent federal decisions. *Washington Cedar & Supply Co., Inc. v. Dept. of Labor and Indus.*, 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)).

When drafting OSHA “Congress 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 Com’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)) (emphasis added). The basis for this reasoning is contained in the Act itself, which states that its purpose is to ensure worker safety only “so far as possible.” 29 U.S.C. § 651(b); *see also W.G. Yates*, 459 F.3d at 606 (citing *Penn. Power & Light Co. v. Occupational Safety and Health Review Com’n*, 737 F.2d 350, 354 (3rd Cir. 1984)).

Likewise, WISHA’s purpose is to promote safe working conditions “*insofar as may reasonably be possible.*” RCW 49.17.010 (emphasis added). Accordingly, WISHA is designed to eliminate *preventable* hazards, and is not intended to impose strict liability upon employers.

Federal decisions hold that employers are not strictly liable for their employee’s actions, even if the employee is a supervisor. In other words, the UEM defense applies to actions taken by supervisors. *See Secretary of Labor v. Asplundh Tree Expert Co.*, 7 OSHC 2074 (1979) (vacating citation when foreman violated safety rule because the foreman’s action was UEM); *see also Danis-Shook Joint Venture XXV v. Secretary of Labor*, 319 F.3d 805 (6th Cir. 2003) (assessing the UEM defense when employer’s foreman was involved in the violation); *P. Gioioso, Inc. v.*

Occupational Safety and Health Review Com'n, 115 F.3d 100 (1st Cir. 1997) (same).

“A supervisor’s participation in the violation does not by itself establish that a safety program is inadequate.” *Butch Thompson Enterprises*, 22 BNA OSHC 1985, 1991 (No. 08-1273, 2009). It is merely evidence that a court may weigh to determine whether an employer has met its burden of establishing the UEM defense. *See Id.* Even though Mr. Sawyer was a foreman, IFS has established UEM here.

5. Previous Board Decisions Show That IFS Has Established the Elements of Unpreventable Employee Misconduct

In *Shake Specialists*, BIAA Dec., W05258, the Board vacated a citation based on UEM, finding that:

1. The employer’s training program included initial training through meetings, training packets, and safety videos. BIAA Dec., W05258 at 1.
2. The employer had written safety rules available, and employees acknowledged reading those rules. *Id.*
3. Training was continued through frequent meetings, safety meetings at each job site, and a quarterly safety meeting. *Id.*
4. The employer had one safety inspector who performed random inspections of job sites daily. When he found violations, he counseled employees and recommended penalties. *Id.* at 2.
5. The employees involved in the violation knew that they were not supposed to engage in the conducted they were cited for. *Id.*

Each of these factors is present here:

1. IFS's initial training program is comprehensive, and IFS provides its employees with copies of various safety documents, including its Safety Manual.
2. IFS's Safety Manual contains detailed written safety rules. Its employees acknowledge receiving, reading, and understanding the Safety Manual.
3. IFS continues its safety training through monthly, weekly, and daily safety meetings.
4. IFS has safety inspectors who perform random daily inspections. In addition, IFS crews are periodically inspected by IFS superintendents and managers, QA/QC personnel, and PSE employees. Furthermore, IFS employees are counseled and/or disciplined for all safety violations.
5. The employees here knew that they were not supposed to be in the trench without proper protection, such as shoring.

IFS has provided even better evidence of UEM and a better safety record than the employer did in *Shake Specialists*. Thus, based on the Board's prior decision, IFS has established the defense of UEM. *See, e.g., In re Northface Cedar Exteriors, Inc.*, BIAA Dec., W13355, 2 (2002) ("we are bound as a quasi-judicial agency by the 'duty of consistency' to follow our prior decision, unless there are 'articulable reasons' for not doing so").

Finally, the UEM affirmative defense has been sustained where there was a single incident of noncompliance by only a few employees. *Scheel Constr. Inc.*, 4 OSHC 1824, 1976-77 OSHD ¶ 21, 263 (1976), as cited in DOSH Directive 5.10, *Unpreventable Employee Misconduct*, Apx. B at P.22 (Sept. 9, 2009). The matter here involved only three employees,

all of whom were well trained, and none of whom had previously violated IFS's safety rules.

C. **VIOLATIONS 1-1a And 1-1b WERE INAPPROPRIATELY DESIGNATED AS "SERIOUS"**

The Department characterized Violations-1a and 1-1b as "serious" violations. A violation is "serious" if:

[T]here 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 work place, *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) (emphasis added). As discussed above, the employees' conduct was entirely unforeseeable and IFS could not have known, even with reasonable diligence, that Mr. Auckland and Mr. Row would enter a deep trench without appropriate safety equipment, or that Mr. Sawyer would allow them to do so. As such, the alleged violations are improperly classified as "serious." If not otherwise vacated based on the affirmative defense of UEM, which IFS has established, both alleged violations should be reclassified as "general," and the associated penalties should be calculated accordingly.

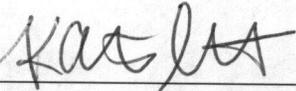
V. **CONCLUSION**

For the reasons discussed above, IFS respectfully requests that the Court dismiss Citation and Notice No. 317583649 along with all related

penalties and fees, including statutory attorney fees awarded to the
Department.

DATED this 15th day of September, 2017.

FOX ROTHSCHILD LLP

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Services LLC

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CERTIFICATE OF SERVICE

I, Ashley Rogers, certify that:

1. I am an employee of Fox Rothschild LLP, attorneys for Appellant 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 September 15, 2017, I served a true and correct copy of the foregoing document on the following party, attorney for Respondent, via email and mail, and addressed as follows:

Robert W. Ferguson, WSBA #26004
Attorney General
Dane William Henager, WSBA #45533
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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 15th day of September, 2017.

Ashley Rogers
Ashley Rogers

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