

FILED
Court of Appeals
Division III
State of Washington
4/3/2018 4:03 PM

No. 35676-1-III

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

POWER CITY ELECTRIC, INC.,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent.

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

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I. INTRODUCTION

One of the most dangerous types of construction is trench work, which kills 40 construction workers every year.¹ This work is dangerous because unprotected trenches—particularly those dug in unstable soil—cave in and bury workers alive. To prevent this, the Department of Labor and Industries has particular regulations for trenching projects. Employers must remove trench workers from hazardous conditions, provide adequate protective systems, provide safe ways for workers to get out, and keep excavated materials safe distances away from trenches' edges.

A Department inspector saw employees of Power City Electric, Inc. working in an unprotected trench that was just over six feet deep in its deep end. The Department cited the company for workplace safety violations and the Board of Industrial Insurance Appeals affirmed. Power City argues that substantial evidence does not support the citations. But the Department presented evidence that the workers had access to the deep portions of the trench and no barrier separated them from those areas. Power City also knew about the violations because the project supervisors were present during the work and the hazards were in plain view. This Court should affirm.

¹ U.S. Department of Labor, Occupational Safety and Health Administration, *Soil Classification*, https://www.osha.gov/dts/vtools/construction/soil_testing_fnl_eng_web_transcript.html

II. ISSUES

1. Employers must provide protective systems for workers who have access to trenches that are more than four feet deep. Power City's employees worked just a few feet from the deep end of an unprotected trench and no barrier stopped them from entering that end. Did the workers have access to the hazard of a trench cave-in?
2. Employers must keep excavated materials at least two feet from an excavation's edge or use a retaining device. The dirt pile here was directly next to the trench's edge. Did the workers have access to the hazards of a spoils pile collapse or falling loose soil?
3. Employers must provide safe means of egress from "trenches" and WAC 296-155-650 defines a "trench" as "[a] narrow excavation in relation to its length made below the surface of the ground." The hole was between 30 inches to six feet deep, six feet wide, and ten feet long. Was it a "trench?" Was the "notch" in the trench's wall a safe means of egress?
4. An employer has actual knowledge of the violations if a supervisor sees them and has constructive knowledge if they occurred in plain view. Power City's foreperson was "back and forth all day" at the trench, another supervisor was present when the Department inspected the jobsite, and the violative conditions were in the open. Did Power City know or could it have known of the conditions?

III. STATEMENT OF THE CASE

A. **Power City's Employees Dug a Trench to Reroute Conduit While a Foreperson Supervised the Project**

Power City began work on a construction project in Pasco. CP 257.

The project involved rerouting conduit located under the street. CP 257-

59. Power City's foreperson for the project was Julian McCarthy. CP 258.

McCarthy was “back and forth all day” at the trench, getting in and out of it several times. CP 269, 284-85. Eventually he left to go buy gravel, a 30 to 45-minute errand. CP 268. When he left, the crew had dug up the conduit and was working on getting the conduit fully exposed. CP 268. McCarthy knew it was possible that the crew might have to do additional digging. CP 287. The trackhoe operator, Dan Schelske, was also a foreperson and supervised the site when McCarthy left. CP 297.

B. A Department Inspector Drove By and Saw the Top of a Worker’s Hardhat in an Unprotected Trench

After McCarthy left, a Department inspector, Reynaldo Gomez, drove by the jobsite. CP 150, 155. As he drove by, he saw the top of a hardhat inside the trench. CP 5, 156, 159-60, 221. Based on the hardhat, it appeared a person was standing inside the trench. CP 156-57. Gomez saw no systems to protect the worker or prevent the trench from caving in. CP 157, 174, 179. He also noticed a pile of excavated dirt (the “spoils pile”) right next to the trench. CP 157.

Gomez pulled over. CP 160. As he stopped, he believed he saw a person coming out of the trench. CP 160-61. Gomez got out of his car and took a picture of the jobsite. CP 159-60; Appx 1 (Ex 3 at 2). As he took this picture, a supervisor sat inside of the excavator, another worker stood

next to the trench, and the top of another white hardhat was visible inside the trench. Appx 1 (Ex 3 at 2); CP 163-65, 223, 297.

Gomez approached the jobsite. CP 161. As he approached, he saw a second worker coming out of the trench. CP 161, 236. To get out, the worker stepped in a notch that the excavator had cut out on the trench's south end. CP 162, 205, 236, 247. There was no ladder. CP 204. One worker was about five feet, five inches tall and the other was about six feet tall. CP 267.

Gomez asked the workers who was in charge. CP 163. They directed him to the person sitting inside the excavator, Schelske. CP 163, 165.

C. The Inspector Believed the Unprotected Trench Could Cave In or the Spoils Pile Could Collapse, Which Could Seriously Injure or Kill the Workers

Gomez was concerned about the safety of the jobsite because the spoils pile was directly next to the trench, which the workers had just been inside. CP 167; *see* Appx 2 (Ex 3 at 3); Appx 6 (Ex 9). Employers must keep spoils piles at least two feet back from an excavation's edge or use a retaining device to protect workers from falling soil or equipment.

WAC 296-155-655(10)(b); CP 175.

Gomez was also concerned because he believed the trench was deeper than four feet, but it had no protective system in place to protect

workers from potential cave-ins. CP 167, 174, 179. Employers must protect their employees who work in excavations deeper than four feet with adequate protective systems, unless the excavations are in stable rock. WAC 296-155-657(1)(a).

Gomez believed the trench was deeper than four feet because he compared the height of the workers to how far down they appeared in the trench when he saw the tops of their hardhats. CP 167-68. Gomez kneeled on the northeast side of the trench and measured the depth with a laser distance measure.² CP 21, 168-170, 244-46; *see* Appx 2 (Ex 3 at 3). The trench was just over six feet deep. CP 170. Gomez also measured the trench's length and width. CP 172. It was six feet wide and ten feet long. CP 171; *see also* Appx 4 (Ex 5 at 1).

As Gomez measured the depth of the trench, he saw "lots of footprints" on the trench floor. CP 251; *accord* CP 171. He saw that the trench's sides were mostly vertical. CP 170.

Gomez, who was trained in soil classification, also inspected the soil. CP 154, 173; *see* Appx 3 (Ex 4 at 4). He did this because a trench's soil type determines what protections are required for workers. CP 173. The soil was type C, which is the most unstable type of soil and the type

² Gomez marked where he took the measurement with an "X" and a "G." CP 170; Appx 2 (Ex 3 at 3).

most likely to cause a cave-in. CP 176. The soil was sandy and fissured. CP 176-77; *see* Appx 3 (Ex 4 at 4). The soil inside the trench was the same type of soil in the adjacent spoils pile. CP 177, 206.

D. The Department Cited Power City for Allowing its Employees to Work in an Unprotected Trench with No Safe Exit That Was Next to a Spoils Pile

Following Gomez's inspection, the Department cited Power City for four serious violations of the Washington Industrial Safety and Health Act of 1973 (WISHA), chapter 49.17 RCW:

- (1) Allowing employees to work in an excavation deeper than four feet without an adequate protective system, violating WAC 296-155-657(1)(a);
- (2) Failing to remove exposed employees from the hazardous area after finding evidence of a situation that could cause a possible cave-in, violating WAC 296-155-655(11)(b);³
- (3) Failing to ensure the employees had a safe means of egress from the trench, violating WAC 296-155-655(3)(b); and
- (4) Failing to keep the spoils pile at least two feet from the excavation, violating WAC 296-155-655(10)(b).

CP 344-45. Power City appealed the citations to the Board. CP 87-88.

E. The Board Affirmed the Department's Four Citations

At the hearing, Gomez explained why Power City's safety violations were dangerous. He testified that workers can suffocate and die

³ The Department grouped the first two violations together for one penalty. CP 203-04, 344.

from trenches caving in and that Power City exposed its two workers to this hazard. CP 192-93. He testified this hazard was present even if the workers were only in the trench for a few seconds. *See* CP 193. He concluded that Power City knew about the unsafe condition because Schelske, a supervisor, was present at the jobsite and because Gomez readily observed the hazard as he drove by. CP 194. He testified that employers can protect workers in trenches through the use of benching, sloping, or installing a trench box. CP 179; *see* Appx 5 (Ex 8) (example of a trench box).

Gomez also testified a worker could die without a safe means of egress from the trench. CP 207. He believed the small notch carved in the trench's side created a greater hazard because it created the potential for a cave-in if a worker tried to scale the wall. CP 205. He testified a worker could trip and fall back into the trench or cause the walls to collapse. CP 206.

Gomez also explained that the spoils pile being adjacent to the trench could cause serious injury or death. CP 212. Excavated material could fall back onto the workers and bury them, suffocate them, crush them, or knock them unconscious. CP 212-13. He testified that Power City could have put the dirt in another location or brought a dump truck to haul it away. CP 211-12.

Power City called McCarthy and Schelske to testify. CP 254, 295. McCarthy testified that when he left the jobsite to buy gravel, the trench's southwest corner was about 30 inches deep and its southeast corner was about four feet deep. CP 269. He stated the trench then got deeper toward the north end. CP 269-70. He agreed that trench cave-ins could kill workers even with just a small amount of dirt. CP 283.

McCarthy also agreed that when he left to buy gravel, the spoils pile was directly adjacent to the trench, just as it was when Gomez inspected the site. CP 280; Appx 2 (Ex 3 at 3). He acknowledged the pile was too close to the trench, but stated that moving the pile further away would have required them to close the road, and Power City had not trained the workers to put the pile in alternate locations. CP 291-92.

Schelske testified that the south end of the trench was 30 inches deep. CP 303. He acknowledged he saw both employees working inside of the trench. CP 303, 307-08. He stated the workers were three and one half to four feet from the trench's deepest part. CP 308. He stated that when McCarthy left he was the site supervisor and project foreperson. CP 297.

The Board affirmed all four of the Department's citations. CP 20. The Board found that the trench's north end was over six feet deep. CP 25. In affirming the citation for Power City's failure to provide an adequate protective system, the Board assumed the trench's south end was between

30 inches and four feet deep. CP 21. Relying on *Mid Mountain Contractors, Inc. v. Department of Labor & Industries*, 136 Wn. App. 1, 146 P.3d 1212 (2006), the Board found that the workers were near the zone of danger, and had “access to the hazard posed by the unprotected portion of the excavation while in the course of their normal duties.” CP 25; *see also* CP 21-22.

In making this finding, the Board observed that the workers had about three and a one half feet between them and where the trackhoe took out soil. CP 21. The Board acknowledged it was unclear whether Power City had instructed its workers to avoid the trench’s deep end. CP 21. But the Board reasoned this was not dispositive because Power City had not placed a barrier, warning tape, or any other protective system in the trench to stop its workers from entering the deep end. CP 21. Because the workers were in close proximity to the trench’s deep end, the Board concluded that it was reasonably likely they could have been in the zone of danger as they shoveled, pushed dirt into the deep area, or performed other normal job duties. CP 22.

The Board also affirmed the citation for Power City’s failure to ensure the employees had a safe means of egress from the trench. CP 24. The Board rejected Power City’s argument that the hole was not a “trench” under WAC 296-155-650 and concluded that the regulation

applied. CP 23. The Board also rejected Power City's argument that the regulation did not apply because the side of the trench the workers actually got in and out of was less than four feet deep. CP 23. The Board rejected this argument based on the evidence that the trench's shallow end was between 30 inches and four feet deep. *See* CP 23.

Finally, the Board affirmed the Department's citation for Power City's failure to keep the spoils pile at least two feet from the trench's edge. CP 24. The Board again reasoned that Power City's workers had access to the trench's deep part and could have been injured or killed had the pile fallen back in. CP 24.

The Board found that all four violative conditions exposed the workers to hazards that could cause serious injury or death. CP 22, 24. The Board also found that Power City either knew, or by exercising reasonable diligence could have known, of the presence of the four violations. CP 25.

The superior court also affirmed. CP 433-36. Power City appeals. CP 437.

IV. STANDARD OF REVIEW

In WISHA appeals, appellate courts review the Board's decision directly, based on the record before the agency. *Frank Coluccio Const. Co. v. Dep't of Labor & Indus.*, 181 Wn. App. 25, 35, 329 P.3d 91 (2014).

The court does not give any weight to the proposed decision. *Stratton v. Dep't of Labor & Indus.*, 1 Wn. App. 77, 79, 459 P.2d 651 (1969).

The Board's findings of fact are conclusive if substantial evidence supports them. RCW 49.17.150(1); *Coluccio*, 181 Wn. App. at 35. Evidence is "substantial" when it is enough to persuade a fair-minded person of the truth of a declared premise. *Coluccio*, 181 Wn. App. at 35. Under substantial evidence review, appellate courts do not reweigh the evidence. *Potelco, Inc. v. Dep't of Labor & Indus.*, 194 Wn. App. 428, 434, 377 P.3d 251, *review denied*, 186 Wn.2d 1024, 383 P.3d 1014 (2016). Instead, courts view the evidence in the light most favorable to the prevailing party at the Board—here, the Department. *Id.*

Washington courts liberally construe WISHA to achieve its stated purpose of ensuring safe and healthful working conditions for all Washington workers. *Coluccio*, 181 Wn. App. at 35-36. Courts give "great weight" to the Department's interpretation of statutes and regulations within its areas of special expertise. *Dep't of Labor & Indus. v. Slauch*, 177 Wn. App. 439, 452, 312 P.3d 676 (2013); *accord Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004).

V. ARGUMENT

The Department's inspector saw Power City's workers in the unprotected trench that was over six feet deep at the deep end. The

employees worked only three and one half feet from the deep end and there was no barrier to keep them out of that end. The spoils pile was directly next to the trench and there was no safe way for the workers to get out if the trench had caved in. Construing these facts in the light most favorable to the Department, substantial evidence supports that Power City exposed its workers to the hazards of a trench cave-in, spoils pile collapse, and falling soil. Power City had both actual and constructive knowledge because a foreperson supervised the project and the violations were in plain view. Substantial evidence supports the Board's decision.

A. Substantial Evidence Supports the Board's Finding That Power City's Workers Had Access to the Hazard of a Trench Cave-In

To establish a serious WISHA violation, the Department must prove: (1) the cited standard applies; (2) the standard was not met; (3) employees were exposed to, or had access to, the violative condition; (4) the employer knew or, through exercising 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. *SuperValu, Inc. v. Dep't of Labor & Indus.*, 158 Wn.2d 422, 433, 144 P.3d 1160 (2006).

Out of the five requirements for a serious WISHA violation, Power City argues that substantial evidence does not support the third—that

employees had exposure or access to the violative conditions.⁴ Power City contests all four of the Department’s citations on this basis. *See* AB 13-21.

WAC 296-155-657(1)(a) 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 cave-in.

1. If workers are near the zone of danger to a hazard, the employer has exposed them to the hazard

To prove an employer exposed a worker to a hazard in violation of WISHA, the Department may show the worker had access to the violative conditions. *Mid Mountain*, 136 Wn. App. at 5. This analysis asks “whether the employees had access to the hazard posed” by the violative condition. *Id.* at 6.

In *Mid Mountain*, the Department inspected one of Mid Mountain’s jobsites. *Id.* at 3. A trench at the jobsite had a south wall that was four feet, six inches deep. *Id.* Other portions of the wall were sloped but the south wall was not. *Id.* The trench did not have a protective

⁴ Power City alludes to the fifth element, suggesting death or serious physical harm could not have resulted from the violative conditions. AB 15, 20. But Power City does not dispute the testimony from both parties that a trench cave-in or spoils pile collapse can cause serious injury or death. *See* CP 192-93, 207, 212-13, 283; AB 13 (acknowledging a cave-in can seriously injure or kill a worker). Rather, the crux of Power City’s argument is that it did not *expose* its employees to these hazards. *See* AB 13-21.

system. *Id.* The Department cited Mid Mountain for exposing its employee to cave-in hazards in the trench. *Id.*

On appeal, Mid Mountain argued that the Department failed to prove the exposure element because its employees worked “in a portion of the trench that was less than four feet deep and more than five feet away from the zone of danger.” *Id.* at 5. The court rejected Mid Mountain’s argument, finding that it was “irrelevant that Mid Mountain’s employees were in a portion of the trench less than four feet in depth.” *Id.* at 6.

The court held that the Department proved the exposure element because Mid Mountain’s employee had access to the zone of danger. *Id.* at 7. 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.” *Id.* The court further reasoned that “[t]here was nothing to prevent entering the zone during the conduct of his normal duties.” *Id.*; compare *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 148, 750 P.2d 1257 (1988) (a worker has neither exposure nor access to a violative condition when the worker must “consciously and deliberately remove” a protective barrier to reach the violative condition.).

Power City relies on two federal OSHA cases—*Secretary of Labor v. Fabricated Metal Products* and *Secretary of Labor v. Tricon*

Industries—in arguing that its workers were not exposed to the hazards. AB 20-21. These cases are of limited value because, while the Department had the burden of proving its case by a preponderance of the evidence at the Board, this standard no longer applies and this Court now reviews for substantial evidence. In any event, these federal cases are factually distinguishable.

In *Secretary of Labor v. Fabricated Metal Products, Inc.*, 18 O.S.H.C. 1072, 1997 WL 694096, at *2 (Occup. Safety Health Rev. Comm’n Nov. 7, 1997), there were barriers that the workers had to remove to access the hazards. “[T]here were numerous obstructions to access to the camshafts and the points of operation from the front—boxes, barrels, splash guards . . .” *Id.* The rows of barrels and design of the aisles made accessing the hazards “extremely difficult” or “impossible.” *Id.* at *3-*4. In other words, there were protective barriers that the workers had to consciously and deliberately remove to enter the zone of danger.

Compare *Adkins*, 110 Wn.2d at 147. Here, the part of the trench that was over six feet deep “was not barricaded,” as Power City acknowledges. AB 16; accord CP 21.

Similarly, in *Secretary of Labor v. Tricon Industries, Inc.*, 24 O.S.H.C. 1427, 2012 WL 5463240, at *9, *12 (Occup. Safety Health Rev. Comm’n Sept. 5, 2012), the employees’ work assignment required them to

work in the middle of the deck, which was 100 feet by 65 feet. During that work, they approached no closer than 12 feet from the edge and had other protections. *Id.* Here, Power City’s employees could not stay this far from the hazard because the entire trench was only ten feet long.

2. Power City’s workers had access to the hazard of a trench cave-in

In concluding that the workers had access to the hazard, the Board focused on two facts. First, the Board emphasized that the workers were just a few feet from the hazard as they shoveled dirt from one section of the trench to the deep end and performed their other normal job duties. CP 21-22; *see* CP 267, 307-08. This was a small trench—it was only six feet wide and ten feet long. *See* Appx 4 (Ex 5 at 1); Appx 5 (Ex 8). If the workers walked a few feet or fell, they would have been in the zone of danger.

The Board also focused on the fact that Power City’s employees did not have to remove or bypass a barrier, warning tape, or a protective system to enter the zone of danger. CP 21. If Power City wanted to ensure its employees did not have access to the deep areas of the trench, it could have put in a barrier. *See, e.g., Adkins*, 110 Wn.2d at 148 (separating worker from the hazard with a vent and weather cap). Based on these two

facts, the Board concluded it was reasonably likely the workers could have entered the zone of danger as part of their normal job duties. *See* CP 22.

Disregarding the analysis in *Mid Mountain*, Power City argues that none of its employees actually worked or had any reason to work in the deep end of the trench. AB 14, 16-17, 19. But the proper standard is whether the employees were *near* the zone of danger or had *access* to the hazard posed by the unprotected trench. *Mid Mountain*, 136 Wn. App. at 6. Contrary to Power City’s argument, a worker does not need to actually be in the zone of danger.⁵ *Id.* at 7. Instead, a worker is exposed to a hazard if it is reasonably likely that he or she “could have walked the short distance” to the zone of danger and there was “nothing to prevent entering the zone during the conduct of his [or her] normal duties.” *Id.*

Relying on the rejected proposed decision’s reasoning, Power City also argues *Mid Mountain* does not apply because there was no evidence of what the workers’ “normal duties” were. AB 17. It argues the workers’ only duties were to expose the fiberoptic conduit in the trench’s shallow end. AB 17 (citing CP 63-65). However, Schelske testified and the Board

⁵ In any event, the Department presented evidence that the workers were actually in the zone of danger. The inspector only saw the tops of the hardhats as he drove by and approached the jobsite, so it is reasonable to infer that the workers were in the deep areas of the trench, given their height. CP 5, 156, 159-60, 221. Additionally, when the inspector measured the trench’s depth at over six feet, he saw footprints on the bottom. CP 251. Taking inferences in the light most favorable to the Department, it is reasonable to infer that he saw these footprints in the same area where he took that measurement. *See Coluccio*, 181 Wn. App. at 35.

concluded that the workers' "normal duties" involved shoveling, pushing dirt into the deep area, and other duties. *See* CP 21, 305-08. The Board found that performing these duties gave the workers access to the deep portion of the trench. CP 25 (FF 2).

Power City's employees still had access to the hazard even though they worked in the shallow part of the trench. Because they were inside the small unprotected trench, they were near the zone of danger. The Board properly found that Power City exposed its workers to the hazard of a trench cave-in.

B. Substantial Evidence Supports That Power City Failed to Remove its Workers From the Trench After Finding Hazardous Conditions

Power City also argues it did not violate WAC 296-155-655(11)(b), which requires employers to remove their workers from excavations when a competent person finds evidence of a possible cave-in, hazardous atmospheres, a failure of protective systems, or other hazardous conditions. AB 18. Power City argues that Schelske did not need to remove the workers from the trench because he inspected it and found no hazardous conditions: the weather was good and the soil was compacted, hard to dig, and "like hard pan." AB 18.

While this was Schelske's testimony, the Department presented contrary evidence that hazardous conditions were present: the soil was

sandy, unstable, and prone to a cave-in. CP 176-77. The Board found this evidence credible and this Court does not reweigh that determination. *See* CP 21. Moreover, the trench lacked a protective system, the spoils pile was right next to the trench's edge, and there was no safe way to get out of the trench. CP 167, 174, 204. Because Schelske knew about the hazardous conditions, he needed to remove the workers. Substantial evidence supports the Board's conclusion that Power City violated WAC 296-155-655(11)(b).

C. Substantial Evidence Supports the Board's Finding That Power City Exposed its Workers to the Hazards of a Spoils Pile Collapse and Falling Soil

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.

Again disregarding the analysis in *Mid Mountain*, Power City argues that the spoils pile was adjacent to the trench's deep end and none of its employees actually worked or had any reason to work in that end. AB 19. As discussed above, Power City's workers were just a few feet from the deep end and nothing prevented them from entering that area. CP 21; AB 16. Thus, they had access to the hazards of a spoils pile collapse and falling soil. *See Mid Mountain*, 136 Wn. App. at 7.

Power City also argues that Schelske never saw any debris actually fall into the trench. AB 19. But the plain language of RCW 49.17.180(6) does not require the Department to prove the probability of harm actually occurring at the jobsite.⁶ *See Mowat Const. Co. v. Dep't of Labor & Indus.*, 148 Wn. App. 920, 931-32, 201 P.3d 407 (2009); *Lee Cook Trucking*, 109 Wn. App. at 477. Nor does the Department have to wait for someone to be crushed by a collapsing spoils pile before it cites the employer. *See Mowat Const. Co.*, 148 Wn. App. at 931. Rather, WISHA only requires the Department to prove that *if* an accident happens, the result could be death or serious physical harm.⁷ *Id.* at 932; *Lee Cook Trucking*, 109 Wn. App. at 477-82; *see also Coluccio*, 181 Wn. App. at 41-42 (because the existence of a workplace safety standard presumes a safety hazard, an employer cannot argue the hazard does not exist despite a violation).

D. Substantial Evidence Supports the Board's Finding That Power City Did Not Provide its Workers a Safe Means of Egress From the Trench

WAC 296-155-655(3)(b) requires employers to provide a safe way for workers to get out of trenches. Specifically, it requires that “[a]

⁶ Otherwise, employers could weigh the likelihood of an accident occurring in deciding whether to obey a regulation. *Lee Cook Trucking & Logging v. Dep't of Labor & Indus.*, 109 Wn. App. 471, 478-79, 36 P.3d 558 (2001).

⁷ The probability of an accident occurring is separately accounted for in the penalty amount. *See Lee Cook Trucking*, 109 Wn. App. at 482.

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 m) of lateral travel for employees.” WAC 296-155-655(3)(b). Power City argues this regulation does not apply because the hole on the jobsite was an “excavation,” but not a “trench.” AB 22-23. Power City is incorrect.

The regulations define an “excavation” as “[a]ny person-made cut, cavity, trench, or depression in the earth’s surface, formed by earth removal.” WAC 296-155-650(2). A “trench” is defined in relevant part as

[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).

WAC 296-155-650(2).

Here, the hole in which Power City’s employees worked was a trench. It was “just over six feet” deep, six feet wide, and ten feet long. CP 170; Appx 4 (Ex 5 at 1). Thus, it was narrow in relation to its length.

Power City argues the hole was not a trench because the south end was less than six feet deep, thus making the hole wider end than it was deep on that end. AB 23. But WAC 296-155-650(2) only states that a trench’s depth is “generally” greater than its width. The definition identifies greater depth as a common feature of trenches, but not a strict

requirement. *See 224 Westlake, LLC v. Engstrom Properties, LLC*, 169 Wn. App. 700, 717-18, 281 P.3d 693 (2012) (distinguishing a provision’s general conditions from its mandatory conditions). What the definition does require, however, is that a trench be “narrow . . . in relation to its length.” WAC 296-155-650(2). This hole met that definition.

Power City also argues the regulation does not apply because the workers got in and out of the trench at the shallower south end, which Power City contends was less than four feet deep. AB 11, 25. But McCarthy testified and the Board found that the south end was between 30 inches and four feet deep. CP 23, 269-70. Construing the facts in the light most favorable to the Department, substantial evidence supports that the entire trench was “4 feet . . . or more in depth” and therefore Power City was required to provide a safe means of egress. WAC 296-155-655(3)(b).

Disregarding the substantial evidence standard of review, Power City also argues the notch in the dirt wall was a “safe means of egress” under WAC 296-155-655(3)(b). AB 26. But the inspector explained that this actually created a greater hazard—the dirt could easily collapse, causing a worker to fall back into the trench. CP 205. The sandy and fissured soil increased this hazard. CP 176-77. Substantial evidence supports that it was not a safe means of egress and the Department proved that Power City violated WAC 296-155-655(3)(b).

E. Substantial Evidence Supports the Board’s Finding That Power City Knew or Could Have Known About the Violative Conditions

To establish a serious WISHA violation, the Department must show the employer knew or by exercising reasonable diligence could have known of the violative conditions. RCW 49.17.180(6); *SuperValu, Inc.*, 158 Wn.2d at 433. Here, Power City had both actual and constructive knowledge.

1. Power City had actual knowledge of the violation though its supervisors

When a supervisor knows about a safety violation, WISHA imputes actual knowledge to the employer. *Potelco, Inc.*, 194 Wn. App. at 440; *accord Danis-Shook Joint Venture XXV v. Sec’y of Labor*, 319 F.3d 805, 812 (6th Cir. 2003); *N.Y. State Elec. & Gas Corp. v. Sec’y of Labor*, 88 F.3d 98, 105 (2d Cir. 1996); *Sec’y of Labor v. A.P. O’Horo Co.*, 14 O.S.H.R.C. 2004, 1991 WL 25318, *3-4 (Occup. Safety Health Rev. Comm’n Aug. 2, 1991) (finding that because the supervisor observed the trenching process that resulted in inadequately sloped walls, his knowledge was imputed to the employer and established a prima facie showing of knowledge).

Here, Power City actually knew of the violations. The supervisors, McCarthy and Schelske, were both on site during the work. McCarthy was

“back and forth” at the trench “all day.” CP 269; *see also* CP 262. He saw inside the trench and went into it several times. CP 269, 285.

Power City argues that it did not actually know of the violative conditions because McCarthy left the jobsite temporarily and was not present when Gomez inspected the site. AB 32. But McCarthy only left for 30 to 45 minutes. CP 268. When he left, he saw that the spoils pile was right next to the trench. CP 280.

Moreover, Schelske was also a foreperson and supervised the jobsite when McCarthy left. CP 297. When the inspector approached the site, Schelske was sitting in the trackhoe next to the trench. CP 164, 223; *see also* Appx 1 (Ex 3 at 2). Schelske saw the employees work inside the trench and saw them get out by using the notch in the wall. CP 303-05, 307-10. Therefore, because a foreperson was present during the violations, WISHA imputes actual knowledge to Power City.

2. Power City had constructive knowledge of the violations because they were in plain view

Constructive knowledge is also sufficient to prove knowledge of the violative conditions. *BD Roofing, Inc. v. Dep’t of Labor & Indus.*, 139 Wn. App. 98, 109-110, 161 P.3d 387 (2007). When a violation is readily observable or in a conspicuous location in the area where employees are working, the employer has constructive knowledge of it. *Erection Co. v.*

Dep't of Labor & Indus., 160 Wn. App. 194, 207, 248 P.3d 1085 (2011).

Put another way, an employer has constructive knowledge when a hazardous condition is in the open and visible to any bystander. *Potelco, Inc.*, 194 Wn. App. at 439-40. In *Potelco*, the employer had a work zone “in the open” and “any bystander—but especially the project foreperson—could have observed that [the safety requirement] had not been created.” 194 Wn. App. at 440. “On this basis alone,” the company knew of the violative condition. *Id.*

Likewise, here, Power City had constructive knowledge because any bystander—but especially the forepersons—could have seen the violations. As the inspector drove by, he saw the top of the worker’s hardhat in the trench and also saw the spoils pile right next to the trench. CP 156-57; *see BD Roofing*, 139 Wn. App. at 110 (finding constructive knowledge when the Department’s inspector drove past the jobsite and observed the violation). The inspector believed the trench was likely over four feet deep based on the height of the workers. CP 167-68, 172. He saw no ladder or protective system inside the trench. CP 174, 179, 204. Because anyone could see the violations, so could Power City, thus giving it constructive knowledge.

Power City argues that the Department failed to prove that it did not exercise reasonable diligence in discovering the violations. AB 27, 32.

The question of reasonable diligence arises when the employer did not actually know about the hazardous conditions and wishes to argue there was nothing it could have reasonably done to discover them. *See Erection Co.*, 160 Wn. App. at 206-09. If the employer could not have reasonably discovered the violations, the employer did not have constructive knowledge. *Cf. id.* at 209; *see also Trinity Indus., Inc. v. Occupational Safety & Health Review Comm'n*, 206 F.3d 539, 542-43 (5th Cir. 2000) (finding that the employer could not have reasonably known that the air toxins exceeded permissible levels because the employer conducted over 1,000 air tests which established the air quality met OSHA standards).

Power City argues it exercised reasonable diligence because its supervisors inspected the trench before allowing anyone to enter. AB 32. But this argument actually supports the Department's position—when Power City's supervisors inspected the trench, they could have seen the sandy and unstable soil, the lack of a protective system, the adjacent spoils pile, and the lack of a safe means of egress. CP 176-77. Unlike the air quality violations in *Trinity Industries*, the violations here all occurred in plain view and Power City could have discovered them had it exercised reasonable diligence.

Accordingly, because Power City had both actual and constructive knowledge of the violative conditions, substantial evidence supports the Board's knowledge finding. *See* CP 25.

VI. CONCLUSION

Power City failed to provide protective systems or remove its employees who worked inside a trench that had areas over six feet deep and was directly next to the spoils pile. A cave-in or spoils pile collapse could have crushed and suffocated the workers, especially given that there was no safe way to get out of the trench quickly. This Court should affirm the Board's order.

RESPECTFULLY SUBMITTED this 30 day of March, 2018.

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Appendix



Appx 1 (Ex 3 at 2)

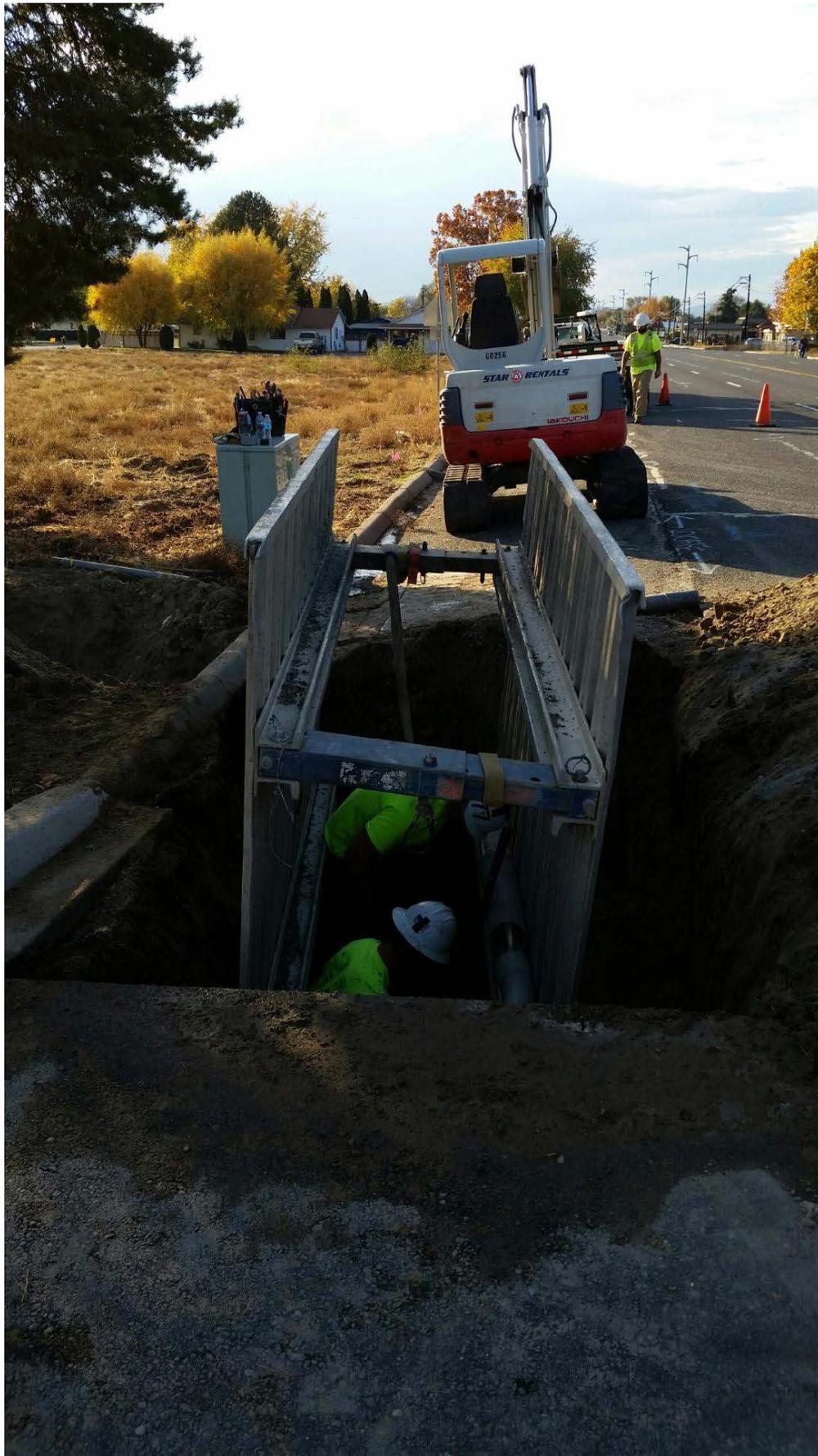


Appx 2 (Ex 3 at 3)

Appx 3 (Ex 4 at 4)



Appx 5 (Ex 8)





Appx 6 (Ex 9)

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Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35676-1
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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