

NO. 70334-0

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JS
2:52

FRANK COLUCCIO CONSTRUCTION CO.,
a Washington Corporation:
Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES
Respondent.

Appeal from Superior Court of King County
Cause No. 12-2-28500-4 SEA
BIIA Docket No. 11 W1088, Citation & Notice No. 314732900

APPELLANT'S RELY BRIEF

Aaron K. Owada, WSBA #13869
Attorney for Appellant

AMS LAW, P.C.
975 Carpenter Road NE #201
Lacey, WA 98516
Tel: (360) 459-0751
Fax: (360) 459-3923

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I. REPLY

- A. **The Employer did assign error to the Board's Finding of Fact No. 5 that found that it was feasible to comply with WAC 296-155-428(20)(a).**

It is undisputed that the Appellant/Employer, Frank Coluccio Construction Company, hereinafter "FCCO", Assigned Error to Findings of Fact Numbers 3, 5 and 6, and took exception to these findings as they pertained to, "the issue of variance, feasibility and penalty." See, Assignment of Error, No. 1 at CABR 3.

It is further undisputed that the FCCO assigned error that, "the Board erred in all of its Findings of Fact and Conclusions of Law" in its appeal to the Superior Court. In its Notice of Appeal to this Court, FCCO sought review of the Trial Court's Findings of Fact, Conclusions of Law and Judgment that was entered on April 16, 2013. As noted in the letter opinion, the Superior Court found that FCCO had met the first prong that required a demonstration that it was technologically infeasible to comply with the ten foot rule set forth in WAC 296-155-428(20)(a), but that FCCO did not meet the second prong which required a showing that there were no alternative means available.

RAP 10.3 provides that:

(4) *Assignments of Error.* A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error.

FCCO in its Brief made the following assignment of error:

Where it was impossible to keep the excavator more than 10 feet away from the electric trolley lines, and there was no feasible means to keep the excavator more than 10 feet away from the lines, did the Board err in not accepting the affirmative defense of impossibility of compliance and affirming a violation of WAC 296-155-428(20)(a)?

Clearly the Superior Court held that the first prong of the affirmative defense on infeasibility had been met by the Employer that it was infeasible to perform the work without coming within the 10 foot zone. FCCO does not assign error to the Superior Courts finding that the first prong was met. The only issue on appeal pertains to the second prong of the affirmative defense, which the Superior Court found was not met by FCCO.

The assignment of error set forth by FCCO is in compliance with RAP 10.3 because it is a concise statement of the issue before this Court. Did FCCO establish the affirmative defense of infeasibility to vacate the citation?

B. A variance pursuant to RCW 49.17.080 is not required by statute or case law to support an affirmative defense of infeasibility or impossibility of compliance.

At page 18 of the State's Brief, the Department asserts that a variance could have been requested by FCCO. While this may be true, RCW 49.17.080 simply does not mandate that an employer pursue a

variance in order to raise the affirmative defense of impossibility of compliance. In relevant part, RCW 49.17.080 declares:

49.17.080. Variance from safety and health standards--
Application--Contents--Procedure

(1) Any employer *may* apply to the director for a temporary order granting a variance from any safety and health standard promulgated by rule or regulation under the authority of this chapter. Such temporary order shall be granted only if the employer files an application which meets the requirements of subsection (2) of this section and establishes that the employer is unable to comply with a safety or health standard because of the unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the safety and health standard or because necessary construction or alteration of facilities cannot be completed by the effective date of such safety and health standard, that he or she is taking *all available steps to safeguard his or her employees against the hazards covered by the safety and health standard*, and he or she has an effective program for coming into compliance with such safety and health standard as quickly as practicable.

(Emphasis added).

Nowhere in this statute is an employer required to file for a variance with the Department of Labor & Industries, nor does this statute contain any language remotely addressing the need to request a variance to assert the affirmative defense of impossibility of compliance. Whether a variance is requested or not, both federal and state law do not require an employer to first seek a variance in order to assert impossibility of compliance as an affirmative defense.

The only reported case in Washington addressing the affirmative defense of infeasibility or impossibility of compliance is *Washington Cedar & Supply Co. v. Department of Labor & Industries*, 137 Wash. App. 592 (Div. II 2007). The Court held:

Washington Cedar also argues that it should have been able to present an infeasibility defense. To support its argument, Washington Cedar relied on a federal case, *Bancker Constr. Corp. v. Reich*, 31 F.3d 32 (2d Cir.1994). In interpreting our WISHA regulations in the absence of state decisions, we may look to the federal Occupational Safety and Health Administration (OSHA) regulations and consistent federal decisions. *Adkins v. Aluminum Co. of Am.*, 110 Wash.2d 128, 147, 750 P.2d 1257, 756 P.2d 142 (1988); 29 U.S.C § 651 *et seq.* Assuming, without deciding, that Washington law recognizes a similar affirmative defense,^{FN3} we hold, following federal precedent, that an affirmative infeasibility defense requires an employer to prove that compliance is technically impossible or that that compliance would have exposed the employees to a greater hazard. *Bancker Constr.*, 31 F.3d 32, 34 (2d Cir.1994).

As set forth in footnote 3, the *Washington Cedar* Court did not decide whether the affirmative defense was available under Washington law because the Employer did not present any evidence that it was technically infeasible to comply with the cited standard.

The *Washington Cedar* Court, however, recognized that state courts may look to federal decisions and the federal Occupational Safety and Health Act. Following federal precedent, the *Washington Cedar* Court held that an affirmative defense of infeasibility requires an employer to establish either that compliance is technically infeasible, or that

compliance would have exposed the employees to a greater hazard, a separate and different affirmative defense.¹

The *Bancker* Court held that:

It is an affirmative defense to a charge of violating an OSHA standard that compliance was impossible or infeasible. The cited employer bears the burden of showing that compliance with the standard's literal requirements was impossible or would have precluded performance of the work. *Brock v. Dun-Par Engineered Form Co.*, 843 F.2d 1135, 1136 (8th Cir.1988). The employer also must show that it used alternative means of protection not specified in the standard or that alternative means were unavailable. *Id.*

As specifically noted, the Employer bears the burden of proof that compliance with the standard's literal requirements was impossible or that compliance with the standard would have precluded performance of the work.

Unlike the "greater hazard" affirmative defense, the affirmative defense of impossibility of compliance does not, under federal case law, require the employer to first apply for a variance. Accordingly, the fact that FCCO did not obtain a variance before doing the work is of no consequence because the affirmative defense asserted by FCCO does not require a variance.

¹ To establish the greater hazard defense, the employer must prove " '(1) the hazards of compliance with [the] standard are greater than the hazards of noncompliance, (2) alternative means of protection are unavailable, and (3) a variance was unavailable or inappropriate.' " *Dole v. Williams Enters. Inc.*, 876 F.2d 186, 188 (D.C.Cir.1989) (quoting *Lauhoff Grain Co.*, 13 O.S.H.Cas. (BNA) 1084 (OSHRC 1987)).

The Superior Court agreed with FCCO's position in its letter opinion, and held:

"The court agrees with Petitioner that there is no requirement that an employer obtains a variance before commencing work that violates a regulation. However, in the absence of such a variance, the burden rests on the employer to demonstrate that its violation of the regulation – in this case doing work within ten feet of energized trolley lines – can be excused the infeasibility defense."

Accordingly, FCCO was not required to obtain a variance. As a result, it had the burden to demonstrate the affirmative defense of infeasibility.

C. The Superior Court agreed that the undisputed facts demonstrated that it was impossible to stay more than 10 feet away from energized power lines in order to dig the trench.

After appropriately recognizing the affirmative defense of infeasibility as set forth in *In re Longview Fibre Company*, BIIA Dec., 98 W0524 (2000), in its letter opinion, the Superior Court set forth the two prongs of the defense:

"First, the employer must demonstrate that complying with the ten foot requirement was technologically infeasible, and, second, there were no feasible alternative means of protecting the workers."

The Superior Court concluded that FCCO met the first prong and found that the Department would not have granted a variance allowing work to be performed within ten feet of highly dangerous wires.

Moreover, the undisputed facts demonstrated that it was impossible to dig the trench without coming within the ten foot zone.

FCCO was hired to put in a new sewage line on Broadway in Seattle. The sewer line was approximately 250 feet long, and a trench 13 feet deep and about 5 feet wide. Brown at pages 89, line 14 - page 90, line 3; and, page 92, lines 3 - 4. As they installed the line with pipes 18 feet long, they needed an excavator that could reach 20 feet that could dig 13 feet deep. Brown at page 90, lines 4 - 8. Mr. Brown testified that a smaller excavator could not be used for this project. That was because a smaller excavator could not dig deep enough, nor would it be strong enough to move a trench box that was 20 feet long. Brown at page 90, line 9 - page 91, line 5. Given the length of the new sewer line, Mr. Brown testified that it was not feasible to dig the trench by hand. Brown, page 91, line 26 - page 92, line 2.

The Superior Court agreed that it was not technically feasible to put in the sewer line on Broadway without using a large excavator. FCCO agrees with this conclusion, but respectfully disagrees with the Court's conclusion that the second prong of the affirmative defense was not met.

D. There was no alternative means to prevent the excavator more than ten feet away from the power lines.

The Superior Court held that the FCCO had not met its burden of proving the second prong that there were no feasible alternative means of protecting the workers. The Court held:

“The second prong, however, requires that if it is not feasible to comply with a regulation, the work must be performed as safely as reasonably possible. Here, there was substantial evidence before the Board that alternative means of protecting the workers were not utilized, including: a limit switch to prevent the boom from going up into the wires, a painted line, a strobe light, and a spotter who was on duty at all times, not just when the excavator was below the wires.”

The Superior Court’s recognition of the affirmative defense of infeasibility is consistent with federal law. However, the limit switch, painted line, strobe light and spotter as referenced were not applicable to the activities taking place for the citation itself.

The Compliance Officer, Randy Paddock, who wrote the citation testified that the hazard to which he cited was based on the excavator pulling the trench box. He testified at page 55, lines 8 – 4 as follows:

Q. Your observations were of the excavator pulling the trench box, correct?

A. Correct.

Q. And that’s what the hazard is that you cited for in this particular case?

A. Correct.

The operator, Dan Mitchell, testified that he was aware that his work would bring him closer than 10 feet to the trolley line. Mitchell, page 115, line 15. He further testified that when he was pulling the trench box, the activity cited by the Compliance Officer, there would be no need to have a limit switch because the purpose of the limit switch would be to protect the boom from going up and down. Since he was not directly underneath the trolley lines, if the boom were to accidentally go up, it would not come into contact with the trolley lines. Mitchell, page 120, lines 9 – 16.

As set forth in the Interim Order (Variance), Exhibit 1, for future work, the Department directed FCCO to take certain actions in order for work activities to take place no closer than 4 feet from the trolley lines. For example, as a condition for future work, FCCO was to have a spotter at all times on the job site, not just when the excavator was working near the trolley lines.

For work taking place up to the WISHA inspection, Mr. Brown testified that whenever the excavator needed to go underneath the trolley lines, he served as the dedicated spotter. Mr. Brown served solely as a spotter, and had no other job duties during these times. As a spotter, he worked with Mr. Mitchell to ensure that he did not come into contact with the trolley lines and trucks. (Brown at Page 93, lines 7 – 20). Although a

spotter was not witnessed at the time of the state's inspection by Compliance Officer, Mr. Paddock, Mr. Brown testified that a spotter was not needed because the box being drug next to the ditch was more than 10 feet away from the energized trolley lines. (Brown at page 104, lines 7-17).

There was no evidence presented that would demonstrate that a strobe light or painted line would have further protected the employees against the hazards of electrocution when the excavator pulling the trench box and was within the 10 foot zone, but not closer than 3 - 4 feet away from the trolley line. Brown at page 98, lines 5-8.

On the contrary, FCCO took affirmative steps to protect its employees against the hazards of electrocution.

When asked if FCCO took any precautions to ensure that no contact was made with the trolley lines, Mr. Brown provided the following relevant testimony (page 103, line 17 - Page 104, line 6):

The way that we backed the trucks in to load them, we had them right next to the ditch so that the machine never had to get a dip or the bucket underneath the wires. We were never going to be underneath the wires by swinging around. A lot of times you'll see an excavator dig, and they'll swing around, load the truck behind them. You couldn't do that here. We did not want to get any closer from center of the road than possible, and that's why the operator sat off centered with the cabs off center so that he always had full vision of the wires on the side of the truck.

If he was on the other side, the boom gets in the way because the

cab is off set. So the excavator was set up that he always had a visual with the wires, and that way he never had to turn the boom. *We never had to put the excavator under the wires. We were never under the wires. We were always alongside the wires as far away as we could possibly get.*

(Emphasis added).

Moreover, the employers were provided specialized training that would allow them to work in close proximity to high voltage lines (up to 115,000 volts). Exhibit 5 is the In-house Training Sign In sheet for the Massachusetts substation electrical training.

Not only was it infeasible to do the work without coming within the 10 foot zone, FCCO in fact provided alternative means to best protect its employees. They carefully planned out the work sequencing of where the dump trucks would be positioned to minimize any accidental contact between the excavator and the power lines. They provided specialized electrical training to ensure that the workers were aware of the hazards of high voltage lines.

The only citation issued by the Department was for coming within ten feet of the trolley lines in violation of WAC 296-155-428(20)(a).

The only way to dig the sewer line and maintain the 10 foot clearance zone would be to dig a sewer line in downtown Seattle 250 feet long, 13 feet deep and 5 feet wide by hand. The Superior Court easily concluded that it was not feasible to dig by hand and that an excavator was

needed. Even if the sewer line could have been dug by hand, it would still not have resolved the issue of moving a 20 foot long trench box to protect workers who would be inside of the trench putting in 18 foot long sections of pipe. The undisputed testimony was that a large excavator was needed not only for the reach, but the capacity to drag the box.

As set forth in Exhibit 1, the Department never directed FCCO to de-energize the lines. This is because Metro was not willing to stop its bus service during the daytime, and noise ordinances precluded FCCO from engaging in heavy construction at night when the buses do not operate.

As noted in *Harry C. Crooker & Sons, Inc. v. Occupational Safety And Health Review Com'n*, 537 F.3d 79, 22 O.S.H. Cas. (BNA) 1298, 2008 O.S.H.D. (CCH) P 32,971, de-energizing the lines would be an “alternative means” as it would allow work to be conducted within the ten foot zone as there would be no electrocution hazards (because there would be no electricity).

In order to continue with the project, FCCO accepted the conditions in the Variance, Exhibit 1. The conditions were based on Department’s decision to grant variance of the ten foot rule that would allow FCCO to operate up to 4 feet away from the power lines, provided the conditions were met. The conditions for the 4 foot clearance, however, had no application to the specific and limited activities that FCCO was

cited for. Had the Department cited FCCO for other activities at the job site, where the variance conditions would be applicable, then the Department's position that FCCO did not engage in alternative means of protection would be relevant. However, that is academic as the Department only cited FCCO for the hazards associated with pulling the trench box.

V. CONCLUSION

FCCO respectfully asserts that the Board and Superior Court erred in finding that it failed to establish the infeasibility defense. As found by the Superior Court, it was impossible to dig the excavation without using the large Komatsu excavator. There were no feasible means to maintain the 10 foot clearance that is required by WAC 296-155-428(20).

The alternative means set forth in the Interim Order are not applicable to the specific hazard cited by the Department and is not relevant to the citation.

The use of a limit switch cannot be used to defeat the defense because there is no standard that required FCCO to use a limit switch. Moreover, at the time of the alleged violation, the boom was never beneath the electric lines. As such, a limit switch would have served no purpose. None of the other conditions to decrease the 10 foot clearance to a 4 foot clearance were applicable to the cited activity. Thus, failure to

have implemented them for the activity cited did not decrease their exposure to the hazard cited. By training the employees on high voltage electrical hazards, FCCO did provide alternative means to allow workers to perform the excavation work within the 10 foot clearance zone.

For the reasons set forth above, the Appellant respectfully urges the court to direct the Superior Court to reverse the findings and conclusions of the Board of Industrial Insurance Appeals and to conclude that the affirmative defense of infeasibility was met.

DATED this 6th day of December, 2013.

AMS LAW, P.C.

By: 
Aaron K. Owada, WSBA No. 13869
Attorneys for Appellant

CERTIFICATE OF SERVICE

I, Christina Kim, hereby certify under penalty of perjury under the laws of the State of Washington that on December 6, 2013, I filed with the Court of Appeals, Division I, via HAND DELIVERY, the original of the following document:

1. APPELLANT'S REPLY BRIEF

With a copy of the same via US MAIL and FACSIMILE to:

Paul Michael Weideman, AAG
Office of the Attorney General
Labor & Industries Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

SIGNED in Seattle, Washington on December 6, 2013.



CHRISTINA KIM