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NO. 50867-2-II

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

INFRASOURCE SERVICES, LLC,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

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

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I. INTRODUCTION

Infrasource Services' employees worked in a trench more than four feet deep with no protection against cave-ins. Washington safety rules require that an employer provide workers working within excavations greater than four feet deep with shoring or other protections from cave-ins and that a designated competent person identify such hazards and remove exposed employees from the hazardous area. Infrasource's claim that it did not know of the violations and that the violations were out of its control are without merit. The hazardous condition was in plain view and in the direct view of its on-site supervisor, who was working nearby. Likewise, Infrasource's unpreventable employee misconduct defense fails because substantial evidence shows that Infrasource's safety program was not effective in practice. Infrasource failed to document that it regularly disciplines employees for safety violations and its own manual stated the wrong standard. The Board of Industrial Insurance Appeals (Board) affirmed the Department of Labor & Industries' (Department) workplace safety citations. Because substantial evidence supports constructive employer knowledge and that Infrasource's safety program was not effective in practice, this Court should affirm.

II. STATEMENT OF THE ISSUES

1. To establish a serious violation at the Board, the Department must show that the employer knew or with reasonable diligence could have known of the violation. Infrasource knew about the violation through its foreman and the violation was in plain view. Does substantial evidence support finding that Infrasource had knowledge of the violation?
2. Unpreventable employee misconduct is an affirmative defense that the employer must establish by showing, among other things, that it has effectively enforced its safety program as written, in practice and not just in theory. Infrasource provided no evidence of disciplining employees before the violations at issue, a foreman participated in the violations, and Infrasource communicated the incorrect safety standard to its employees in its safety manual. Does substantial evidence support the Board's finding that the program was not effective in practice?

III. STATEMENT OF THE CASE

A. **Infrasource Crewmembers Worked in a Trench Without Proper Shoring Under the Supervision of the Crew Foreman**

Infrasource is a nationwide company that operates in twenty-six states performing natural gas pipe installations and employs roughly 1700-1800 employees—digging excavations, and having workers work in those excavations, is a regular part of its business operations. *See* AR Bartells 55-56.¹ Infrasource's sister company is Potelco, Inc., an electrical utility contractor that builds and repairs power lines. *See* AR Bartells 55, 58. Infrasource's safety director reports to the vice president of safety for

¹ "AR" refers to the administrative record found in the certified appeal board record. Witness testimony is referenced by "AR" followed by the witness's last name.

Potelco. AR Bartells 55, 58. In Washington, Infrasource is a service provider for Puget Sound Energy and employs around 350 employees. AR Bartells 55-56.

In September 2014, an Infrasource crew consisting of Mike Sawyer, Chad Auckland, and Carson Row worked on a gas main project along Capital Boulevard in Tumwater, Washington. AR Auckland 38; AR de Leon 30. The project involved excavating and installing pipe sections over the course of a week or two. AR Auckland 41. Auckland was a fitter, meaning that he would fuse together the plastic gas pipes in the excavation. AR Auckland 38-39. Row also assisted in the pipe installation in the trench. AR Auckland 44. Sawyer was both crew foreman on site and the designated competent person. AR de Leon 12, 26.²

The crew had been working at this job site for a week or two at the time of the inspection. AR Auckland 41. As part of their job, Auckland and Row regularly climbed down into the trench to perform the pipe installation. *See* AR Auckland 38. On the day of the inspection, Auckland and Row entered the trench without measuring its depth. AR Auckland 44.

² WAC 296-155-655(11) requires an employer to designate a “competent person” to conduct daily inspections of excavations, the adjacent areas, and protective systems. A competent person is trained to look for situations that could result “in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions.” WAC 296-155-655(11); AR de Leon 30-31. Chad Auckland had also received competent person training, but he was not the designated competent person for this jobsite. AR Auckland 39, 43-44.

The trench was in the middle of a lane of Capitol Boulevard, with safety cones separating the trench from another lane of traffic. Ex 2. Auckland fused pieces of plastic pipe together while working in the trench. AR Auckland 38-39. While Auckland and Row were in the trench, their foreman, Sawyer, operated an excavator close by. AR de Leon 32-33.

Washington regulations set forth requirements to protect workers from potential cave-ins by either the creation of a sloping and benching system or the installation of a protective system, which can be placed along the walls of excavation to prevent the collapse. *See* WAC 296-155-657. Infrasource was using a protective system known as “speed-shoring,” which is a portable protection system used in projects involving lengthy excavations. *See* AR Auckland 45. Although the Infrasource crew had the “speed-shoring” protection system available on site the day of the inspection, as Auckland testified, the Infrasource crew placed no shoring, sloping, or other protective system while they worked in the trench. AR Auckland 39. Rather, as their foreman operated an excavator, they entered the trench without measuring it. *See* AR de Leon 32; AR Auckland 44; Ex 2.

B. Department Inspectors Witnessed Infrasource Workers Working Without Cave-in Protection While Driving By the Job Site

Department inspector Raul de Leon and his supervisor, Scott McMinimy, observed Auckland and Row in the trench while driving by the job site. AR de Leon 11. Inspector de Leon could see the tops of their bodies and based on the amount of the employees' bodies that he could see, de Leon was concerned that the workers were working in a trench that was over four feet deep with no protective systems. AR de Leon 11.

The Department inspectors inspected the work-site. AR de Leon 13, 16; *see* Ex 2. The inspectors took photographs as they approached the site, including a picture of the trench from a public sidewalk. *See* AR de Leon 12, 16. At the request of Infrasure's Safety Director, inspector de Leon also took a photograph exactly where the employees were standing in the trench when he saw them. AR de Leon 16-18; Ex 2. He measured the trench and determined that the depth of the trench was between five feet, one inch and four feet, six inches deep, depending upon where it was measured. AR de Leon 16. While Auckland and Row were in the trench, foreman Sawyer was operating an excavator, which was in plain view of the employees in the trench. AR de Leon 26.

C. The Department Issued Two Serious Violations After Conducting Its Inspection

The Department issued a citation with two violations to Infrasure. Inspector de Leon recommended that the Department issue a

serious violation of WAC 296-155-657(1)(a), for failing to ensure that employees working in an excavation of four feet or more were protected from the hazards of cave-ins by adequate protective systems. AR de Leon 15. Infrasource had exposed both Auckland and Row to a potential cave-in from previously disturbed soils. AR de Leon 18. Were a cave-in to occur, de Leon testified that it would engulf the men with the soils, which could result in broken bones, collapse of the chest cavity, or death. AR de Leon 27-28. The inspector calculated a penalty based on a number of factors, including the severity of the injuries likely to occur, the probability of an injury occurring, the size of the employer, and the employer's good faith. AR de Leon 20-25.³

The inspector also recommended a serious violation of WAC 296-155-655(11)(b), for failing to ensure that the competent person removed exposed employees from a hazardous area until necessary precautions are taken to ensure their safety. AR de Leon 25-26. Because the competent person failed to take the necessary precautions, Infrasource exposed both Auckland and Row to a potential cave-in hazard while working in the trench. AR de Leon 27.

³ Infrasource does not challenge the specific calculations the Department used to arrive at the penalty amount.

D. The Board Rejected Infrasource's Claim that the Violations Resulted From Unpreventable Employee Misconduct and the Superior Court Affirmed the Board's Decision

Based on the inspector's recommendation, the Department issued the citation. At hearing, Infrasource raised the affirmative defense of unpreventable employee misconduct. To support its defense, Infrasource provided evidence of training and safety meetings it held that indicated shoring in a trench was required if a trench was deeper than four feet. Exs 6-8; AR Auckland 42. Infrasource provided its employees with a policy and safety manual, which the company asked employees to keep with them, but that manual stated shoring in a trench was required if a trench was deeper than five feet. Ex 5 at 35; AR Bartells 108-09.

Infrasource provided very limited evidence of discipline related to its safety program. Infrasource presented no evidence that it had punished or fired workers for violating safety rules before these violations. Infrasource only presented evidence it punished the three employees involved in these violations after the violations occurred. AR Bartells 83; AR Auckland 51. Infrasource did not provide any records of discipline administered to any employee related to safety or otherwise. It also provided no prior inspections by the Department where the Department found that Infrasource was compliant.

The Board affirmed the citation. AR 3, 26-29. It found that “Infrasource did not effectively enforce its safety rules regarding the use of trenching protection when violations were discovered. Specifically, its supervisor exposed workers to hazards of trenches in excess of four feet deep without using trenching protection.” AR 3, 28. The industrial appeals judge 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 its violation.” AR 3, 27. As a result, the defense of unpreventable employee misconduct failed. AR 3, 28.

Infrasource appealed the matter to superior court, which affirmed the Board. CP 41-42. The superior court found that “[s]ubstantial evidence supports that Infrasource did not effectively enforce its safety rules regarding the use of trenching protection when violations were discovered.” CP 41. Infrasource then appealed to this court.

IV. STANDARD OF REVIEW

In a Washington Industrial Safety & Health Act (WISHA) appeal, this Court reviews a decision by the Board directly based on the record before the agency. *J.E. Dunn Nw., Inc. v. Dep’t of Labor & Indus.*, 139 Wn. App. 35, 42, 156 P.3d 250 (2007); *see also Martinez Melgoza & Assocs., Inc. v. Dep’t of Labor & Indus.*, 125 Wn. App. 843, 847, 106 P.3d 776 (2005).

The Board’s findings of fact are conclusive if substantial evidence supports them. *Elder Demolition, Inc. v. Dep’t of Labor & Indus.*, 149 Wn. App. 799, 806, 207 P.3d 453 (2009); RCW 49.17.150(1). Evidence is substantial if it will convince a fair-minded person of the truth of the declared premise. *Elder Demolition*, 149 Wn. App. at 807. Under substantial evidence review, courts will not reweigh the evidence even though they “might have resolved the factual dispute differently.” *Zavala v. Twin City Foods*, 185 Wn. App. 838, 867, 343 P.3d 761 (2015) (citation omitted). Rather, courts view the evidence in the light most favorable to the prevailing party at the Board—here, the Department. *See Frank Coluccio Constr. Co. v. Dep’t of Labor & Indus.*, 181 Wn. App. 25, 35, 329 P.3d 91 (2014). Unchallenged findings of fact are verities on appeal. *Mid Mountain Contractors, Inc. v. Dep’t of Labor & Indus.*, 136 Wn. App. 1, 4, 146 P.3d 1212 (2006).

This Court reviews questions of law, including an agency’s construction of a regulation, de novo. *Pilchuck Contractors, Inc. v. Dep’t of Labor & Indus.*, 170 Wn. App. 514, 517, 286 P.3d 383 (2012). The court construes WISHA statutes and regulations “liberally to achieve their purpose of providing safe working conditions for workers in Washington.” *Frank Coluccio Constr.*, 181 Wn. App. at 36; *see also* RCW 49.17.010. The court gives substantial weight to the Department’s interpretation of

WISHA. *See Frank Coluccio Constr.*, 181 Wn. App. at 36.

V. ARGUMENT

This Court should affirm the Board's decision that Infrasource violated excavation safety codes when it allowed workers to work in a trench more than four feet deep with no protection against cave-ins and failed to ensure that its designated competent person identify the cave-in hazard and remove the employees from the potential hazard. When viewing the evidence in the light most favorable to the Department, as must occur here, substantial evidence supports finding that Infrasource knew of the violations and that it failed to show its safety program was effective in practice.

First, under the case law governing knowledge, substantial evidence shows that Infrasource knew or should have known of the violations because a foreman was involved in the violation and the violations occurred in plain view. Second, Infrasource's unpreventable employee misconduct defense fails because Infrasource did not submit documentation to show that the safety program was effective in practice, a foreman participated in the violation, and Infrasource's safety manual contained the incorrect standard regarding trenching rules.

A. Substantial Evidence Supports the Board's Finding That the Employer Knew or Should Have Known of the Violations Because the Foreman Participated in the Violations and the Hazardous Condition Was Visible From a Public Road

The Board's decision should be affirmed because Infrasource violated WAC 296-155-657(1)(a) by failing to ensure that employees working in excavation were protected from cave-in hazards and violated WAC 296-155-655(11)(b) by failing to ensure that the competent person removed the exposed employees from the hazard.⁴

WAC 296-155-657(1)(a) requires employers to protect employees working in excavations from cave-ins, providing:

(1) Protection of employees in excavations.

(a) You must protect each employee in an excavation 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.

WAC 296-155-655(11)(b) requires an employer to ensure that a competent person removes exposed employees from hazardous conditions, specifically providing:

(11) Inspections.

(a) Daily inspections of excavations, the adjacent areas, and protective systems must be made by a competent person for evidence of a situation that could result in

⁴ Because the hazardous condition was the same for both items of the grouped violation (with a single penalty), the analysis is the same for each.

possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection must be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections must also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

(b) Where the competent person finds evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, you must remove exposed employees from the hazardous area until the necessary precautions have been taken to ensure their safety.

(emphasis added). The two provisions of WAC 296-155-655(11) work in concert to ensure that employers provide protections from cave-in hazards and provide a “competent” person on-site to ensure that the employer identifies the cave-in hazards and implements the necessary protection.

At the Board, to establish a prima facie case of a “serious” violation under WISHA, the Department must meet the following five elements by a preponderance of the evidence:

(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.

Wash. Cedar & Supply Co., Inc. v. Dep’t of Labor & Indus., 119 Wn.

App. 906, 914, 83 P.3d 1012 (2003) (citation omitted); *see also Potelco*,

Inc. v. Dep't of Labor & Indus., 191 Wn. App. 9, 34, 361 P.3d 767 (2015).

On appeal, the court reviews each prong only for substantial evidence, with the burden on Infrasource as the appellant to disprove the Board's findings. *See Frank Coluccio Constr.*, 181 Wn. App. 25 at 35. Infrasource does not challenge any other element for the two violations other than the knowledge requirement.

At the Board, to establish the knowledge element to prove a serious violation of WISHA, the Department need only show that the employer knew, or with the exercise of reasonable diligence, could have known of the presence of the violative condition. RCW 49.17.180(6); *Wash. Cedar & Supply*, 119 Wn. App. at 914.

Actual and constructive knowledge of a violative condition may be demonstrated by the Department in a number of ways. First, knowledge may be imputed to the employer through a supervisory agent—such as a crew foreman. *Potelco, Inc. v. Dep't of Labor & Indus.*, 194 Wn. App. 428, 440, 377 P.3d 251 (2016), *review denied*, 186 Wn.2d 1024 (2016). Second, constructive knowledge may be established if a violation is readily observable or in a conspicuous location in the area of the employer's crews (i.e. "plain view"). *Erection Co. v. Dep't of Labor & Indus.*, 160 Wn. App. 194, 207, 248 P.3d 1085 (2011). When a violation is

in the open and the violation is visible to any bystander, an employer has sufficient knowledge of that violation. *Potelco*, 194 Wn. App. at 440.

Infrasource's claim that it "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" lacks merit under the case law (and when applying the substantial evidence standard of review). Appellant's Opening Br. (AB) 21. Here, the Board may have found knowledge in at least two ways. First, the hazard was observed by the foreman, which provides knowledge to the employer. AR de Leon at 26, 32-33; *Potelco*, 194 Wn. App. at 440. The foreman, who was also serving as the competent person, operated the excavator that created the trench. *See* AR de Leon 26. And Infrasource did not take exception to the Board's finding that "the supervisor for Infrasource allowed the two employees to enter the trench when he had a plain view of surrounding area." *See* AB 1-3; AR 28 (FF 3). This finding is a verity on appeal. *Mid Mountain Contractors*, 136 Wn. App. at 4. The Board could rely on the knowledge of the foreman to determine Infrasource had knowledge of the hazard.

Second, the excavation was also in plain view—the Department inspector could see the violative condition while driving by the work site because it was visible from the road. AR de Leon 11. This Court has

already applied the plain view doctrine to establish employer knowledge when a violation is easily observable by a Department inspector, such as here. See *BD Roofing, Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 98, 110, 161 P.3d 387 (2007). Based on this, the Board properly affirmed the Department's serious classification.

B. Substantial Evidence Supports Finding That Infrasource's Safety Program Was Not Effective in Practice

Infrasource failed to meet its burden of proving the defense of unpreventable employee misconduct at the Board. RCW 49.17.120(5)(a)(i)-(iv) provides employers with a statutory affirmative unpreventable employee misconduct defense to certain WISHA violations. *BD Roofing*, 139 Wn. App. at 111. After the Department establishes a prima facie case that a violation has occurred, as it did here, the employer may be relieved of responsibility for the violation, but only if the employer can prove it has taken all the following steps:

1. Established a thorough safety program, including work rules, training, and equipment designed to prevent the violation;
2. Adequately communicated these rules to its employees;
3. Taken steps to discover and correct safety rule violations;
and,
4. Effectively enforced its safety program as written, in practice, and not just in theory.

RCW 49.17.120(5)(a); *BD Roofing*, 139 Wn. App. at 111. The defense only applies in “situations in which employees disobey safety rules despite the employer’s diligent communication and enforcement.” *See Asplundh Tree Expert Co. v. Dep’t of Labor & Indus.*, 145 Wn. App. 52, 62, 185 P.3d 646 (2008).

Here, Infrasource failed to establish the “effective enforcement of its safety program as written in practice and not just in theory.” RCW 49.17.120(5)(a)(iv); AR 28. This can only be shown if the violation is an isolated occurrence and not foreseeable. *See BD Roofing*, 139 Wn. App. at 111.

Infrasource fails to show that it has enforced its safety program in the past for three reasons. First, Infrasource failed to provide any evidence that it has punished its employees before the violations at issue or communicated that punishment to its workers. Second, a foreman participated in the violations, which creates an inference of lax enforcement of its safety policies. Third, Infrasource provided the incorrect standard for the violated rule in its company safety guide. For any one of these reasons, Infrasource has not met the elements of RCW 49.17.120(5)(a).

1. There Is No Documentary Evidence That Infrasource Disciplined Its Employees Before This Violation or Communicated Past Discipline of Other Safety Violations to Its Employees

Infrasource has provided no documentary evidence that it punished any employees for violating safety rules before the violations at issue. In *BD Roofing*, the court noted that “showing a good paper program does not demonstrate effectiveness in practice.” *BD Roofing*, 139 Wn. App. at 113. The court found that when there was no evidence that an employer had fired employees for violating safety rules, despite there being a written policy allowing for dismissal, the evidence of unpreventable employee misconduct fails. *BD Roofing*, 139 Wn. App. at 113-14. In *BD Roofing*, there was no documentary evidence that it disciplined its employees or implemented its written discipline policy, and the court held that the employer did not show its safety program was effective in practice. *Id.*; *see also Legacy Roofing, Inc. v. Dep’t of Labor & Indus.*, 129 Wn. App. 356, 366, 119 P.3d 366 (2005) (inadequate documentation of discipline supported Board determination of no unpreventable employee misconduct). Without a showing of actual enforcement of a company’s disciplinary policy, the employer cannot meet its burden to show unpreventable employee misconduct. And the Board can rely on the lack

of documented evidence to determine whether the program is effective in practice. *BD Roofing*, 139 Wn. App. at 113-14.

Indeed, Infrasource admits the “actions an employer takes to discipline employees for safety violations are also indicative of the effectiveness of its safety program.” AB 12. Infrasource provided no records of discipline for any employees. Although Infrasource safety director Alexander Bartells testified that the employees in question were punished, this occurred after the violation was found and is not evidence of the state of the safety program at the time of the violation. AR Bartells 83-84. The safety director testified that Infrasource audited worksites and that discipline was administered as needed, but Infrasource provided no documentary evidence of any administration of discipline related to safety audits. AR Bartells 58-59, 98-99. The Board could reject the safety director’s self-serving testimony in the absence of corroborating evidence. *See Ramos v. Dep’t of Labor & Indus.*, 191 Wn. App. 36, 40, 361 P.3d 165 (2015) (a factfinder may disbelieve a witness’s self-serving testimony).

Infrasource provided no written documentation of ever administering any discipline to any employee related to safety (or otherwise). The Board could believe that the failure to document discipline to mean that Infrasource could not effectively administer

progressive discipline as required by its safety plan, and shows its written plan is not effective in practice. AR Bartells 117; Ex 5 at 89; *see BD Roofing*, 139 Wn. App. at 113-14. When viewing the evidence in the light most favorable to the Department, Infrasource has not proven it has an effective safety program in practice on these facts.

2. A Foreman Was Involved in the Violations at Issue, Creating an Inference of Lax Enforcement

The Board also correctly inferred that Infrasource had lax enforcement of its safety policy because its foreman was involved in the violations. Where a supervisor or foreperson participates in a safety violation, “such fact raises an inference of lax enforcement and/or communication of the employer’s safety policy.” *Potelco*, 194 Wn. App. at 437 (quoting *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1277 (6th Cir. 1987)). Thus, when a supervisory employee is involved, as here, “the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor’s duty to protect the safety of employees under his supervision.” *Id.* (quoting *Sec’y of Labor v. Archer-W. Contractors, Ltd.*, 15 O.S.H.C. 1013, 1991 WL 81020, at *5 (Occupational Health & Safety Review Comm’n April 30, 1991)). Infrasource’s lengthy discussion of *In re John Lupo Constr.*, No. 96 W075, 1997 WL 450274 (Wash. Bd. Indus. Ins. App. June 10, 1997) and

the federal OSHA cases is extraneous here because the *Potelco* Court established the controlling standard for this case—a presumption of lax enforcement for foreman misconduct. *See* AB 16-19.

Infrasource also misreads *Lupo* as limiting the relevancy of foreman involvement. AB 18. *Lupo* dealt with a particular set of facts involving a small business whose supervisor issued a direct order to violate a safety regulation and did not explore other fact patterns; it did not purport to set forth the only circumstances where a foreman's conduct was relevant. *See Lupo*, 1997 WL 450274, at *1.

While Infrasource is correct that the presence of a foreman does not impose strict liability (AB 18), the factfinder Board may rely solely on the fact of a foreman's presence to determine whether there was an effective safety program. *See Potelco*, 194 Wn. App. at 437-38. Infrasource relies upon a federal administrative decision to assert that supervisor participation in a violation does not by itself establish a safety program is inadequate. *Sec'y of Labor v. Butch Thompson Enter., Inc.*, 22 O.S.H.C. 1985, 2009 WL 4842764, at *8 (Occupational Health & Safety Review Comm'n Oct. 27, 2009); AB 19. But *Potelco* sets no such limitation. *See Potelco*, 194 Wn. App. at 428. And such a limitation is illogical because it would hamper the factfinder.

Consistent with *Potelco*, the Board weighed the evidence and concluded that the training was inadequate as demonstrated by the supervisor's involvement. *Potelco*, 194 Wn. App. at 437-38; AR 27 ("The facts surrounding this violation call into question the training provided to the supervisor by the employer."). It is a verity that foreman Sawyer was present for the violation of the safety standards. *See* AB 1-3; AR 28 (FF 3); *Mid Mountain Contractors*, 136 Wn. App. at 4. In addition, Auckland, one of the employees in the trench, was also certified as a competent person, but still did not ensure proper shoring. AR Auckland 43-45. Infrasource points to the fact that all necessary safety equipment was on site, yet the employees still failed to use that equipment when not only a foreman, but a second competent person was present. AR Auckland 45.

Because two competent personnel participated in the violation and no one remedied it until the Department's inspection, the Board correctly inferred that Infrasource's implementation of its safety program was not adequate to prevent safety violations, and it was not effective in practice.

3. Infrasource Provided the Incorrect Standard in Its Company Safety Guide and Was Ineffective in Informing Employees of the Proper Washington Standard

Infrasource's safety program was also not effective in practice because it provided the wrong standard for Washington in its company

policy and safety guide. Infrasource asks employees “to keep this book [Infrasource’s company policy and safety guide] with them, we’re asking them to reference it, we’re asking them to familiarize themselves with the context of the book and if they break the rules, then they can’t say they didn’t.” AR Bartells 108-09. Yet, that same manual indicates that the requirement for mandatory shoring or sloping is at five feet or deeper. Ex 5 at 35. This contradicts WAC 296-155-657(1)(a), which requires trenching protection when the depth of the trench is four feet or deeper. When the manual that the employer instructs employees to carry on the jobsite does not reflect the correct standard in Washington, the employer has an ineffective safety program.

Infrasource points to other sources of information that informed its employees of the correct standard and in doing so asks this Court to reweigh the evidence in its favor. AB 12-13. Based on it providing that other information, as well as by providing the proper equipment to the employees, Infrasource wrongly claims that it was unforeseeable that the violation would occur. AB 12-14. But this Court must view the evidence in the light most favorable to the Department, *see Frank Coluccio Constr.*, 181 Wn. App. at 35, and the very fact that the employer provided the equipment shows it was aware of the hazard. Infrasource cites to its safety meetings, job hazard analysis, and training records as examples of where

the proper standard was provided to employees. But the one document that Infrasource instructed its employees to keep on hand contained incorrect information. The two PowerPoint presentations Infrasource presented as examples of the presentations of the proper safety information are together roughly 169 slides in total, with only four brief mentions of the four-foot standard. Exs 6, 8. The Board could infer that fleeting references to the proper standard in distant training did not supplant the language in the manual Infrasource demanded that its employees carry on the job site. The violation was all the more foreseeable given the flawed language in the manual. Infrasource's communication of incorrect standards show an ineffective safety program in practice.

Similarly, Infrasource's safety guide states that local and state laws take precedence. Ex 5 at 5. But Infrasource submitted no evidence that the workers had access to the regulations while working in the field and no portion of the manual specified the correct Washington standard.

Infrasource relies heavily on the Board decision, *In re Shake Specialists, Inc.*, No. 99 W0528, 2001 WL 292977 (Wash. Bd. Indus. Ins. App. Jan. 22, 2001). AB 19-21. By drawing comparisons with the facts of *Shake Specialists* to this case, Infrasource attempts to relitigate the facts. And *Shake Specialists* does not address unpreventable employee misconduct when a foreman has direct knowledge of the

violation and the employer communicates the incorrect standard. *Shake Specialists* is not analogous to the present case.⁵

Infrasource presented no documentary evidence that it had enforced its safety program in the past, it provided the incorrect safety standard to its employees in its most important safety document, and a foreman actively participated in the violations. Based on these three factors, substantial evidence supports the Board's finding that Infrasource has failed to show its safety program is effective in practice. AB 28 (FF 6).

C. Infrasource Failed to Present Any Argument on Its Claim the Superior Court Erred in Granting Statutory Attorney Fees

This Court should decline to consider the issue because Infrasource failed to preserve its claim with supporting argument, but even if this Court reaches the merits, Infrasource's claim that the Department is not entitled to statutory attorney fees is without merit. AB 22.

First, Infrasource provides no argument or case law for its assertion that the superior court erred in granting the Department statutory attorney fees. Where a party purports to assign error to a finding of fact

⁵ Infrasource's reliance on *Scheel* is also misplaced. See AB 20. The *Scheel* panel did not dismiss the matter based on unpreventable employee misconduct as Infrasource suggests, but rather because the "respondent had no knowledge, either actual or constructive, of the violative conditions." *Sec'y of Labor v. Scheel Constr., Inc.*, 4 O.S.H. Cas. (BNA) 1824, 1976 WL 6145 (Occupational Safety & Health Review Comm'n Nov. 8, 1976). To the extent it is relevant to this matter at all, *Scheel* supports the Board's conclusion that Infrasource had knowledge of violations because consistent with Washington case law, it acknowledges that a violation can be proven with a showing of constructive knowledge. See discussion Part V.A *infra*.

but fails to present clear argument as to how the finding is not supported by substantial evidence, the finding is a verity. *Nelson v. Dep't of Labor & Indus.*, 175 Wn. App. 718, 728, 308 P.3d 686 (2013); see *In re Estate of Lint*, 135 Wn.2d 518, 531-33, 957 P.2d 755 (1998).

Second, even if this Court decides to consider the merits of this request, it should reject Infrasource's claim because the Department is entitled to statutory attorney fees as a prevailing party under RCW 4.84.010 and RCW 4.84.030. RCW 4.84.030 and RCW 4.84.010 allow the prevailing party to recover costs. RCW 4.84.010(6) defines those costs as "[s]tatutory attorney and witness fees." Nothing in the cost statutes preclude an agency, such as the Department, from claiming costs, and such cost requests are routine in the administrative appeals of Department citations.

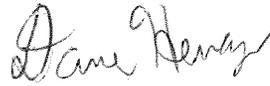
VI. CONCLUSION

Two Infrasource employees, in direct line of sight of their foreman and a public street, performed work in a trench deeper than four feet with no protection against cave-ins. Infrasource has not documented that it punishes employees for violating its safety policies, and it taught its employees an incorrect trenching standard in its most important safety document, the company policy and safety guide. Substantial evidence

supports the Board's findings that Infrasource did not have a safety program that was effective in practice and that both violations in the Department's citation were serious violations. This Court should affirm.

RESPECTFULLY SUBMITTED this 16th day of November, 2017.

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

INFRASOURCE SERVICES, LLC,

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF LABOR
AND INDUSTRIES,

Respondent.

DECLARATION OF
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I served the Brief of Respondent, Department of Labor and Industries and this Declaration of Service in the below described manner:

E-Filing via Washington State Appellate Courts Portal:

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DATED this 16th day of November 2017, at Tumwater, Washington.



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