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SUPREME COURT
STATE OF WASHINGTON
1/13/2023 9:45 AM
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NO. 101465-1

SUPREME COURT OF THE STATE OF WASHINGTON

INFRA SOURCE SERVICES LLC,

Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

**DEPARTMENT OF LABOR AND INDUSTRIES
ANSWER TO PETITION FOR REVIEW**

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TABLE OF CONTENTS

I. INTRODUCTION1

II. ISSUE.....2

III. STATEMENT OF THE CASE2

 A. An Inspector and Infrasource’s Foreperson
 Testified that the Trench Was over Four Feet
 Deep, with the Worker in the Trench Agreeing It
 Was “Too Deep”2

 B. The Board and Court of Appeals Affirmed that
 the Unprotected Trench Was over Four Feet
 Deep9

IV. REASONS WHY REVIEW SHOULD BE DENIED.....12

 A. Appellate Courts Routinely and Correctly Apply
 the Substantial Evidence Standard of Review, so
 “Clarifying” the Standard Is Not an Issue of
 Substantial Public Interest.....13

 B. Three Witnesses’ Testimony Provided
 Substantial Evidence the Trench Was More than
 Four Feet Deep14

V. CONCLUSION.....18

TABLE OF AUTHORITIES

Cases

<i>Campbell v. Dep’t of Soc. & Health Servs.</i> , 150 Wn.2d 881, 83 P.3d 999 (2004)	10
<i>Cent. Steel, Inc. v. Dep’t of Lab. & Indus.</i> , 20 Wn. App. 2d 11, 498 P.3d 990 (2021), <i>review denied</i> , 199 Wn.2d 1020 (2022)	13
<i>Frank Coluccio Constr. Co. v. Dep’t of Lab. & Indus.</i> , 181 Wn. App. 25, 329 P.3d 91 (2014)	10
<i>Infrasource Servs., LLC v. Dep’t of Lab. & Indus.</i> , No. 83515-7-I, 2022 WL 9744037 (Wash. Ct. App. Oct. 17, 2022)	10, 11, 13
<i>Mid Mountain Contractors, Inc. v. Dep’t of Lab. & Indus.</i> , 136 Wn. App. 1, 146 P.3d 1212 (2006)	17
<i>Potelco, Inc. v. Dep’t of Lab. & Indus.</i> , 194 Wn. App. 428, 377 P.3d 251, <i>review denied</i> , 186 Wn.2d 1024 (2016)	13
<i>Providence Hosp. of Everett v. Dep’t of Soc. & Health Servs.</i> , 112 Wn.2d 323, 770 P.2d 1040 (1989)	12
<i>Univ. of Wash. Med. Ctr. v. Dep’t of Health</i> , 164 Wn.2d 95, 187 P.3d 243 (2008)	12

Regulations

WAC 296-155-650(2).....	2, 3
-------------------------	------

WAC 296-155-655(11)(b)3, 14, 16
WAC 296-155-657(1)(a).....2, 14, 16

Rules

RAP 13.418
RAP 13.4(b)(4)12, 14
RAP 18.1718

I. INTRODUCTION

This run-of-the-mill substantial evidence case offers no reason for review. The dispositive factual issue in this worker safety case was whether an unprotected trench at a worksite was over four feet deep. Three witnesses' testimony supported that it was, including the testimony of a safety inspector who measured the trench's depth. The Court of Appeals determined this was substantial evidence of the trench's depth. This fact-specific case about a trench's depth will affect no other case.

Infrasource LLC seeks review only to "clarify what evidence is required in order to be considered 'substantial' evidence." Pet. 12. No clarity is lacking. Day in and out, Washington's appellate courts apply the substantial evidence standard of review, without trouble or confusion. Here, the Court of Appeals correctly applied the standard by rejecting Infrasource's requests to reweigh evidence. It is Infrasource, not Washington's courts, that lacks clarity about the substantial evidence standard. The Court should deny review.

II. ISSUE

An employer must protect against the hazard of cave-ins in trenches that are over four feet deep. A safety inspector measured the trench to be about five feet deep, Infrasource's foreperson testified that the trench was more than four feet deep, and the worker in the trench testified it was "too deep." Did these three witnesses' testimony amount to substantial evidence that the trench was over four feet deep?

III. STATEMENT OF THE CASE

A. An Inspector and Infrasource's Foreperson Testified that the Trench Was over Four Feet Deep, with the Worker in the Trench Agreeing It Was "Too Deep"

Under the Washington Industrial Safety and Health Act (WISHA), employers must protect employees in excavations, such as trenches, from cave-ins. WAC 296-155-657(1)(a). To do so, employers must use an adequate protective system, unless the excavations are less than four feet deep. *Id.*; *see also* WAC 296-155-650(2) (defining "protective system").

Under WISHA, employers must also ensure that a competent person who can identify excavation hazards removes exposed employees from hazardous excavations until precautions are taken to ensure their safety. WAC 296-155-655(11)(b); *see also* WAC 296-155-650(2) (defining “competent person”). If a trench over four feet deep is not adequately protected, the trench can cave in and asphyxiate a worker. CP 417.

Infrasource is a company that installs gas piping. CP 375–76, 470. On June 6, 2019, a safety inspector was driving by a new housing development where Infrasource employees were installing gas piping when he “saw a head pop out of a hole.” CP 348, 352. The inspector stopped to investigate and took photographs of the Infrasource employee, Benjamin Grubenhoff, as he was standing in the trench. CP 354–56, 505, 553, 677 (Ex 1), 691 (Ex 15). The trench where Grubenhoff was standing had no protective system to prevent cave-ins. CP 356.

Using a tape measure, the inspector measured the trench's depth at the location he saw Grubenhoff standing, and he took photographs of his measurements, which appear at Exhibits 7, 20, and 21. CP 373, 444–45, 458–59, 683 (Ex 7), 696 (Ex 20), 697 (Ex 21).

The inspector testified that his photographs showed the trench at the location where he saw Grubenhoff standing to be “[a]bout 60 inches in depth.” CP 373. He also said he had an independent recollection that the trench at that location was “slightly deeper than 5 [feet].” CP 373. On cross-examination, he reiterated that the tape measure in his photographs showed the trench was “approximately 5 feet in depth” and “clearly above 4 feet.” CP 444–45. On redirect, he again explained how his photographs showed that the trench was more than four feet deep where Grubenhoff was standing:

Q: [W]hat did you do while you were taking [Exhibit 7]? Just walk us through how this happened.

A: Well, I took measurement as best I can without placing myself in any hazard, as we're trained. I placed the tape measure where the exposed worker was^[1] and I measured from the base of that trench to the edge of the trench. . . . So if you were to— on the very top of the edge, if you were to run a direct line to the tape measure, it would indicate roughly 60 inches, plus or minus 1 or 2 inches.

Q: And is that based on your viewing this photo, your memory, or a combination of those two things?

A: Both of those things.

CP 458–49.

The inspector and the foreman, Peter DeGraaf, testified that Grubenhoff was in the trench when the inspector saw him because DeGraaf had told him to enter the trench. CP 367, 504–05, 509. DeGraaf ordered him to enter the trench to ensure that a guide wire attached to a gas pipe did not snag or bunch up as the pipe was pushed through a conduit that ran beneath an

¹ The “exposed worker” refers to Grubenhoff. *See* CP 415-16.

asphalt driveway. CP 367, 508-09. Grubenhoff also testified he jumped in the trench to support the gas pipe with sandbags and to clear away rocks and other debris. CP 554. He said he had been in the trench for about five minutes when the inspector saw him. CP 367.

When Grubenhoff viewed the inspector's photograph of him standing in the trench (which is Exhibit 1), he testified that the photograph showed "[t]he spot that the ditch is too deep." CP 553, 667 (Ex 1). He testified that he understood an "unsafe" jobsite to mean one where a trench is more than four feet deep. CP 560.

DeGraaf also testified about the trench's depth in the area where Grubenhoff had been standing. Specifically, he testified about Exhibit 13, a photograph that the inspector took after he returned to the worksite sometime between June 7 and June 10. CP 391, 529, 544-45. The photograph shows protective shoring that Infrasource had installed after the inspection, with shoring jacks holding the shoring against the trench walls. CP 380, 382,

544-45, 689 (Ex 13). The inspector testified that Exhibit 13 was a photograph of “the site where the exposed worker was,” referring to Grubenhoff. CP 385; *see* CP 415, 416. DeGraaf confirmed this, testifying that Exhibit 13 was “the same location where Mr. Grubenhoff was in the trench,” as visible in Exhibit 1. CP 529.

DeGraaf testified that, after the inspector had left the worksite on June 6, he and Infrasource’s field safety manager, Jeremy Orphus, had measured the depth of the portion of the trench that was visible in Exhibit 13. CP 527. DeGraaf testified that the part of the trench visible in Exhibit 13 was more than four feet deep:

Q: Mr. De Graaf, would you agree with me that one of the measurements you took of this trench with Mr. Ophus indicated that the trench was over 4 feet in depth?

A. Yes.

...

Q. Did you previously testify in this case that on the left side of the shoring jack the trench

was not over 4 feet in depth when you and Mr. Ophus measured it, on the right side of the shoring jack it was over 4 feet in depth?

A. Yes, ma'am.

CP 531–32. DeGraaf agreed the trench was more than 4 feet deep where the sidewalk and black asphalt road made a right angle. CP 531. This was the location where the inspector saw Grubenhoff standing in the trench. *See* CP 555–56, 677 (Ex 1).

On June 6, besides measuring the trench's depth at the location where Grubenhoff was standing, the inspector also measured the depth of the trench on the other side of a driveway from where Grubenhoff was standing in the trench. CP 357–58, 369–70; 514–16, 555, 678–80 (Exs 2–4), 693–95 (Exs 17–19).¶¶ The inspector's measurements, which he photographed, showed the trench was also over four feet deep on the other side of the driveway. CP 678 (Ex 2), 693 (Ex 17), 695 (Ex 19).

The inspector did not see Infrasource workers in that part of the trench on June 6. CP 442. But he understood that the crew was fitting pipes “all along that street,” and Grubenhoff

told him that “they fit the pipe outside of the trench and then they flop it into the trench, and then he goes in to make sure that the pipe is not banging against the wall and he centered it in person.” CP 442. The inspector’s photographs show that portion of the trench contained an unfused gas pipe and pipes placed on sandbags. CP 368–70, 680 (Exs 2–4).

None of the Infrasource crewmembers on site on June 6 had been trained as competent persons to identify excavation hazards. CP 521, 523–26, 557–58. DeGraaf had never previously measured the trench depth at any jobsite, did not do so at this jobsite before beginning work, and did not identify the potential for cave-ins as a hazard at the worksite. CP 524–25.

B. The Board and Court of Appeals Affirmed that the Unprotected Trench Was over Four Feet Deep

L&I cited Infrasource for serious repeat violations of WISHA for failing to protect the trench against cave-ins and for failing to have a competent person at the worksite to protect workers against cave-in hazards. CP 401–02. Infrasource

appealed to the Board of Industrial Insurance Appeals. CP 321–22.

The Board affirmed the citation, finding that the unprotected trench was over four feet and there was no competent person on site. CP 110 (FF 5, 7, 9). The superior court reversed.² CP 882–83.

L&I appealed to the Court of Appeals, which reinstated the Board’s decision. *Infrasource Servs., LLC v. Dep’t of Lab. & Indus.*, No. 83515-7-I, 2022 WL 9744037, at *1 (Wash. Ct. App. Oct. 17, 2022). The Court of Appeals affirmed that substantial evidence supported the Board’s finding that the

² *Infrasource* cites the superior court’s decision (Pet. 12), but in WISHA appeals the superior court’s findings are irrelevant because appellate courts review the Board’s decision directly based on the record before the agency. *Frank Coluccio Constr. Co. v. Dep’t of Lab. & Indus.*, 181 Wn. App. 25, 35, 329 P.3d 91 (2014); *see also Campbell v. Dep’t of Soc. & Health Servs.*, 150 Wn.2d 881, 898–99, 83 P.3d 999 (2004) (in review of administrative decisions, findings of superior court are not reviewed). The Board’s findings in WISHA cases are conclusive if substantial evidence supports them. *Frank Coluccio*, 181 Wn. App. at 35.

trench was over four feet deep. 2022 WL 9744037, at *3–4. The Court of Appeals observed that the inspector’s photographs, the inspector’s testimony about trench depth, and testimony from Grubenhoff and DeGraaf that “also indicated that the trench was four feet or greater in depth” all provided substantial evidence supporting the Board’s finding that the trench was over four feet deep. *Id.* at *3.

In concluding that substantial evidence supported the Board’s finding on trench depth, the Court of Appeals rejected Infrasource’s arguments that the inspector’s photographs and portions of the testimony were “unconvincing,” “unreliable,” “contradicted by other evidence,” and “not persuasive.” 2022 WL 9744037, at *4. The Court of Appeals observed that, in making such arguments, “Essentially, InfraSource asks us to reconsider the weight of the evidence presented to the Board,” which was inappropriate on substantial evidence review. *Id.*

IV. REASONS WHY REVIEW SHOULD BE DENIED

Infrasource shows no reason for review. It asserts its case presents a matter of substantial public interest under RAP 13.4(b)(4) because it offers the Court an opportunity to “clarify” the substantial evidence standard of review. Pet. 12. No clarification is needed, as Washington’s appellate courts capably apply this standard hundreds of times a year.

This case is a routine example of an appellate court correctly applying that standard. Faced with Infrasource’s arguments that certain evidence before the factfinder about the trench’s depth was “unconvincing,” “unreliable,” “contradicted by other evidence,” and “not persuasive,” the Court of Appeals correctly rejected these arguments because appellate courts do not reweigh facts on substantial evidence review, as this Court has repeatedly stated. *See, e.g., Univ. of Wash. Med. Ctr. v. Dep’t of Health*, 164 Wn.2d 95, 103, 187 P.3d 243 (2008) (citing *Providence Hosp. of Everett v. Dep’t of Soc. & Health Servs.*, 112 Wn.2d 323, 360, 770 P.2d 1040 (1989)); *Infrasource Servs.*,

2022 WL 9744037, at *2, 4. Infrasource’s petition is yet another attempt to reweigh evidence in its fact-specific case. If offers no reason for this Court’s review.

A. Appellate Courts Routinely and Correctly Apply the Substantial Evidence Standard of Review, so “Clarifying” the Standard Is Not an Issue of Substantial Public Interest

Besides the decision in this case, Infrasource cites no other case from this Court or the Court of Appeals where it alleges the substantial evidence standard of review has been applied incorrectly. *See* Pet. 12. To the contrary, Washington’s appellate courts routinely apply this standard correctly, including in worker safety cases. *See, e.g., Cent. Steel, Inc. v. Dep’t of Lab. & Indus.*, 20 Wn. App. 2d 11, 21–25, 498 P.3d 990 (2021), *review denied*, 199 Wn.2d 1020 (2022); *Potelco, Inc. v. Dep’t of Lab. & Indus.*, 194 Wn. App. 428, 436–39, 377 P.3d 251, *review denied*, 186 Wn.2d 1024 (2016).

So Infrasource shows no reason for the Court to accept review to “clarify what evidence is required in order to be considered ‘substantial’ evidence.” Pet. 12. Though Infrasource

believes that its evidence about trench depth was more persuasive than L&I's (*see* Pet. 12), that both misapplies the substantial evidence standard of review and underscores the fact that its plea to this Court is really limited to the facts of its own case. Pet. 12. This case is a fact-specific application of the substantial evidence standard that presents no reason for review under RAP 13.4(b)(4).

B. Three Witnesses' Testimony Provided Substantial Evidence the Trench Was More than Four Feet Deep

In any case, the Court of Appeals correctly applied the substantial evidence standard of review here. The dispositive factual issue before the Board was whether the trench where Infrasource's employee was working was over four feet deep. If so, Infrasource had the duty to protect the trench against cave-ins, and it needed to ensure that a competent person was on site to identify excavation hazards and remove exposed employees from the hazard. *See* WAC 296-155-657(1)(a) and 296-155-655(11)(b).

As the Court of Appeals explained, the testimony of three witnesses provided substantial evidence that the trench's depth where the inspector saw Grubenhoff standing was over four feet deep. First, the inspector testified that he measured the trench's depth where he saw Grubenhoff standing and that both his photographs and his independent recollection showed the trench to be about five feet in depth.^{3, 4} CP 373, 444–45, 458–59, 683 (Ex 7), 696 (Ex 20), 697 (Ex 21). Second, Grubenhoff himself testified that the trench was “too deep” where he was standing,

³ Infrasource's suggestion that the inspector's photographs are “essentially useless . . .” is an argument that the factfinder should give them little weight. *See* Pet. 6. That is an improper argument on substantial evidence review. And it ignores the inspector's explicit testimony about how his photographs show the trench was over four feet deep, which the factfinder was entitled to rely on. CP 459.

⁴ Infrasource wrongly claims that the inspector did not measure the trench's depth where Grubenhoff was standing. *See* Pet. 6. The inspector explicitly testified that he measured the trench's depth where the “exposed worker was,” finding a depth of “roughly 60 inches.” CP 459. The inspector testified that Grubenhoff was the exposed worker. CP 415-16. Infrasource ignores this testimony.

admitting during his testimony that an unsafe worksite was one where trenches deeper than four feet were unprotected. CP 553, 560. Third, the foreman, DeGraaf, agreed that the area of the trench where Grubenhoff had been standing was more than four feet deep. CP 533; *see also* CP 555–56, 677 (Ex 1).

The testimony of these three witnesses supported the Board’s finding that the trench was over four feet deep. This, in turn, supported the Board’s conclusions that Infrasource committed repeat serious violations of WAC 296-155-657(1)(a) and 296-155-655(11)(b). Infrasource is therefore wrong that L&I “failed its burden to show that the ditch at issue was greater than four feet in depth.” Pet. 1. The testimony of three witnesses supported that Infrasource violated the trench safety rules.

Though Infrasource minimizes the extent of its work on the project, stating that it “was installing gas pipe by *dropping* fused pipe into a ditch” (Pet. 1) (emphasis added), its own employees testified that they had to work in the trench.

Grubenhoff testified that he centered the gas pipes on sandbags and cleared away debris in the trench, which is consistent with photographs showing pipes centered on sandbags. *See* CP 554; 678-80 (Exs 2-4).⁵ DeGraaf admitted that some gas pipe on the east side of the driveway had to be fused inside of the trench with a smaller machine, which is consistent with Exhibit 4, which shows an unfused pipe in the trench. CP 507, 517, 521, 554, 680 (Ex 4).

When viewed in the light most favorable to L&I, this evidence is enough to support that Infrasource employees were also working in the ditch on the east side of the driveway as well (and not just where Grubenhoff was standing), where even Infrasource did not dispute the trench was over four feet deep. *Contra* Pet. 3-4. This is additional substantial evidence of a violation. *See Mid Mountain Contractors, Inc. v. Dep't of Labor & Indus.*, 136 Wn. App. 1, 5, 146 P.3d 1212 (2006) (an

employee is exposed to a safety hazard if there is a “reasonable predictability that, in the course of [the workers’] duties, employees will be, are, or have been in the zone of danger.”)

Finally, throughout its petition, Infrasource’s raises arguments to undermine the evidence that the Board relied on in finding the trench was over four feet deep. The Court need not consider such arguments, as these are arguments to persuade a factfinder; they are not a basis for accepting review under RAP 13.4. Even so, all of these arguments are wrong.

V. CONCLUSION

This Court should deny review.

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RESPECTFULLY SUBMITTED this 13th day of January,
2023.

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DEPARTMENT OF LABOR AND
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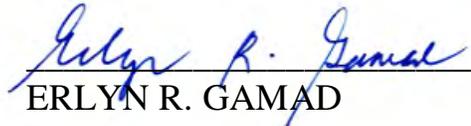
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DATED this 13th day of January, 2023.



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