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

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Comes now the Appellant, Power City Electric (PCE), by and through its attorneys, OWADA LAW, P.C., by Aaron K. Owada, and hereby provides this Supplemental Brief, which represents Response to the Board's Supplemental Findings that were made pursuant to this Court's Decision dated November 15, 2018.

### I. ISSUES

- A. **On remand, did the Board fully address all of the issues this Court ordered the Board to make more detailed findings as required?**
- B. **On remand, did the Board make detailed findings supporting its finding that it was reasonably predictable that workers would "access" the deep end of the trench?**

### II. ARGUMENT

- A. **The Board did not fully address all of the issues as ordered by this Court.**

This Court remanded the Board's Decision and Order and ordered the Board to enter "more detailed findings of fact that explain its determination that the PCE workers had access to the zone of danger. Because PCE argues that the Board applied the wrong standard in making its determination, we also direct the Board to ascertain that it applied the *Adkins* 'reasonable predictability' standard to its determination that the workers had access to the zone of danger."

In the November 15, 2018 Opinion, this Court concluded that the Board's use of the word "access" insufficiently described how the workers were endangered. As such, this Court specifically directed the Board to address whether the men were working in an area that was four feet deep? Was the soil in danger of collapsing on them? Did the hole slope sufficiently that a worker might be expected to tumble into the deep end? Were they working so close to the deeper portion of the trench that they would have been endangered by a collapse occurring on the north side? Additionally, this Court asked the Board to address whether the spoils pile threatened to collapse the north end of the trench? Was it likely to slide into the trench of its own accord?

The Board did not make findings to address these specific questions, except for the finding that, "We do not have evidence as to the specific measurement of where the workers were standing relative to the deepest part of the trench, but the testimony established that whatever the specific distance from the tallest wall of the trench was immediately adjacent to it and of necessity, given the 6 foot width of the trench, closer than 6 feet from the deepest part of the trench. Given the narrowness of the trench, one step closer to the deepest area would put them in the zone of danger."

In the supplemental Finding of Fact No. 3, the Board found that, "The workers had access to the hazard posed by the unprotected portion of

the excavation while in the course of their normal duties. The employees were working in close proximity to the deep end of a 10 foot trench with nearly vertical walls that ranged in depth from over 6 feet to approximately 30 inches in one small step on the southwest corner of the trench, and it is reasonably predictable that they were or would be in the zone of danger as they shoveled or pushed dirt into that area or performed other duties of their normal job duties.”

Appellant respectfully asserts that the Board did not fully address the issues and make more detailed findings of fact as ordered by this Court. For the reasons set forth in the next section, because the Board did not fully address all issues as ordered, its finding that the workers had “access” did not address the primary issue as to whether it was reasonably predictable that the workers would go to the deep end of the trench where they would be exposed to the hazards the cited safety standards were designed to prevent.

**B. The Board’s Supplemental Findings do not provide more detailed facts as to why the workers would go to the deep end of the trench where they would have been exposed to the hazards alleged by the Department.**

This Court correctly held that the statutory elements of employee exposure to a hazard which has a substantial probability of causing serious bodily injury or death as set forth in RCW 49.17.180(6) are guided by federal OSHRC decisions. Both the Supreme Court in *Adkins v. Aluminum*

*Company of America*, 110 Wn.2d 128 (1988) and the Court of Appeals, Division I, in *Mid Mountain Contractors, Inc. v. Department of Labor & Industries*, 136 Wash. App. 1 (2006) have followed OSHRC decisions regarding access to a hazard. The *Mid Mountain* Court adopted the federal decisions when it held that the Department must “show by reasonable predictability that in the course of [the workers’] duties, employees will be, are, or have been in the zone of danger.” *Id.* at page 5.

It was undisputed that the back hoe operator, Mr. Schelske, was scooping dirt out of the trench along the north side of the trench. With a bucket one foot wide, the width of the portion of the trench that was greater than four feet deep was also one foot. Had the employees been in this one foot portion of the trench, it is undisputed that they would have been exposed to a trench wall cave-in greater than four feet. This is the zone of danger. This is the area where employees would also be exposed to a hazard if the dirt on the spoils pile slid or fell into the trench. As the employees were not in the deep part of the trench, the Department had the burden of proving that the employees were either in the deep portion of the trench, or that it was reasonably predictable that they would be in the deep portion of the trench. The Board did not make any supplemental findings that would explain why it was reasonably predictable that the employees would go into the deep portion of the trench.

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To the contrary, PCE provided the factual basis adopted by the IAJ in the Proposed Decision & Order as to why the employees would not go into the deep end of the trench. CABR 63, lines 22 – 37. The employees testified that it was not necessary for them to go into the deep part of the trench to perform their work as their work was to uncover the fiber optic cables with shovels; no tools or materials were stored in the deep part of the trench; and that it was not necessary for them to go into the deep part of the trench to either get in or out of the trench.

Without explaining why, the Board found in Finding of Fact No. 3 that, "...it is reasonably predictable that they were or would 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 record is void of any job duties that were required to be performed in the deep end of the trench. Using hand shovels to toss in the dirt removed around the fiber optic lines allowed the workers to stay away from the deep end. Moreover, the Board never explained why it was reasonably predictable that the experienced construction workers would go into the north end of the truck where there was a moving back hoe bucket. It is not reasonable to believe that anyone would step into the path of a moving back hoe buck, let alone experienced construction workers.

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The Board emphasizes the close distance the workers were from the deep end of the trench. However, the close proximity to the hazard does not support a finding of reasonable predictability that the workers would reasonably enter the area where the hazard exists.

*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 back hoe 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.

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.

The Board in our present case appears to suggest that employees could inadvertently slip or fall into the deep portion of the trench. While this may well be a theoretical possibility, that is not the legal standard articulated by the federal cases. The OSHRC held in *Rockwell International Corp*, 80 OSHRC 118/A2, 9 BNA OSHC 1092, that for employee exposure the Secretary must prove more than just the possibility that an employee may get injured. For example, in *Secretary v. Fabricated Metal Products, Inc.*, OSHRC Docket No. 93-1853, there was no finding of employee exposure where the CSHO believed that an employee could be injured if he inadvertently slipped and fell into an unguarded machine. The ALJ found that it was highly unlikely that an employee would slip or fall in such a way to constitute employee exposure. See also, *Secretary of Labor v. Tricon Industries, Inc.* 24 BNA OSHRC 1427, where the ALJ found that it was not reasonably predictable that employees would wander around the deck where there was an unprotected edge where a fall could occur.

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In our present case, the Board was ordered to make detailed findings of the slope of the hole and whether there was any evidence that the north wall would collapse, whether there was any danger of dirt from the spoils pile threatened to collapse the north end of the trench? Was it likely to slide into the trench of its own accord? The Board did not make any findings to address these pertinent questions as to whether there was employee exposure. Although the Board made the ultimate finding that it was reasonably predictable for the employees to be in the zone of danger, it did not make any findings to support its mere conclusion.

### III. CONCLUSION

The Board did not fully address on remand all issues as ordered. There are no substantial facts in the record to support any finding that it was reasonably predictable that the PCE employees would be in the deep end of the trench. As such, the Board erred as a matter of law by concluding that the employees had access to the hazards alleged by the Department. This Court should vacate the Board's Decision & Order and vacate all of the citations.

Respectfully submitted this 1<sup>st</sup> day of March 2019.

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**CERTIFICATE OF SERVICE**

I certify that on March 1, 2019, I caused the original and copy of the Employer's/Appellant's Supplemental 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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Appellant's Supplemental Brief

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