

FILED
Court of Appeals
Division III
State of Washington
3/27/2019 8:12 AM

NO. 35676-1-III

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

POWER CITY ELECTRIC, INC.,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

**SUPPLEMENTAL BRIEF
DEPARTMENT OF LABOR & INDUSTRIES**

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I. INTRODUCTION

Power City Electric, Inc. exposed its workers to the potential of serious bodily harm or death when it allowed them to work in a trench without protections. As requested, the Board of Industrial Insurance Appeals entered additional findings demonstrating exposure, consistent with the Court's order. *See Power City Elec. v. Dep't of Labor & Indus.*, No. 35676-1-III (Wash. Ct. App. Nov. 15, 2018) (unpublished) ("slip op."). Substantial evidence supports these findings, which in turn support the conclusions of law upholding the Department's citations. This Court should affirm.

II. ARGUMENT

A. **Substantial Evidence Supports the Board's Findings That PCE's Workers Had Access to the Hazard of a Trench Cave-In**

PCE allowed its workers to work in a trench that included depths four feet and over; this violated WAC 296-155-657(1)(a). This rule requires employers to protect their employees in excavations from cave-ins by an adequate protective system, unless the excavation is in stable rock or the excavation is less than four feet deep and a competent person inspected it and found no indication of a potential cave-in. WAC 296-155-657(1)(a). The Board determined PCE violated this rule.

PCE argues the Board did not make adequate findings and argues that there were not “substantial facts” to support a finding that it was “reasonably predictable that the PCE employees would be in the deep end of the trench.” Suppl. Br. 8. If the findings are inadequate, then the remedy is not to vacate the Board’s decision, but to remand for further fact-finding.

In any event, substantial evidence supports the findings and they in turn support the conclusion that the “employees were exposed to, or had access to, the violative condition.” *See SuperValu, Inc. v. Dep’t of Labor & Indus.*, 158 Wn.2d 422, 433, 144 P.3d 1160 (2006). The salient aspects of the Board’s findings are:

- “Mr. Gomez measured the depth of the excavation and found it over 6 feet deep and the sides were almost vertical. The size of the excavation was approximately 6 feet wide and 10 feet in length. A spoils pile approximately 4 feet high was located immediately adjacent to the 10 foot side of the excavation. The soil was Type C a rating for the most unstable type of soil.” Finding of Fact (FF) 2.
- “The workers had access to the hazard posed by the unprotected portion of the excavation while in the course of their normal duties.” FF 3.
- “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” FF 3.

- “[I]t 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.” FF 3.
- “Power City Electric did not establish that employees were instructed to avoid the deep end of the trench.” FF 3.
- “They were either in the zone of danger or immediately adjacent to the zone of danger while in the trench.” FF 3.

Bd. Indus. Ins. Appeals, Suppl. Findings of Fact Pursuant to Remand at 2 (Jan. 18, 2019).

Viewing the evidence in the light favorable to the Department, substantial evidence supports these findings. *See Potelco, Inc. v. Dep’t of Labor & Indus.*, 194 Wn. App. 428, 434, 377 P.3d 251 (2016).

- CP 170 (trench six feet deep at one end); CP 171 (trench was six feet wide and ten feet long. CP 171); CP 170 (trench’s sides were mostly vertical).
- CP 171, 251 (“lots of footprints” on the trench floor); CP 156 (inspector saw top of hardhat of worker in trench).
- CP 285, 332 (workers pushed and threw dirt into the deep area of the trench); CP 285 (three feet from deep end).

PCE incorrectly states the standard as whether it would be “reasonably predictable that the PCE employees would be in the deep end of the trench.” Suppl. Br. 8. But there only needs to be access to the zone of danger; the employees did not have to be “in the deep end.” *See Mid Mountain Contractors, Inc. v. Dep’t of Labor & Indus.*, 136 Wn. App. 1, 6, 146 P.3d 1212 (2006); Suppl. Br. 8. In *Mid Mountain*, the court

discussed the standards used to determine whether someone is near the zone of danger when working in a trench. The court reasoned that “[a]lthough [the employee] was not actually within the zone of danger, he was working within close proximity, and it is reasonably likely that he could have walked the short distance and been within the zone of danger.” *Mid Mountain*, 136 Wn. App. at 6. Here, the Board’s findings show that there were vertical walls, which are dangerous and that the depth ranged up to six feet. FF 3. The workers were working in a cramped location of only six feet wide, which made it reasonably likely they would enter the zone of danger. FF 2.

The Board also found that the workers were pushing or shoveling dirt into the deep end, which gave them access to the danger—either placing them in the zone of danger or near it. FF 3. And “it is reasonably likely [they] could have walked the short distance and been within the zone of danger.” *Mid Mountain*, 136 Wn. App. at 6. The Board emphasized that “[u]nder the standard provided by *Adkins* and *Mid Mountain*, [PCE’s workers] had access to the zone of danger and could have easily stepped the short distance and entered it within the normal course of their duties.” Suppl. Findings at 1-2. Given that the workers were pushing or shoveling dirt into the deep end, it was reasonably predictable that they could step into the zone of danger. FF 3.

Additionally, there was no barrier to prevent the workers from entering the deep end. In *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 148, 750 P.2d 1257 (1988), the court held it was not reasonably predictable that a worker would gain access to the zone of danger when the worker must “consciously and deliberately remove” a protective barrier to reach the violative condition. Under the reasoning in *Adkins*, barriers can prevent workers from gaining access to an existing hazard. In contrast, in *Mid Mountain*, the court found exposure because “[t]here was nothing to prevent entering the zone during the conduct of his normal duties.” 136 Wn. App. at 6. Here, the Board found that PCE did not tell the workers not to enter the trench (FF 3), and there was no protective barrier.

The supplemental findings that address the workers’ task pushing dirt, the workers’ ability to walk a short distance, the cramped space, the lack of a barrier to the deep end, and the lack of evidence that PCE instructed its workers not to enter the deep end provide sufficient detail to inform the Court “*how* PCE exposed its workers and *how* they had access to the hazard.” Slip op. at 4. The “*how*” was because the workers pushed dirt so closely to the deep end and nothing prevented them from walking the short distance. And, if a worker tripped, the worker could easily be near or in the zone of danger.

And viewing the evidence as a whole shows that the workers were in or near the zone of danger. For example, the inspector saw footsteps on the trench's bottom. "It was lots of footprints at the bottom." CP 251. His vantage point was of the trench's deep end, as that is where he measured. CP 170. It is reasonable to infer from his observation that a footprint was located near the trench's deep end, when considering his observation in the light most favorable to the Department. CP 171. This is all the more true because one worker admitted that he was three feet from the deep end, pushing dirt to the deep end. CP 285. Since the deep end was six feet deep, three feet is very close to the zone of danger, if not in the zone of danger.

PCE argues that the workers' job duties did not take them into the deep part of the trench. Suppl. Br. 5. This misses the point. The workers used shovels to push dirt in the trench, placing them near or in the zone of danger. That they may not have been standing in the part of the trench that was six feet deep while working is not relevant, since they were near the trench's deep end and the regulation requires trenching protections for trenches four feet and deeper, not six feet and deeper. WAC 296-155-657(1)(a). In any event, a violation occurs if workers have access to the zone of danger; there is no requirement that workers must actually be in the zone of danger. *Mid Mountain*, 136 Wn. App. at 6.

None of the cases that PCE cites provide for a different outcome because they involve fact-finders weighing different facts. *See Sec’y of Labor v. The Fishel Co.*, 18 O.S.H. Cas. (BNA) 1530, 1998 WL 558885, *4 (Occupational Safety Health Rev. Comm’n Aug. 28, 1998) (weighing evidence to conclude it was not reasonably predictable worker would enter zone of danger); *Sec’y of Labor v. Fabricated Metal Prods.*, 18 O.S.H. Cas. (BNA) 1072, 1997 WL 694096 (Occupational Safety Health Rev. Comm’n Nov. 7, 1997) (weighing facts to find not reasonably predictable to access hazard); *Sec’y of Labor v. Tricon Indus. Inc.*, 24 O.S.H. Cas. (BNA) 1427, 2012 WL 5463240 (Occupational Safety Health Rev. Comm’n Sept. 5, 2012) (same). Here, the Court does not reweigh the Board’s weighing of facts, and it should affirm the Board’s decision.

B. The Board’s Findings About the Spoils Pile Supports the Conclusion That PCE Violated WAC 296-155-655(10)(b)

WAC 296-155-655(10)(b) requires employers to protect workers from the hazards of excavated materials by keeping spoils piles more than two feet from an excavation’s edge, using a retaining device, or both. On this subject, the Board found:

They were standing in the shallow end of the trench, less than 6 feet in distance from the vertical wall that was over 6 feet high with a spoils pile approximately 4 feet in height and immediately adjacent to the trench. These two employees were allowed to work inside the trench and were exposed to the hazards of cave-in, either within the excavation or from

the approximately 4 feet in height spoils pile falling into it, and that could result in severe bodily injury or death.

FF 3. Substantial evidence supports this finding. CP 157 (spoils pile right next to trench); CP 212-13 (spoils pile presents a hazard of suffocation and crushing); CP 176 (soil was type C, which is the most unstable type of soil).

In the opinion remanding the case, the Court requested more information about the spoils pile:

The presence of the pile within two feet of the excavation constituted a violation of WAC 296-155-655(10)(b), but why it constituted a major violation due to the risk it imposed to the workers is not explained in the Board's findings. Did the pile threaten to collapse the north end of the trench? Was it likely to slide into the trench of its own accord?

Slip op. at 6. These questions are not the correct focus because a standard that proscribes certain conditions “presumes the existence of a safety hazard.” *Frank Coluccio Const. Co. v. Dep't of Labor & Indus.*, 181 Wn. App. 25, 41, 329 P.3d 91 (2014). WAC 296-155-655(10)(b) protects workers against falling loose rock or soil, which presumes that falling loose rock or soil is a safety hazard:

(b) You must protect employees from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection must be provided by placing and keeping such materials or equipment at least two feet (.61 m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials

or equipment from falling or rolling into excavations, or by a combination of both if necessary.

Like in *Frank Coluccio*, the regulation presumes the hazard: falling loose rock or soil. This regulation read with RCW 49.17.180 shows that there was a serious violation here because the pile was next to the trench and could cause serious bodily harm if dirt fell. See *Potelco, Inc. v. Dep't of Labor & Indus.*, 166 Wn. App. 647, 656, 272 P.3d 262 (2012). RCW 49.17.180 provides:

[A] serious violation shall be deemed to exist in a workplace if there is a substantial probability that death or serious physical harm *could* result from a condition which exists, or from one or more practices . . . adopted or are in use in such workplace

“[T]he statute’s ‘substantial probability’ language refers to the likelihood that, should harm result from the violation, that harm could be death or serious physical harm.” *Potelco*, 166 Wn. App. at 656 (quoting *Lee Cook Trucking & Logging v. Dep't of Labor & Indus.*, 109 Wn. App. 471, 482, 36 P.3d 558 (2001)). “Substantial probability” does not take into account the likelihood that an accident will occur, in part because the probability of an accident is separately accounted for in the penalty amount. *Lee Cook Trucking*, 109 Wn. App. at 481. The courts have held that trenching violations are serious because trench cave-ins could lead to death or

serious physical harm. *Laser Underground & Earthworks, Inc. v. Dep't of Labor & Indus.*, 132 Wn. App. 274, 279, 153 P.3d 197 (2006).

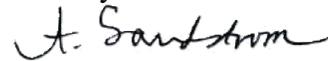
As to the serious designation, the issue is whether death or serious physical harm could result *if* the spoils fell into the trench while a PCE employee was in the trench. The record supports that this would happen. CP 212-13 (spoils pile presents suffocation and crushing hazard). The Board properly determined that the spoils violation was a serious violation.

III. CONCLUSION

PCE allowed its workers to work under dangerous conditions in a trench. The Board's findings are supported by substantial evidence and support the Board's conclusions, so the Board's decision should be affirmed.

RESPECTFULLY SUBMITTED this 27th day of March, 2019.

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The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department's Supplemental Brief and this Certificate of Service in the below described manner:

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DATED this 27th day of March, 2019.

A handwritten signature in black ink, appearing to read "Shana Pacarro-Muller". The signature is written in a cursive style with a large initial 'S'.

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March 27, 2019 - 8:12 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
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Appellate Court Case Title: Power City Electric, Inc. v. Washington State Department of Labor & Industries
Superior Court Case Number: 17-2-50275-1

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