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## I. INTRODUCTION

This is a substantial evidence case arising from an employer's appeal of a citation under the Washington Industrial Safety and Health Act (WISHA), RCW 49.17. The Department of Labor and Industries cited Frank Coluccio Construction Co. (Coluccio) for operating an excavator within 10 feet of energized overhead Metro bus trolley lines in violation of WAC 296-155-428(20)(a). Contact with these high voltage lines could have seriously injured or killed the excavator operator or nearby individuals. The Board of Industrial Insurance Appeals and the superior court affirmed the Department's citation.

Coluccio acknowledges that it operated the excavator within 10 feet of the energized lines in violation of WAC 296-155-428(20)(a). And it does not assign error to, and therefore does not contest, the Board's findings that it was feasible for the company to implement the compliance requirements and to perform work operations after having implemented compliance requirements. Nor does it assign error to the Board's finding that it did not use feasible alternative protection.

Nevertheless, Coluccio asks this Court to reweigh the evidence to accept its affirmative defense of infeasibility. But well-established standards for substantial evidence review provide that appellate courts do not reweigh the evidence. Here, ample evidence supports the Board's

findings on feasibility and its rejection of Coluccio's affirmative defense. Coluccio knew before beginning work that it would violate the 10-foot safety standard but it did not apply for a variance until after the Department cited it for the safety violation. Coluccio did not ask Metro to de-energize the lines. Additionally, substantial evidence demonstrates that it did not use any of several available means to protect its workers from the hazards of electrocution, including a dedicated spotter, a limit switch or nylon sling to restrict the movement of the excavator's boom, a warning strobe light on the excavator's cab, and painted lines on the worksite to remind workers of the necessary clearance.

## **II. ISSUE**

1. Does substantial evidence support the Board's finding of fact 5 on feasibility where Coluccio did not apply for a variance even though it knew before beginning work that it would violate the 10-foot standard, where it did not ask Metro to de-energize the trolley lines, and where it did not use other safety measures such as a dedicated spotter, a limit switch, a nylon sling, a warning strobe, and painted clearance lines?

## **III. STATEMENT OF THE CASE**

### **A. Sound Transit Hired Coluccio To Replace A Sewer Line Under Broadway Street, Which Has Energized Overhead Bus Trolley Lines**

Sound Transit hired Frank Coluccio Construction Co. to replace a damaged sewer main in the Capitol Hill neighborhood in Seattle. BR

Brown 83-84; BR Mitchell 110; Ex. 1 at 1.<sup>1</sup> The main was located underneath Broadway Street between Denny Street and East Howell Street. BR Brown 83-84; Ex. 1 at 1. At that location, Broadway has one northbound and one southbound lane, each of which is 13½ feet wide. BR Paddock 45; BR Mitchell 114; *see also* BR Brown 85-86; Ex. 4. The center turning lane is 11 feet wide. BR Paddock 45; BR Mitchell 114.

Trolley lines that power Metro buses run above Broadway. BR Paddock 46-47; BR Brown 87; Ex. 1 at 2. The trolley lines are approximately 12 to 15 feet from the center of the road. BR Mitchell 119. According to Metro, the approximate height of trolley lines in Seattle is 18 feet. Ex. 1 at 2. The trolley lines over Broadway are high voltage lines of 600-800 volts. BR Paddock 46; Ex. 1 at 1; Ex. 2 at 2. Power as low as 50 volts and 5 milliamps can cause death. BR Clouatre 143; Ex. 6 p. 19.

The sewer work required Coluccio to dig a trench approximately 250 feet long, 13 feet deep, and 5 feet wide down Broadway's center turn lane. BR Brown 84, 89-90, 92. The company determined that it needed a medium-size excavator with a boom (or arm) length of about 20 feet for the project. BR Paddock 20; BR Brown 88, 90. According to the company, a smaller excavator would not have been able to dig to the necessary depth or to pull a trench box around the worksite. BR Brown

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<sup>1</sup> The certified appeal board record is cited as "BR." Witness testimony is cited by the witness's name and page number.

89-91; BR Mitchell 119. A trench box is a structure that is placed inside a trench to protect workers from the risk of cave-in. BR Brown 89; *see also* WAC 296-155-650(q).

**B. Coluccio's Foreman And Safety Director Knew Before Beginning The Project That The Excavator Would Come Within 10 Feet Of The Energized Overhead Lines In Violation Of WAC 296-155-428(20)(a)**

Before beginning the work, the company's corporate safety director, Robert Clouatre, visited the worksite to identify potential safety hazards. BR Clouatre 127, 131. Mr. Clouatre saw the Metro trolley lines over Broadway. BR Clouatre 132. He knew that the excavation project would require Coluccio employees to work within 10 feet of the trolley lines. BR Clouatre 134. He knew about WAC 296-155-428(20)(a)'s requirement that employers must maintain a 10-foot clearance from energized overhead lines when operating vehicles or mechanical equipment. *See* BR Clouatre 140.<sup>2</sup>

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<sup>2</sup> WAC 296-155-428(20) reads in its entirety:

Vehicular and mechanical equipment.

(a) Any vehicle or mechanical equipment capable of having parts of its structure elevated near energized overhead lines shall be operated so that a clearance of 10 ft. is maintained. If the voltage is higher than 50kV, the clearance shall be increased 0.4 inch for every 1kV over the voltage. However, under any of the following conditions, the clearance may be reduced:

(i) If the vehicle is in transit with its structure lowered, the clearance may be reduced to 4 ft. If the voltage is higher than 50kV, the clearance shall be increased 0.4 inch for every 1kV over that voltage.

Mr. Clouatre did not realize at that time that the bus trolley lines were high voltage. BR Clouatre 141-42. He was not “used to high voltage lines being that low.” BR Clouatre 142. He did not consult with Metro about the lines’ voltage. BR Clouatre 144. Ascertaining the voltage of overhead lines before beginning work is an important step that an employer can take to make the worksite safer for workers. *See* BR Paddock 26.

The project’s foreman, Randy Brown, also visited the worksite before the work began and observed the trolley lines. *See* BR Brown 83, 87. He knew that Coluccio employees would not be able to comply with the 10-foot clearance requirement in WAC 296-155-428(20)(a) due to the location of the sewer in the street. *See* BR Brown 91. He realized that portions of the excavator would be closer than 10 feet to the high-voltage trolley wires at times. BR Brown 91, 100.

**C. Despite The Company’s Knowledge That It Would Violate A Safety Standard Intended To Protect Its Workers From The Hazard Of Electrocution, Coluccio Did Not Seek a Variance From WAC 296-155-428(20)(a) Before Beginning Work**

Despite Mr. Clouatre’s and Mr. Brown’s knowledge that the company could not perform the work without violating WAC 296-155-

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(ii) If insulating barriers are installed to prevent contact with the lines, and if the barriers are rated for the voltage of the line being guarded and are not a part of or an attachment to the vehicle or its raised structure, the clearance may be reduced to a distance within the designed working dimensions of the insulating barrier.

428(20)(a), the company did not apply to the Department for a variance from that regulation before beginning work. BR Paddock 16, 18-19; BR Clouatre 141; *see also* RCW 49.17.080, .090; WAC 296-155-010. Mr. Clouatre knew about the procedures for obtaining a variance when the company was unable to comply with a safety or health regulation. *See* BR Clouatre 144-45. On an earlier project, Mr. Clouatre initiated the process of obtaining a variance when he knew Coluccio's employees would be working near energized lines. BR Clouatre 144; *see also* BR Clouatre 135. He had worked with the Department to obtain variances in the past. *See* BR Clouatre 145.

Mr. Clouatre was aware of an incident a few years ago when one of Coluccio's excavators touched an electrical line. BR Clouatre 133. The excavator operator knew about a nearby 480-volt electrical line. BR Clouatre 133. The excavator had "been operating fine all day[]" and swung the wrong direction." BR Clouatre. The excavator scraped the insulation off the electrical line but nobody was injured. BR Clouatre 133.<sup>3</sup>

Instead of obtaining a variance, Mr. Clouatre worked with Mr. Brown "to insure that we did not touch those lines." BR Clouatre 134. According to Mr. Clouatre, the two men discussed how the foreman "was

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<sup>3</sup> The industrial appeals judge originally allowed Mr. Clouatre's testimony about the prior excavator incident as an offer of proof in colloquy. *See* BR Clouatre 133; *see also* WAC 263-12-116(9). In her proposed order, the judge removed this testimony from colloquy. BR 24.

going to position all of his vehicles and his equipment and keep an eye and remind people on a regular basis how any time the excavator arm was articulating he'd be standing there spotting to make sure nobody got close to that." BR Clouatre 132.

Mr. Brown explained that Coluccio backed the trucks "right next to the ditch" in order to load them in such a way that they never had to get the excavator's bucket underneath the overhead lines. BR Brown 103-04. He explained that the excavator was set up to allow the operator to "always ha[ve] a visual with the wires." BR Brown 104. He stated that "most of the time" his job was to spot for the excavator operator, Dan Mitchell. BR Brown 93.

Mr. Mitchell, the excavator operator, was not told before beginning the work that he had to stay 10 feet away from the trolley lines. BR Mitchell 122-23. He never worked directly underneath the trolley lines. BR Mitchell 123. The excavator's cab could rotate 360 degrees. *See* BR Paddock 64. From time to time, Mr. Mitchell had to turn the excavator so that the boom and the bucket would leave the center line. BR Mitchell 122. This would bring the boom and the bucket to the side of the excavator. BR Brown 99-100. Mr. Mitchell knew the lines were energized. BR Mitchell 120.

**D. The Excavator Came Within 10 Feet Of The Energized Overhead Lines In Violation Of WAC 296-155-428(20)(a)**

Mr. Brown observed the bucket or boom come within three to four feet of the energized trolley lines. BR Brown 98. Mr. Mitchell stated that when he connected the bucket of the excavator to the trench box in the trench, the boom was approximately 8 to 10 feet away from the trolley lines. *See* BR Mitchell 113-14. Both men knew the Metro bus trolley lines were energized. BR Brown 99; BR Mitchell 121.

**E. A WISHA Inspector Observed The Excavator Within 10 Feet Of The Energized Lines**

On the morning of February 11, 2011, compliance safety health officer Randy Paddock was driving north on Broadway. BR Paddock 11, 39, 41, 44. He observed the excavator at the Coluccio worksite dragging a trench box at street level from one end of the work zone to the other. BR Paddock 19. The trench box was chained to the excavator's bucket. BR Paddock 19-20; *see also* Ex. 3. The excavator was traveling forward with its boom extended out in front of the trench box, which was being pulled. BR Paddock 19-20, 60; *see also* Ex. 3.

While in his car, Mr. Paddock observed that the boom was within 10 feet of the Metro bus trolley lines. BR Paddock 11, 19, 40-41, 53. The boom's pivot point was the part of the excavator closest to the bus trolley lines. BR Paddock 63-64; *see also* Ex. 3. Mr. Paddock observed buses

attached to the trolley lines, confirming that the lines were energized. BR Paddock 12.

Mr. Paddock was concerned that the chain could break, causing the boom to contact the energized Metro trolley lines. BR Paddock 20-21. If the excavator had touched the energized trolley lines, the operator's death by electrocution was almost certain. BR Paddock 32; *see also* BR Evans 77. People standing close to the excavator would also be at risk of death or serious injury. *See* BR Paddock 56; BR Evans 77.

Mr. Paddock parked his car and walked to the worksite to begin a safety investigation. BR Paddock 11-12. Mr. Clouatre and the project manager, Mr. McGinley, told Mr. Paddock that they did not have a variance. BR Paddock 16.

There are safety devices that prevent a boom from moving upward or that otherwise restrict its movement. BR Paddock 25. A nylon sling can act as a limit on booms. BR Paddock 25. A limit switch can also be installed on the controls of an excavator. BR Paddock 25. A limit switch limits the excavator's operation to pre-established parameters, allowing for control of the boom's height and swing. BR Evans 74-75; *see also* BR Paddock 25.

However, the excavator did not have a nylon sling or a limit switch to limit its reach. BR Paddock 26, 65; BR Brown 100. The strobe light on

the outside shroud of the excavator cab was not operating. BR Paddock 64-65; *see also* Ex. 1 at 2-3. Mr. Paddock did not observe a painted line on the ground as visual reminder of the necessary clearance from the overhead lines. *See* BR Paddock 64-65; Ex. 1 at 2.

Mr. Paddock did not observe a spotter. BR Paddock 64-65. He recalled speaking to someone, who he believed to be the foreman, Mr. Brown, about the use of a spotter. *See* BR Clouatre 27. Nobody identified a spotter on the worksite to Mr. Paddock. BR Clouatre 27. Mr. Brown acknowledged that he was not spotting when the trench box was being dragged at the time of Mr. Paddock's inspection. BR Brown 101, 104. He stated that a spotter was not needed at that time "[b]ecause the box was right next to our ditch was more than 10 feet away as far as I knew at the time." BR Brown 104.

Mr. Paddock informed the Coluccio employees that they could not operate equipment within 10 feet of the energized overhead lines. BR Paddock 18-19. He provided them with a phone number of a Department employee, Steve Heist, who handled variances. BR Paddock 18-19.

After the inspection, Mr. Paddock spoke with Rick Evans, high voltage compliance supervisor for the Department. BR Evans 69-70. Mr. Evans testified that "qualified electrical workers" and employees working under a variance can work within 10 feet of high voltage lines. BR Evans

72-73. Evans stated that the fact that Coluccio employees had previously received hazard awareness training from Seattle City Light on another project where Coluccio had worked within 10 feet of energized lines under a variance did not allow them to work within 10 feet of the energized trolley lines at the Broadway project. BR Evans 70-72.

**F. After The Inspection, Coluccio Applied For A Variance From WAC 296-155-428(20)(a) And Proposed Several Feasible Safety Measures That It Could Have Used Before Beginning Work**

After the safety inspection, Coluccio stopped the excavation work and applied for a variance. BR Paddock 28; Ex. 2. Mr. Clouatre consulted with Mr. Heist about measures to protect Coluccio workers. *See* BR Clouatre 144. In its application, the company proposed the following alternative protection measures in order to protect its workers:

1. This crew has been trained in a 4 hour electrical hazards recognition and procedures course by Seattle City Light. They performed excavation work in the Massachutes St [sic] substation without any incident and worked near very high voltages. We will conduct a refresher of this course with site specific procedures discussed.
2. Daily prejob meetings will be held.
3. A foreman (not the one directing this work) that has already been thru [sic] the training mentioned in 1. above, will be assigned as safety watch. He will have no other duties. He is a competent person and will have full authority to stop the work and correct procedures.

4. The excavator used will have a limiter switch attached to it. An adjustable rod will be attached to the boom hoist cylinder that will move with the boom hoist cylinder rod up and down. A magnetic switch will be installed on the cylinder barrel that will trip when the rod passes by it. When the magnetic switch trips, it will close off the pilot used to control [the boom hoist by using a solenoid valve. This will stop the excavator boom cylinders from extending any further. All other functions will still work including boom hoist down.]<sup>4</sup>

Ex. 2 at 2; *see also* Ex. 1 at 2.

On March 7, 2011, the Department issued an interim order that allowed the company to continue the sewer work as long as it maintained a minimum clearance of 4 feet from the energized trolley lines. *See* Ex. 1. The interim order required Coluccio to follow the safety measures that it had proposed. Ex. 1 at 3. Additionally, the order stated that the excavator would use the strobe light on the excavator's cab when the limit switch (aka lock out device) was activated and when the trolley was working directly beneath the lines. Ex. 1 at 2. The order required Coluccio to paint a line 4 feet back from the trolley lines as a visual reminder of the clearance. Ex. 1 at 2. The dedicated spotter's duties would include ensuring that the operator did not swing the bucket beyond the limits of the truck's box and spotting for the excavator when it was within 10 feet of the energized lines. *See* Ex. 1 at 3. All crew members would be kept

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<sup>4</sup> The bracketed portion of #4 appears in the interim order's restatement of Coluccio's proposed safety measures. Ex. 1 at 2. It appears to be unintentionally cut off on Coluccio's variance application. *See* Ex. 2 at 2; *see also* Ex. 1 at 1.

away from the excavator when it rotated to load trucks under the trolley lines. Ex. 1 at 3. Additionally, Coluccio would hold safety meetings every day. Ex. 1 at 3.

**G. The Department Cited Coluccio For A Serious Violation of WAC 296-155-428(20)(a) And The Board And Superior Court Affirmed The Department's Citation**

The Department issued a citation to Coluccio for a serious violation of WAC 296-155-428(20)(a).<sup>5</sup> BR 39-40; BR Paddock 30, 46. A hearings officer affirmed the citation in a corrective notice of redetermination. *See* BR 42. Coluccio appealed the corrective notice of redetermination to the Board. *See* BR 49-50. At the Board, Coluccio argued it was infeasible to comply with WAC 296-155-428(20)(a). BR 73-80.

After considering the testimony, the industrial appeals judge issued a proposed decision and order affirming the corrective notice of redetermination. BR 24-37. The judge entered several findings of fact, which including findings that it was feasible to implement compliance requirements, it was feasible to perform work after doing so, and that feasible alternative protection was not in use:

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<sup>5</sup> A serious violation exists 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, means, methods, operations, or processes which have been adopted or are in use in such workplace, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation. RCW 49.17.180(6).

3. In February 2011, Safety Compliance Officer Randy Paddock observed a Coluccio employee operating a Komatsu 228 excavator with a 42-inch bucket within 10 feet of an overhead energized Metro bus trolley line without first obtaining a variance, in violation of WAC 296-155-428(20)(a).

4. The highest level of injury reasonably expected from unprotected exposure to energized trolley lines is death or serious injury.

5. At the time of this violation it was feasible to implement the compliance requirements, feasible to perform work operations after having implemented the compliance requirements, and feasible alternative protection was not in use.

BR 36-37.

Coluccio petitioned for review of the judge's decision to the three-member Board. BR 3-12. The Board denied Coluccio's petition for review and adopted the proposed decision and order as its final decision and order. BR 2.

Coluccio appealed the Board's final decision and order to superior court. CP 1-3. The trial court affirmed the Board. CP 36-38.<sup>6</sup> Coluccio now appeals. CP 40-41.

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<sup>6</sup> Coluccio states that the superior court "easily concluded that it was impossible for [Coluccio] to dig the excavation without the use of an excavator." App. Br. 9. This appears to be a reference to the superior court's letter ruling. CP 43-44. The superior court in its judgment concluded that substantial evidence supported each of the Board's findings including the finding it was feasible to comply with the compliance requirements. See CP 38. Moreover, in a WISHA appeal, this Court reviews the Board's decision, not the superior court's. See *J.E. Dunn Nw., Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 35, 42, 156 P.3d 250 (2007).

#### IV. STANDARD OF REVIEW

In a WISHA appeal, this Court reviews a decision by the Board directly based on the record before the agency. *J.E. Dunn Nw., Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 35, 42, 156 P.3d 250 (2007); *see also Martinez Melgoza & Assocs., Inc. v. Dep't of Labor & Indus.*, 125 Wn. App. 843, 847, 106 P.3d 776 (2005). The Board's findings of fact are conclusive if substantial evidence supports them. *Elder Demolition, Inc. v. Dep't of Labor & Indus.*, 149 Wn. App. 799, 806, 207 P.3d 453 (2009); RCW 49.17.150(1).

Substantial evidence is evidence "in sufficient quantum to persuade a fair-minded person of the truth of the declared premise." *J.E. Dunn Nw., Inc.*, 139 Wn. App. at 43 (quoting *Holland v. Boeing Co.*, 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978)). This Court views the evidence and its reasonable inferences in the light most favorable to the prevailing party. *Erection Co. v. Dep't of Labor & Indus.*, 160 Wn. App. 194, 202, 248 P.3d 1085 (2011), *review denied*, 171 Wn.2d 1033 (2011). When undertaking substantial evidence review, the appellate court does not reweigh the evidence or re-balance the competing testimony presented to the factfinder. *Fox v. Dep't of Ret. Sys.*, 154 Wn. App. 517, 527, 225 P.3d 1018 (2009); *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002).

Unchallenged findings of fact are verities on appeal. *Mid Mountain Contractors, Inc. v. Dep't of Labor & Indus.*, 136 Wn. App. 1, 4, 146 P.3d 1212 (2006). Here, Coluccio did not assign error to any of the Board's findings and they are verities on appeal. *See* App Br. 1.

Finally, this Court applies a substantial evidence standard to review an employer's claim that it has established an affirmative defense to a WISHA citation, including an infeasibility defense. *Mowat Constr. Co. v. Dep't of Labor & Indus.*, 148 Wn. App. 920, 929, 201 P.3d 407 (2009); *BD Roofing, Inc. v. State Dep't of Labor & Indus.*, 139 Wn. App. 98, 114, 161 P.3d 387 (2007) (“[S]ubstantial evidence supported the Board's decision that BD failed to establish the affirmative defense of employee misconduct”); *Legacy Roofing, Inc. v. Dep't of Labor & Indus.*, 129 Wn. App. 356, 368, 119 P.3d 366 (2005).

## V. ARGUMENT

### A. Employers Must Comply With WISHA Regulations In Order To Protect Workers From Serious Injury Or Death

WISHA's purpose is to “assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington.” RCW 49.17.010. WISHA requires employers to provide employees with a place of employment free from recognized hazards that are likely to cause serious injury or death to its

employees. RCW 49.17.060(1). At Coluccio's worksite, contact with the high voltage Metro trolley lines would likely have resulted in the death or serious injury of the excavator operator or workers standing in close vicinity. BR Paddock 32, 56; BR Evans 77.

The Department is authorized to promulgate health safety regulations under WISHA. RCW 49.17.040. Employers must comply with these regulations. RCW 49.17.060(2). These regulations must meet or exceed standards promulgated under the federal Occupational Safety & Health Act (OSHA). RCW 49.17.010; RCW 49.17.050(2); *Aviation W. Corp. v. Dep't of Labor & Indus.*, 138 Wn. 2d 413, 423-24, 980 P.2d 701 (1999) (stating that WISHA standards can be "*more* protective, although not less, of worker safety" than OSHA standards). This Court may consider relevant federal decisions interpreting OSHA when interpreting WISHA. *Erection Co., Inc.*, 160 Wn. App. at 204 n.1.

Because of the danger of energized overhead wires, the Department has promulgated WAC 296-155-428(20)(a), which protects workers from potentially deadly contact with such wires. To prove that an employer violated a specific regulation, the Department must prove that (1) the cited standard applies; (2) the requirements of the standard were not met; (3) employees were exposed to, or had access to, the violative condition; and (4) the employer knew or, through the exercise of

reasonable diligence, could have known of the violative condition. *SuperValu, Inc. v. Dep't of Labor & Indus.*, 158 Wn. 2d 422, 433, 144 P.3d 1160 (2006).

Any employer may apply to the Department for a temporary order granting a variance from a WISHA regulation. RCW 49.17.080(1). To obtain a temporary order, the employer must establish that it is taking all available steps to safeguard its employees against the hazards covered by the safety and health standard. RCW 49.17.080(1). The employer must file an application with the Department that identifies the safety and health standard from which the employer seeks a variance. RCW 49.17.080(2)(a). The employer must represent, based on the firsthand knowledge of its employees, that it "is unable to comply with the safety and health standard or portion thereof" and must include a detailed statement of the reasons it is unable to comply. RCW 49.17.080(2)(b). In the application for a temporary order, the employer must also state the steps that it has taken and that it will take "to protect employees against the hazard covered by the standard." RCW 49.17.080(2)(c). The Department may issue an interim order, as it did in this case, until it makes a determination on the variance application. RCW 49.17.080(1)

The Department shall issue an order granting a variance if it determines that the employer has demonstrated by a preponderance of the

evidence that the “conditions, practices, means, methods, operations, or processes used or proposed” by the employer will produce a place of employment that is as safe and healthful as those which would prevail if the employer complied with the safety and health standard from which the variance is sought. RCW 49.17.090. The Department may permit a variation from WISHA regulations under RCW 49.17.080 or RCW 49.17.090 after receiving an application from an employer and conducting an adequate investigation “when other means of providing an equivalent measure of protection are afforded.” WAC 296-155-010. Here, as discussed below, Coluccio was well aware of the variance procedure and failed to use it. *See* BR Clouatre 144-45.

**B. An Employer Has The Burden Before The Board To Prove That Compliance With A Regulation Is Infeasible**

When the Department cites an employer for violating a specific WISHA standard, the Department does not need to prove that the employer had a feasible means of complying with the standard. *See SuperValu, Inc.*, 158 Wn. 2d at 434. If a specific standard exists, as in this case, the standard is presumed feasible, and the burden is on the employer to prove that it is not. *See SuperValu, Inc.*, 158 Wn.2d at 434. To prove that compliance with a regulation is infeasible, the employer has the burden to demonstrate both that it would be infeasible to comply with

the standard, and that it used any feasible alternative method of protection that was available in order to protect its workers:

(1) the means of compliance prescribed by the applicable standard would have been infeasible under the circumstances in that (a) its implementation would have been technologically or economically infeasible, or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and (2) either (a) an alternative method of protection was used, or (b) there was no feasible alternative means of protection.”

*In re Longview Fibre Co.*, BIIA Dec., 98 W0524, 2000 WL 33217383 at \*4 (2000) (citing *Sec’y of Labor v. Armstrong Steel Erectors, Inc.*, 17 BNA OSHC 1385, 1995 WL 561592 (No. 92-262, 1995)); see also Mark A. Rothstein, *Occupational Safety and Health Law* § 5:29 (2013).<sup>7</sup> As the

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<sup>7</sup> The parties in this case agree that the Board’s decision in *Longview Fibre*, which quotes the Occupational Safety Health Review Commission’s decision in *Armstrong Steel Erectors*, correctly articulates the test that an employer must meet to establish the affirmative defense of infeasibility. See App. Br. 10 (citing *Armstrong Steel Erectors*, 1995 WL 561592 at \*2); see also Mark A. Rothstein, *Occupational Safety and Health Law* § 5:29 (2013) (articulating same test as *Longview Fibre* and *Armstrong Steel Erectors*).

In *Washington Cedar & Supply Co. v. Department of Labor & Industries*, 137 Wn. App. 592, 597-98, 604, 154 P.3d 287 (2007), the court addressed an employer’s argument that it should have been allowed to present an infeasibility defense when the Department cited it for violating a fall restraint safety standard. The court declined to address whether Washington recognized the infeasibility defense because it determined that, even if the defense existed in this state, the employer could not meet it. See *Washington Cedar & Supply Co.*, 137 Wn. App. at 604 n.3; *contra Supervalu*, 158 Wn.2d at 434 (explaining that the burden is on the employer to prove that compliance with a safety standard is not feasible). The *Washington Cedar & Supply Co.* Court believed that federal precedent established that “an affirmative infeasibility defense requires an employer to prove that compliance is technically impossible or that compliance would have exposed the employees to a greater hazard.” *Washington Cedar & Supply Co.*, 137 Wn. App. at 604 (citing *Bancker Constr. Corp. v. Reich*, 31 F.3d 32 (2d Cir. 1994)). This summary of the infeasibility defense is incorrect. As the *Bancker Construction Corporation* decision makes clear, the affirmative defense of infeasibility and the

Board found, Coluccio has not met its burden to show infeasibility. BR 37.

**C. Because Coluccio Did Not Assign Error To The Board's Finding Of Fact On Feasibility, It Is A Verity On Appeal, And The Board's Unchallenged Findings Support The Board's Conclusion Affirming The Department's Citation**

As an initial matter, Coluccio did not assign error to any of the Board's findings, including finding of fact 5, which pertains to the issue of feasibility. *See* App. Br. 1; BR 37; *see also* RAP 10.3(a)(4), (g). Accordingly, all of the Board's findings, including the Board's finding of fact 5 on feasibility, are verities on appeal. *See Express Constr. Co. v. Dep't of Labor & Indus.*, 151 Wn. App. 589, 596, 215 P.3d 951 (2009). As such, this Court's review is limited to determining whether the Board's unchallenged findings support the Board's conclusions of law. *See McIntyre v. Fort Vancouver Plywood Co., Inc.*, 24 Wn. App. 120, 123, 600 P.2d 619 (1979); *see also Jamison v. Dep't of Labor & Indus.*, 65 Wn. App. 125, 127 n. 1, 827 P.2d 1085 (1992).

Here, it is undisputed that Coluccio violated WAC 296-155-428(20)(a). *See* App. Br. 1, 8; BR 36. The only issue that Coluccio raises

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affirmative defense of avoidance of a greater hazard are distinct affirmative defenses with different tests. 31 F.3d at 34. The *Washington Cedar & Supply Co.* Court conflated these two defenses. Thus, this Court should apply the test articulated in *Longview Fibre*.

in its appeal is whether the Board erred in rejecting its affirmative defense of infeasibility. *See* App. Br. 1, 8-9, 12.

The following are verities on appeal: it was feasible for Coluccio to implement the compliance requirements; it was feasible for Coluccio to perform work operations after having implemented the compliance requirements; and Coluccio did not use feasible alternative protection. BR 37. These verities, in addition to the unchallenged and undisputed Board finding that Coluccio violated WAC 296-155-428(20)(a), support the Board's conclusion of law 3 affirming the corrective notice of redetermination. *See* BR 36-37. Therefore, this Court need not engage in substantial evidence review and should affirm the superior court's judgment.

**D. Substantial Evidence Supports The Board's Finding Of Fact 5 And Its Rejection Of The Affirmative Defense Of Infeasibility**

In any case, Coluccio's argument fails on the merits. Coluccio concedes that it violated WAC 296-155-428(20)(a) because "it is undisputed that the excavator came within 10 feet of the trolley lines." App. Br. 8. The inspector, foreman, and excavator operator each testified to this fact. BR Paddock 11, 19, 40, 53; BR Brown 98; BR Mitchell 113-14. Additionally, the safety director testified that he knew the workers would be within the 10-foot zone at times. BR Clouatre 134.

Instead, Coluccio argues that the Board erred in rejecting its affirmative defense of infeasibility. App. Br. at 1, 12. Specifically, it asserts that “[b]ecause it was impossible to dig the excavation without a large excavator, and no other methods to maintain the 10 foot standard were feasible,” the affirmative defense was established and the Board erred by not vacating the citation. App. Br. 12. This argument fails.

WAC 296-155-428(20)(a) reads in relevant part: “Any vehicle or mechanical equipment capable of having parts of its structure elevated near energized overhead lines shall be operated so that a clearance of 10 ft. is maintained.” Any overhead wire “shall be considered to be an energized line until the owner of such line or the electrical utility authorities indicated that it is not an energized line and has been visibly grounded.” WAC 296-155-428(1)(m).

In order to establish the infeasibility affirmative defense, Coluccio had to prove that it met at least one prong of two distinct two-part tests. *See In re Longview Fibre Co.*, 2000 WL 33217383 at \*4. First, it had to prove that it would have been technologically or economically infeasible to implement the means of compliance prescribed by the standard or, in the alternative, that it could not have performed necessary work operations after implementing the means of compliance prescribed by the standard. *See In re Longview Fibre Co.*, 2000 WL 33217383 at \*4. Second, it had

to prove either that it used an alternative means to protect its workers from the hazard of electrocution or, in the alternative, that it had no feasible alternative means to protect its employees from the hazard of electrocution. *See In re Longview Fibre Co.*, 2000 WL 33217383 at \*4.

It is not enough for an employer to meet only one of these two-part tests. *See In re Longview Fibre Co.*, 2000 WL 33217383 at \*4. The employer must establish at least one prong of *both* tests in order to meet its burden on the defense of infeasibility. *See In re Longview Fibre Co.*, 2000 WL 33217383 at \*4. In this case, substantial evidence supports that Coluccio did not meet any prong of either test and, therefore, that the Board properly rejected its defense of infeasibility.

**1. Substantial evidence supports the Board's finding that it was feasible for Coluccio to implement the compliance requirements**

Substantial evidence supports each portion of the Board's finding of fact 5. *See* BR 37. First, substantial evidence supports the portion of the finding stating that "it was feasible to implement the compliance requirements." BR 37. This finding is relevant to the first prong of the first two-part test, i.e. whether the means of compliance prescribed by the standard was technologically or economically infeasible. *See In re Longview Fibre Co.*, 2000 WL 33217383 at \*4.

Coluccio could have implemented the means of compliance prescribed by WAC 296-155-428(20)(a)—staying 10 feet from energized overhead lines—by requesting that Metro de-energize the lines. Coluccio’s safety director testified that he did not consult with Metro about the voltage of the overhead lines before beginning the work. BR Clouatre 144. Coluccio did not present any other evidence that, before beginning the work, it had requested that Metro de-energize the lines and that Metro had refused.<sup>8</sup>

At least one federal case has rejected an employer’s infeasibility defense when the employer presented affirmative evidence from a utility employee about the difficulty of de-energizing overhead lines. There, an OSHA inspector observed an excavator within 10 feet of 14-foot-high power lines in violation of a federal regulation that is similar to WAC 296-155-428(20)(a). *Harry C. Crooker & Sons, Inc. v. Occupational Safety & Health Review Comm’n*, 537 F.3d 79, 81, 83 (1st Cir. 2008); *see also* 29 C.F.R. § 1926.200(a)(6). The employee of the public utility stated in an affidavit that de-energization was the utility’s “least preferred option,” that it would be unprecedented, and that de-energizing specific lines would

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<sup>8</sup> There is a statement in the record that “King County Metro will not allow de-energization.” Ex. 2 at 2. But that statement by Coluccio appears on Coluccio’s February 14, 2010 variance application, which it filed with the Department after the safety inspection.

require 24-hour notice to affected customers. *Harry C. Crooker & Sons*, 537 F.3d at 83.

The court held that the problems outlined by the public utility employee, although “not insignificant . . . [fell] short of satisfying either of the elements of the infeasibility defense.” *Harry C. Crooker & Sons*, 537 F.3d at 83. The court observed that nothing in the record demonstrated that “[n]ormal foresight, planning, and patience” would not have sufficed to satisfy the utility’s notice requirements and that the fact that de-energization had not occurred on other projects was not dispositive because “the infrequent use of prophylactic measures is not a proxy for impossibility.” *Harry C. Crooker & Sons*, 537 F.3d at 83.

Here, in contrast, Coluccio presented no evidence that it made any effort to have the lines de-energized. The safety director did not consult with Metro before beginning work. *See* BR Clouatre 144. As such, as the rationale in *Harry C. Crooker & Sons* illustrates, Coluccio failed to meet its burden that it was technologically infeasible to comply with WAC 296-155-428(20)(a) and substantial evidence supports the Board’s finding that it was feasible to implement the compliance requirements.

Additionally, substantial evidence supports that it was feasible for Coluccio to implement the compliance requirements by obtaining a variance from WAC 296-155-428(20)(a) before beginning work.

Coluccio's foreman and safety director knew before beginning work that the excavator they had selected to perform the work would come within 10 feet of energized overhead lines. BR Brown 91; BR Clouatre 132, 134. The safety director knew about the requirements of WAC 296-155-428(20)(a). BR Clouatre 140. He knew there was a process for applying to the Department for a variance, and he had obtained variances in the past. BR Clouatre 144. Coluccio applied for and obtained a variance in this case after the safety inspection. Exs. 1 and 2. It could have obtained the variance before beginning the work. Had it done so, it would have been in compliance with the Department's regulations through the variance process. As the industrial appeals judge correctly observed, although Coluccio presented evidence that it could not avoid working within 10 feet, that did not allow the employer to disregard an applicable variance process that exists to further the goals of RCW 49.17. BR 34.

As one federal court has explained in the OSHA context, an employer should seek a variance if it believes that compliance with a specific safety and health regulation is infeasible. *See Reich v. Trinity Indus., Inc.*, 16 F.3d 1149, 1154 (11th Cir. 1994). In that case, Trinity Industries adopted a program requiring its employees to wear hearing protection devices at all times. *Reich*, 16 F.3d at 1151. The employer adopted this program instead of complying with a specific OSHA

regulation that required employers to establish a hearing conservation program and to monitor its employees' hearing over time. *Reich*, 16 F.3d at 1151. The Secretary cited the employer for a willful violation of the OSHA regulation. *Reich*, 16 F.3d at 1151.

The employer believed that its alternative program afforded more protection to its employees, and it further alleged that compliance with the specific OSHA regulation was "not feasible or possible." *Reich*, 16 F.3d at 1154-55. The Eleventh Circuit rejected these arguments, relying in part on the availability of a variance procedure and explaining that if Trinity Industries wanted to implement an alternative program, it "should have sought a variance":

Trinity did not apply for a variance until August 15, 1988, about two months after the Secretary issued this citation. According to Trinity, it filed a request for variance from compliance with section 1910.95 on the grounds that changing conditions and employee mobility made it infeasible to comply, and Trinity's alternative program better protected employees. . . . If Trinity desired to implement and operate its alternative program within the law, Trinity should have sought a variance from the Secretary prior to the issuance of a citation. For a period of at least four years, Trinity was aware of OSHA requirements and the applicability of the requirements to its Jacksonville plant. We cannot excuse Trinity from failing to either comply with OSHA regulations or apply for a variance, based upon the pendency of other citations in the administrative and judicial systems.<sup>[9]</sup>

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<sup>9</sup> One of the reasons that Trinity gave for its delayed application for a variance was "the pendency of other actions involving citations." *Reich*, 16 F.3d at 1154.

*Reich*, 16 F.3d at 1154.

The same is true here. The Legislature has provided a variance process for when an employer cannot comply with a regulation. RCW 49.17.080, .090. This variance process exists to further the goals of RCW 49.17 while simultaneously balancing employee safety and employer needs. Coluccio knew about the variance process and knew that the 10-foot clearance standard applied to its excavation project. Coluccio cannot be excused, under the guise of the infeasibility defense, from failing either to comply with WAC 296-155-428(20)(a) or to apply from a variance from that regulation.

**2. Substantial evidence supports the Board’s finding that it was feasible for Coluccio to perform work operations after having implemented compliance requirements**

Next, substantial evidence supports the portion of the finding stating that “it was feasible to perform work operations after having implemented the compliance requirements.” BR 37. This finding is relevant to the second prong of the first two-part test, i.e. whether Coluccio would have been able to perform necessary work operations after implementing means of compliance prescribed by the standard. *See In re Longview Fibre Co.*, 2000 WL 33217383 at \*4.

Here, it is reasonable to infer that had Metro de-energized the lines at Coluccio’s request, Coluccio would have been able to continue the work

that it was performing while the lines were still energized. Additionally, substantial evidence supports that Coluccio could perform its work while operating under a variance. After receiving the citation, Coluccio applied for the variance, which included the safety measures that are discussed in more detail in the following section. *See* Ex. 2. And Coluccio continued to perform excavation work under the interim order with the additional safety measures in place. *See* BR Clouatre 145-46.

Accordingly, substantial evidence supports that Coluccio has failed to meet either prong of the first two-part test. Therefore, as the Board correctly determined, its infeasibility defense fails. In any case, as explained below, substantial evidence also demonstrates that Coluccio has not met either prong of the second-two part test.

**3. Substantial evidence supports the Board’s finding that Coluccio was not using feasible alternative protection to protect its workers from the hazard of electrocution**

Next, substantial evidence supports the portion of the Board’s finding that “feasible alternative protection was not in use.” BR 37. This finding is relevant to both prongs of the second two-part test, i.e. whether the employer either used an alternative method of protection or whether there was no feasible alternative means of protection available. *See In re Longview Fibre Co.*, 2000 WL 33217383 at \*4.

Mr. Paddock testified that there were two devices—nylon slings and limit switches—that could restrict a boom’s movement. BR Paddock 25. Before the safety inspection, Coluccio did not use either of these devices to prevent the boom from contacting the trolley wires. BR Paddock 26, 65; *see also* BR Brown 100; BR Clouatre 145-46. Mr. Paddock was concerned that the boom would contact the trolley wires. *See* BR Paddock 20. He observed the pivot point of the boom within 10 feet of the energized overhead lines, and Mr. Brown testified that equipment came as close as 3 feet to the lines. BR Paddock 63-64; BR Brown 98.

Moreover, when Coluccio applied for the post-inspection variance, the company itself proposed adding a limit switch to the excavator. Ex. 2 at 2; *see also* Ex. 1 at 2. When tripped, the switch would “stop the excavator boom cylinders from extending any further.” Ex. 1 at 2. Coluccio’s request to employ a limit switch on its excavator provides additional substantial evidence that it was feasible to use this particular safety measure before beginning work.

Coluccio appears to suggest that the citation is not valid because it was not operating directly beneath the lines. *See* App. Br. 1. It states that a limit switch would have been “meaningless” because the boom never operated beneath the lines. App. Br. 12. But Coluccio itself proposed a

limit switch in its variance application as a way to protect its workers. Ex. 2 at 2; *see also* Ex. 1 at 2. Additionally, there was testimony that a limit switch could restrict not only the boom's height, but also its swing. *See* BR Evans 74-75. Although there was not specific testimony on this point, restricting a boom's swing would presumably protect against the boom from contacting energized wires from another angle rather than from directly underneath. Here, the excavator operator stated that he had to turn the excavator from time to time so that the boom and the bucket would leave the center line. BR Mitchell 122. Mr. Brown testified that when the cab of the excavator rotated, the rotation would bring the boom and the bucket to the side of the excavator. BR Brown 99-100.

In any event, Coluccio attempts to escape application of WAC 296-155-428(20)(a) by focusing on whether the excavator was operating directly beneath the energized lines. *See* App. Br. 1, 8. But just as the 10-foot standard applies even if a worker is not working directly beneath the lines (e.g. if the worker is working to the side of the lines), the feasible alternatives operate to protect a worker even if that worker is not directly beneath the lines.

The Department has issued a regulation about energized overhead lines and made the judgment that employers must protect their employees from the hazard of electrocution by ensuring that all vehicles and

mechanical equipment are kept 10 feet away from the energized lines. *See* WAC 296-155-428(20)(a). This safety concern remains paramount when determining what alternative method of protection to use. *See* RCW 49.17.010. There was testimony that use of a limit switch limits the excavator's operation to pre-established parameters, allowing for control of the boom's height and swing. *See* BR Evans 74-75; *see also* Paddock 25. Substantial evidence shows that it was an alternative method of protection that Coluccio did not use.

In addition to safety measures to restrict the boom's movement, Coluccio's variance application identified several other measures to protect its workers on the jobsite, all of which were feasible for Coluccio to implement before beginning work. Ex. 2 at 2. These safety measures included a refresher course for workers on working near high voltage, daily pre-job meetings, and assigning a foreman, other than the foreman who was directing the work, to act solely as a spotter on the worksite. Ex. 2 at 2.

Despite some conflicting testimony about the use of a spotter at the worksite before the safety inspection, substantial evidence supports a finding that Coluccio was not using a spotter at the time of the safety violation. Mr. Paddock did not observe a spotter during his safety inspection. BR Paddock 65. He recalled speaking to someone, who he

believed to be Mr. Brown, about the use of a spotter, and that nobody identified a spotter to him. BR Paddock 27. Finally, Mr. Brown, who had testified that he served as a spotter “most of the time,” acknowledged that he was not acting as a spotter on February 11, 2011, when the trench box was being dragged. *See* BR Brown 93, 104.

Besides the feasible safety measures that Coluccio proposed in its variance application, substantial evidence supports that Coluccio could have feasibly used the other safety measures listed in the interim order to protect its workers from the hazard of electrocution. *See* Ex. 1. These included the use of the strobe light and the painting of a line on the ground as a visual reminder of the necessary clearance. Ex. 1 at 2.

In sum, substantial evidence demonstrates that there were several feasible alternative means of protection that Coluccio failed to use to protect its workers from the hazard of electrocution. These included a device to limit the boom’s motion, a dedicated spotter, visual cues such as a strobe light and painted line, and training its employees through daily safety meetings. The failure to use any one of these methods—all of which Coluccio agreed to use after it was cited—provides substantial evidence that there were feasible methods of protection that Coluccio did not use before beginning work. The Board properly rejected its defense.

**E. Coluccio's Argument That A Limit Switch Is Not A Feasible Alternative Safety Measure Because There Is No Specific Regulation Requiring Limit Switches Is Without Merit**

Coluccio relies on *A.J. McNulty & Co.*, 19 BNA OSHC 112, 2000 WL 1490235 (No. 94-1758, 2000), and *Spancrete Northeast, Inc. v. Occupational Safety & Health Review Commission*, 905 F.2d 589 (2d Cir. 1990), to argue that the Department “as a matter of law, cannot demonstrate that a failure to use a limit switch is sufficient to defeat the defense of infeasibility.” App. Br. at 11-12. Coluccio essentially asserts that there must be a specific WAC standard requiring a limit switch in order for a limit switch to be considered a feasible alternative method. *See* App. Br. at 11-12. These arguments have no merit.

First, it would make no sense to limit feasible alternative methods of protection to requirements found in the WISHA regulations. When an employer asserts an infeasibility defense, the employer is saying that it cannot follow the regulation at issue. To meet its burden on an infeasibility defense, the employer must show that alternative means of protection were followed or were not available. *See In re Longview Fibre Co.*, 2000 WL 33217383 at \*4. Logically, many alternative means of protection would not appear in the regulations because the regulations contemplate that the employer will, as the law requires, follow the cited regulation. *See* RCW 49.17.060(2). Certainly, Washington case law does

not require that only alternative means found in the WACs be used. *See In re Longview Fibre Co.*, 2000 WL 33217383 at \*4.

Second, as discussed above, Coluccio's failure to use a limit switch is not the sole basis for the Board's rejection of its affirmative defense of infeasibility. Coluccio also failed to prove that it asked Metro to de-energize the lines, failed to seek a variance, and failed to use several other feasible safety measures to protect its workers against the hazards of electrocution, including a nylon sling, a dedicated spotter, a strobe light, and a painted line.

Third, in any event, *Spancrete* and *A.J. McNulty* are narrow federal decisions that pertain to the enforcement of a specific federal regulation, 29 C.F.R. § 1926.28(a). *See Spancrete*, 905 F.2d at 593-94; *A.J. McNulty*, 2000 WL 1490235 at \*12. In those cases, the courts held, under the specific facts of those cases, that because of 29 C.F.R. § 1926.28(a)'s "lack of specificity and generality of its language," the Secretary of Labor had the burden to prove that specific personal protective equipment was appropriate. *See Spancrete*, 905 F.2d at 593-94; *A.J. McNulty*, 2000 WL 1490235 at \*12; *see also* Mark A. Rothstein, *Occupational Safety and Health Law* § 5:4 (2013) (discussing general standards about personal protective equipment). These cases are inapplicable to a specific regulation such as WAC 296-155-428(20)(a).

Rather, this is a case like *Harry C. Crooker & Sons* in which an employer asserts that the working conditions “left it no practical choice but to operate within the ten-foot radius surrounding the energized wires.” 537 F.3d at 83. But, like in the employer in that case, Coluccio did have a choice. Coluccio could have attempted to work with Metro to de-energize the lines. It could have sought a variance before beginning the work instead of waiting until a Department inspector came across its worksite. Moreover, as the First Circuit explained, an employer asserting a defense of infeasibility must seek out “other means of protecting its workforce from the targeted hazard (here, electrocution)” or demonstrate, in the alternative, “that no such alternatives were feasible.” *Harry C. Crooker & Sons*, 537 F.3d at 84. Coluccio had other means to protect its workers from the hazard and it chose not to use them. For these reasons, the Board correctly rejected its affirmative defense.

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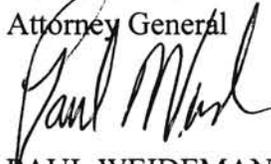
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**VI. CONCLUSION**

For the foregoing reasons, the Department asks this Court affirm the superior court judgment.

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of September, 2013.

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NO. 70334-0-I

**COURT OF APPEALS FOR DIVISION I  
THE STATE OF WASHINGTON**

FRANK COLUCCIO  
CONSTRUCTION CO.,

Appellant,

v.

DEPARTMENT OF LABOR AND  
INDUSTRIES OF THE STATE OF  
WASHINGTON

Respondent.

CERTIFICATE OF  
SERVICE

DATED at Seattle, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Department's Brief of Respondent and Certificate of Service to counsel for all parties by depositing a postage prepaid envelope in the U.S. mail addressed as follows:

Original & copy to:

Richard D. Johnson  
Court Administrator/Clerk  
Court of Appeals, Division I  
One Union Square  
600 University Street  
Seattle WA 98101-1176

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CLERK OF COURT

Copy to:

Aaron Owada, Attorney  
Jennifer Truong, Attorney  
AMS Law P.C.  
975 Carpenter Road N.E, Suite 201  
Lacey, WA 98516

DATED this 27<sup>th</sup> day of September, 2013.

  
\_\_\_\_\_  
ERLYN R. GAMAD  
Legal Assistant