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**IN THE COURT OF APPEALS, DIVISION III  
THE STATE OF WASHINGTON**

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POWER CITY ELECTRIC, INC.,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF  
THE STATE OF WASHINGTON,

Respondent.

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**REPLY BRIEF OF APPELLANT  
POWER CITY ELECTRIC, INC.**

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## I. REPLY

**A. The Board and the Department misconstrue the law as none of the employees were in the zone of danger or had any reason to be within the zone of danger.**

Industrial Appeals Judge Randolph F. Bolong, the trial judge who presided over the administrative hearing, had the opportunity to take testimony from the witnesses and observe the demeanor of the witnesses. In his Proposed Decision & Order, Judge Bolong found that the Department failed to meet its burden of proof for Items 1-1a, 1-1b and Item 1-3. CABR 67.

Judge Bolong applied the facts and concluded that under *Mid-Mountain Contractors v. Department of Labor & Industries*, 136 Wn.App. 1 (Division 2 2006) the Department did not meet its burden of proof that there was employee exposure as required by RCW 49.17.180(6). After concluding that the Department failed to establish employee exposure, he vacated Items 1-1a, 1-1b and 1-3. Judge Bolong wrote at CABR 63, lines 22 – 37:

“Were the employees exposed to, or had access to, the violative condition? The Department cites the *Mid Mountain Contractors* case for support of their position. However, the holding in that case requires that the ‘normal duties’ be examined. If, in the course of the workers’ normal duties, they are exposed to or have access to the hazard posed, then the employer was properly cited. In this case, the workers were in the trench to expose the conduit and to dig around the fiber optics and other wires. The area in which they worked was at a depth of 30 inches. They had approximately 3.5 feet between the south wall of the trench and the area where the track hoe was taking out soil. Though in close proximity, the workers did not have any reason to enter the north side of the trench, other than to push soil to that side of the excavation. The workers appeared to be aware that they should not enter the deeper side of the trench. In the course of their normal duties, the workers did not have access to the hazard posed by the unprotected portion of the excavation.”

Following the Department's Petition for Review, two of the three Board members held that the IAJ incorrectly vacated Item 1-1a and 1-1b on an, "incorrect interpretation of the zone of danger standard as set forth by the court of appeals in *Mid Mountain Contractors, Inc.*" CABR 6, lines 23 – 27.

The Board declared at CABR 7, lines 4 – 16:

"The court found it irrelevant that the employees were working in an area of the trench that was less than four feet deep, concluding that the proper standard is whether the employees had access to the hazard posed by the unprotected part of the trench that was subject to cave-in.

We understand that the employees in this appeal had job duties that concentrated in the shallower end of the trench. However, the Department's argument is persuasive that the employees were working in close proximity to the deep end of the trench, and it is reasonably likely that they could be in the zone of danger as they shoveled or pushed dirt into that area or performed other duties as part of their normal job duties."

The Board respectfully erred in this conclusion of law. The *Mid Mountain Contractors* court correctly identified the standard to determine employee exposure to a hazard. The "zone of danger" standard is well established under Federal OSHA cases. The Secretary must demonstrate that employees were either actually exposed to the cited hazard, or had access to the cited condition. The Secretary may show employee access through either actual employee exposure, or by showing that "while in the course of their assigned working duties . . . [employees] will be, are, or have been in a zone of danger." *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976).

Under the federal OSHA cases, however, the Secretary must establish that it was reasonably predictable that employees “will be, are, or have been in the zone of danger” created by the violative condition. *Fabricated Metal Products*, 18 BNA OSHC 1072, 1073-1074 (No. 93-1853, 1997). The test of whether an employee would have access to the “zone of danger” is “based on reasonable predictability.” *Kokosing Constr. Co., Inc.*, 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996). Moreover, the inquiry is not whether the exposure is theoretically possible but whether the employee's entry into the danger zone is reasonable predictable. *See, Fabricated Metal Products, Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997).

*Secretary of Labor v. Fishel*, OSHRC Docket No. 97-102, illustrates very clearly that access to the zone of danger is not based on proximity, but is based on the reasonable predictability that the nature of the work will place the employee in harm's way. In that case, the Fishel Company (Fishel), an underground utility contractor, was locating buried telephone cables in Dublin, Ohio, on October 16, 1996, when its excavation site was inspected by the Occupational Safety and Health Administration (OSHA). As a result of the inspection, Fishel received a willful citation alleging violations of §1926.651(j)(2) for failing to maintain the spoil pile and backhoe at least two feet from the edge of the excavation, and, §1926.652(a)(1) for failing to shore or otherwise protect the excavation from cave-ins.

The telephone company directed Fishel to uncover underground telephone cables. Fishel sent Jeromy Perry, crew leader, with a backhoe and laborer Jerrod Gussler to uncover the cables (Tr. 202). On October 15, 1996, Perry and Gussler uncovered two of the missing cables and a splice encapsulation. There was no shoring or other protective equipment to prevent cave-ins used for the excavation. On October 16, 1996, Perry and Gussler returned to the site to uncover the third cable. As Perry operated the backhoe to excavate to a depth immediately above the cable, Gussler, using a shovel, removed the dirt from around the cable. As they followed the cable from the old terminal, the excavation led into a small hill which apparently was made after the cable was buried. Gussler located the splice encapsulation where the telephone company splicers needed to work. No work was to be performed two to three feet beyond the splice encapsulation. However, the excavation extended approximately 10 to 14 feet beyond the encapsulation. After uncovering the splice encapsulation, Perry went into the excavation. The splice encapsulation was at a depth of 4 feet, 6 inches<sup>1</sup>. On the side of the encapsulation nearest the backhoe, Perry exposed two cables leading from the backside of the encapsulation. Gussler remained in the shallow area of the excavation. Approximately two to three feet beyond the splice encapsulation, the cable ran into the ground and back toward the side of the excavation. Perry placed a shovel under the cable to mark the

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<sup>1</sup> OSHA requires trenches and excavations to be protected if they are greater than 5 feet deep. WISHA is the only state in the nation to have a 4 foot trenching requirement.

location of the cable when he resumed digging with the backhoe. Where Perry placed the shovel, which was two to three feet beyond the splice encapsulation, the excavation exceeded five feet in depth. Perry was in the excavation for five to ten minutes.

Based on this evidence, the OSHA Review Commission held that the Secretary established that Perry was exposed to the trenching hazard, but Gussler was not. The Commission held:

Here, there is no evidence of Gussler's actual exposure, and it was not shown reasonably predictable that he would enter the deeper portion of the trench. Gussler's work ended when he uncovered the encapsulation. Perry told Gussler that he intended to shore the trench and move the spoil pile before any other work was done. There was no reason for Gussler to enter the unsafe portion of the trench.

In the *Fishel* case, Gussler was 2 – 3 feet away from the section where the excavation was deeper than 5 feet. There was no barricade or physical barrier to keep him from going into the deeper portion of the trench. Despite this close proximity to the deeper portion of the trench, the OSHA Review Commission had no difficulty in finding that Gussler did not have access to the zone of danger.

In our present case, the Power City Electric employees were in the shallow end of the excavation only to uncover the fiber optic conduit by hand. They had no reason to be at the deep end. In fact, as that was where the track hoe shovel was actively scooping, they would stay away from the deep end to avoid being struck by the bucket. There was no evidence to

suggest that they would need or want to put themselves directly into the oncoming path of the moving bucket. Thus, there was no substantial evidence in the record to support the Board's findings that the employees were in the zone of danger or had access to it.

The Department erroneously argues that Power City Electric needed to erect a barricade or barrier and that it was necessary to keep the employees out of the deep end of the trench. Where the evidence establishes that the employees' normal duties would not require the Power City Electric employees to be in the deep end of the trench, no physical barricade or barrier was required. To hold otherwise would be to require all employers to erect barricades or barriers at all trenches greater than 4 feet in depth where an employee "could" access. This is not the law, nor could it ever be reasonably required. Where a contractor is installing underground utilities, hundreds, if not thousands of feet long, it would be illogical to require the employer to erect a physical barrier to protect employees who have no duties to go into the excavation. Yet, that is precisely the argument and the position the Board and the Department take in this matter.

As a matter of law, the Board erred by concluding that it was, "reasonably likely that they [the Power City Electric employees] *could* be in the zone of danger as they shoveled or pushed dirt into that area or performed other duties as part of their normal job duties." Emphasis added.

Based on the federal OSHA cases, the standard is where it is reasonably likely that the employees *would* be in the zone of danger, not a theoretical possibility that they could be in the zone of danger. Moreover, there are no substantial facts in the record to support the Board’s finding that they could be within the zone of danger when they performed “other duties”.

**B. The Board erred by affirming Item 1-2 when Power City Electric employees were able to egress the excavation wall that was less than four feet deep.**

The Department alleged that Power City Electric committed a serious violation of WAC 296-155-655(3)(b) in Item 1-2. The Department alleged:

The Employer did not ensure that the employees working in the trench/excavation were provided a safe means of access or egress, two employees were in a [sic] excavation greater than 4 feet deep.

CP 345.

WAC 296-155-655(3)(b) states:

**(3) Access and egress.**

(b) Means of egress from **trench** excavations. **A stairway, ladder, ramp or other safe means of egress must be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62) of lateral travel for employees.**

Emphasis *added*.

The clear language of the cited regulation demonstrates that it applies only to *trench* excavations that are more than four feet deep. It does not apply to excavations. The stated purpose of WAC 296-255-655(3)(b) is to ensure that an employee does not have to travel more than 25 feet to

get out of a trench that is more than 4 feet deep. That is, if the exit point of the trench is greater than 4 feet deep, regardless of the depth of the trench on the other side, a ladder or other means of safe egress must be provided to allow the employees to freely exit the trench.

An excavation is defined in WAC 296-155-650 as “[a]ny person-made cut, cavity, trench or depression in the earth’s surface, formed by earth removal.”

A trench excavation is defined in WAC 296-155-650 as:

**Trench (trench excavation).** A narrow excavation in relation to its length made below the surface of the ground. In general, the depth is greater than the width, but the width of a trench (measured at the bottom) is not greater than 15 feet (4.6m).

An “excavation” that is not a trench is defined in WAC 296-155-650(2) as:

**Excavation.** Any person-made cut, cavity, trench, or depression in the earth's surface, formed by earth removal.

In the case at bar, the depth of the excavation dug by the Employer was not greater than the width. Officer Gomez never measured the width. He measured the deepest part which was only 6 feet. The depth was not symmetrical and ranged from 30 inches on the south end to 6 feet on the north. The width on the other hand was constant and was 6 to 7 feet. As such, the depth was not greater than the width. As such, the excavation in the present case is an excavation, but it is not a trench excavation as defined in WAC 296-155-650. Accordingly, the WAC 296-155-655(3)(b) is not applicable to excavations that are not defined as a “trench excavation.” The

Department offers no reasonable argument to explain how a trenching requirement can apply to an excavation that is not a trench by its own standards and definitions.

Based on the undisputed testimony, the dimensions of the excavation demonstrate that it was an excavation, but that it did not meet the definition of a “trench” or a “trench excavation.” As such, the cited standard does not apply.

In upholding the citation, the Board erroneously concluded that all excavations are trenches. CABR 4. This is false. While all trenches by definition are excavations, not all excavations are trenches. “Trench excavations” are a subset or a specific and discrete type of excavation.

In confusing the terms (“trench excavation” and its abbreviated version “trench” with “excavation”) the IAJ, in discussing the citation, stated that:

WAC 296-155-655(3)(b) states the employer must provide a safe means of egress when entering and exiting a **trench** 4 or more feet in depth, and within 25 feet of lateral distance in the trench. Here, the cited standard applies because the **trench** was more than 4 feet in depth in some areas. The Employer did not have a stairway, ladder or ramp located in the **trench excavation**. What they did have was a ledge or notch cut into one side of the **excavation**.

CP 64 Lines 19 - 25 emphasis **added**.

The burden is on the Department to prove that the code applies. *Olympia Glass Company, 95 W0455, J.E. Dunn Northwest, Inc. v. Dept. of Labor & Indust., 139 Wn. App 35, 44, 156 P.3d 250 (2007); Washington Cedar & Supply Co. v. Dept. of Labor and Indust., 137 Wn.App. 592 602,*

154 P.3d 287 (2007). In addition, the Board confuses the terms “trench” and “trench excavation” with “excavation.” These terms have different meanings in the regulatory definitions.

Agency regulations are interpreted as if they are statutes. *Roller v. Dept. of Labor & Indust.*, 128 Wn.App. 922, 926-927, 117 P.3d 385 (2005) (quoting *Cobra Roofing Serv., In v. Dept. of Labor & Indust.*, 122 Wn.App. 402, 409, 97 P.3d 17 (2004)). When interpreting a statute, courts first look at its plain language. *State v. Armendariz*, 160 Wn.2d 106, 110 156 P.3d 201 (2007). If the plain language is subject to only one interpretation, the inquiry ends because plain language does not require construction. *Id.* “Where statutory language is plain and unambiguous, a statute’s meaning must be derived from the working of the statute itself.” *Washington State Human Rights Comm’n v. Cheney Sch. Dist. No. 30*, 97 Wn.2d 118, 121, 641 P.2d 163 (1982). Absent any ambiguity or a statutory definition, Washington courts are to give words in a statute their common and ordinary meaning. *Garrison v. Washington State Nursing Bd*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976). “A statute that is clear on its face is not subject to judicial construction.” *State v. J.M.*, 114 Wn.2d 472, 480, 28 P.3d 720 (2001).

Here the WAC is clear that states that “[a] **stairway, ladder, ramp or other safe means of egress must be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62) of lateral travel for employees.**” WAC 296-155-655(3)(b), *Emphasis added.* While this was an “excavation it was not a “trench excavation” and as such, the code does not apply.

**C. Even if the excavation in question was also a trench, which it was not, the cited WAC still does not apply because it was less than four feet where the workers egressed.**

Not only does the cited regulation not apply to the excavation in question, even if it were a trench excavation (which it is clearly not), it is also not deeper than 4 feet. The clear language of the cited WAC specifies that when the trench is more than four feet deep, a safe means of egress must be made available within 25 feet of travel. The Compliance officer took no measurements of the south side of the excavation, even though he testified that he observed two employees get out of the south side of the excavation. Mr. Schelske testified that it was 30 inches or less. He testified that Curtis had put in a notch to help him walk out, and that it was easy for the workers to get out.

Although ladders may be a common way to provide a safe means of access and egress, it is clearly not the only method available to employers to satisfy the code. Rather, a ramp or other safe means of egress may be used if the excavation is greater than four feet in depth. In the case at bar, putting a notch inside of the south side of the excavation was an acceptable means of egress, even though it was technically not required.

In the case at bar, the employees had to travel less than 25 feet to get to the south side of the excavation that was approximately 30 inches deep, shallow enough for the employees to freely walk out of the excavation.

The Department failed to establish that any employee was exposed to the hazards of not being able to freely exit the excavation in question.

Just as there was no employee exposure for Items 1-1a, 1-1b and 1-3, the Board should have concluded that the cited WAC did not apply, or that there was no employee exposed to any hazard of ingress or egress into the excavation.

**D. Federal OSHA Review Commission decisions support the Employer's position.**

Whether a particular means of egress complies with the standard is measured by whether the facts show that the means of egress provided is reasonably safe, given the particular circumstances existing at the site of the trench. *See C.J. Hughes Constr., Inc.*, 17 BNA OSHC 1753; *see also Lowe Construction Co.*, 13 BNA OSHC 2182, 2185 (No. 85-1388, 1989).

In *C.J. Hughes*, the respondent left a slope at the end of a trench in order to enter and exit. *C.J. Hughes*, 17 BNA OSHC 1753. The compliance officer in that case asserted that the slope of the ramp was too steep; however, he admitted that he had neither measured the ramp nor attempted to use it himself. *Id.* The respondent's foreman, however, testified that he was able to enter and exit the trench without difficulty and that he was able to do so in an upright position. *Id.* The Commission found that the firsthand knowledge of the individuals who utilized the ramp was far more persuasive than the speculative testimony of the compliance officer. *Id.* Ultimately, the Commission held that a ramp that allows an individual to walk unobstructed into and out of a trench constitutes a "safe means of egress" according to the standard. *Id.*

Likewise, in our present case, it was undisputed that the Power City Electric employees were able to easily exit the shallow end of the excavation wall. Not only did the cited code not apply, the undisputed facts demonstrated that Power City Electric employees had a safe means of egress from the excavation.

## **II. CONCLUSION**

The Department failed to meet its burden of proof that the Employer did not comply with terms of the cited regulations or that any employee was exposed to a serious hazard, as it was not reasonably predictable that employees would be, were, or had been in the zone of danger. First, regarding Item 1-1, the record establishes that Officer Gomez did not know what specific task the Power City Electric crew was performing at the time of the inspection. Moreover, Officer Gomez never testified that he actually saw anyone inside of the deep portion of the excavation, and he never testified that he saw anyone attempt to get out of the excavation of the west, north, or east sides.

Mr. Schelske, however, testified that no one was in the deep end of the excavation where it was about six feet deep because Power City Electric was not performing any work there, no tools were stored there, nor was the access or egress point anywhere close to that side of the excavation. Rather, Mr. Schelske testified that the two Power City Electric employees had

always been on top of the fiber optic conduits in an area that was less than four feet deep.

With regard to Item 1-2, the record establishes that Power City Electric's employees were able to safely walk out of the south side of the excavation, and Power City Electric's employees were never observed attempting to climb out of the vertical walls of the west, north, or east sides of the excavation.

As to Item 1-3, Mr. Schelske testified that he had never seen any dirt fall into the excavation from the spoil pile. The spoils pile was sloped 1:1.5. Even if it did, there were no employees in the north end of the excavation where they could be hit by any debris from the spoil pile. That is, the record establishes that there was no reason for Power City Electric's employees to be in the north end of the excavation, as Power City Electric had no work to be performed in that area, there were no tools stored there, the employees were aware that they were not to be in that area, the competent person was watching that area, and the access and egress point was not located anywhere near the north end of the excavation.

Overall, it was not reasonably predictable that any of Power City Electric's employees were exposed to any of the alleged violations. Just because it may be possible that workers can gain access to a hazard, it does

not mean that it is reasonably predictable that employees will be exposed to a hazard. The Board erred as a matter of law.

For the aforementioned reasons, the Department cannot establish that it was reasonably predictable that employees were exposed to a hazard because there was no reason or occasion for Power City Electric's employees to go into the deep end of the excavation, or that in the course of their assigned working duties or their personal comfort activities while on the job, they would be exposed to any of the alleged violations.

For all of the reasons set forth above, the Employer respectfully urges the Court to reverse the Findings and Conclusions of the Board and vacate the citation in its entirety.

Respectfully submitted this 30th day of April 2018.

*s/ Aaron K. Owada*

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**CERTIFICATE OF SERVICE**

I certify that on April 30, 2018, I caused the original and copy of the **Employer's/Appellant's Reply Brief** to be filed via Electronic Filing, with the Court of Appeals, Division III, and that I further served a true and correct copy of same, on:

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