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No. 78172-3-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

METIER CONSTRUCTION, INC.

Petitioner/Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Appellee.

PETITION FOR REVIEW

SEBRIS BUSTO JAMES

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I. IDENTITY OF PETITIONER

Petitioner Metier Construction, Inc. (“Petitioner”) asks this Court to accept review of the Court of Appeals Decision, in which Metier Construction was the Appellant, designated in Part II of this petition pursuant to Washington Court Rules of Appellate Procedure 13.4.

II. COURT OF APPEALS DECISION

Petitioner Metier Construction seeks review of the opinion of the Court of Appeals entered on April 15, 2019 (“the Opinion” or “Op.”). A copy of the Opinion is in the Appendix, attached at pages A-1 through A-12.¹

III. ISSUES PRESENTED FOR REVIEW

Issue No. 1: Is an issue of substantial public interest presented when the Court of Appeals interprets and applies WAC 296-155-265(4)(a) in a manner inconsistent with the remainder of the at-issue chapter?

Issue No. 2: Is a significant question of law under the Federal Constitution presented when the Court of Appeals interprets and applies a vague WAC in violation of the Due Process Clause of the Fourteenth Amendment?

¹ The Court of Appeals’ denial of Metier Construction’s Motion for Reconsideration is attached as A-13-14.

IV. STATEMENT OF THE CASE

1. Factual Background.

Metier Construction was a subcontractor installing drywall on a project at 301 East Pine in Seattle, WA. CP 39. On December 15, 2015, the Department of Labor and Industries (“Department”) issued Metier Construction a Citation and Notice of Assessment for violation of WAC 296-155-265(4)(a).² CP 4. WAC 296-155-265(4)(a) requires that materials stored indoors “shall not obstruct, or adversely affect, means of exit.” CP 39. The regulation does not require employers to ensure that a means of exit is a particular width. CP 42. However, WAC 296-155-265(g) sets a minimum clearance of 24 inches around *fire* doors – not just walkways. CP 42.

The Department’s investigator calculated that drywall stored by Metier at the worksite, in a work area away from a fire door exit, provided for a walkway of 23 ³/₄ inches wide. CP 40. This also resulted in a three to four-foot opening for employee to access the area under construction. CP 40. Metier employees testified that workers had no difficulty moving through the area where the drywall was stored and thus there was no obstruction or adverse effect on the means of exit. CP 43.

² WAC 296-155-265 is attached as A-15-16.

2. Procedural Background.

On December 15, 2015, the Department issued Metier Construction a Citation and Notice of Assessment. CP 4. Metier Construction filed a Notice of Appeal with the Department on December 23, 2015. CP 57. On February 4, 2016, the Department issued Corrective Notice of Redetermination No. 317938044. CP 4. Metier Construction filed an appeal with the Board of Industrial Insurance Appeals (“BIIA”) on February 8, 2016. CP 4. A hearing was held beginning October 17, 2016. CP 85. At the hearing, Metier presented the expert testimony of Kurt Stranne who testified that, while the regulation at issue did not set a minimum clearance width for actionable “obstruction” of worker egress, WAC 296-155-265(g) did set a minimum clearance for fire doors for construction workers as 24 inches. CP 42.³ Department representatives at the hearing testified that the clearance at issue was 23 ¾ inches. CP 42.

On January 19, 2017, after hearing and post-hearing briefing, the Industrial Appeals Judge issued a Proposed Decision and Order. CP 9. The Proposed Decision and Order found that the drywall that Metier stored in the hallway of the unit resulted in worker clearance at the location of the storage of 23 ¾ inches. Despite this finding, the Judge

³ The citation at issue initially referenced an alleged state-mandated clearance of 28 inches which, at hearing, the Department admitted did not exist. CP 39, 42.

determined that the storage adversely affected the means of exit from the unit. CP 44.

On March 7, 2017, Metier Construction filed a Petition for Review of the Proposed Decision and Order. CP 11. The Petition for Review was granted on March 21, 2017. CP 9. In its briefing before the Board, Metier pointed to the record evidence that the drywall storage resulted in a clearance of 23 $\frac{3}{4}$ inches for workers in one location at the jobsite and that the regulation governing fire doors called for a clearance of 24 inches. CP 137. On June 23, 2017, the Board issued its Decision and Order affirming the Corrective Notice of Redetermination dated February 4, 2016 and found that the drywall that Metier Construction stored in the hallway where work was being performed adversely affected the only means of ingress and egress into a particular unit that was being worked on. CP 4. Board Member Jack S. Eng dissented based on the absence of any evidence of actual blockage or adverse effect. CP 5-6.

On July 24, 2017, Metier Construction appealed to the Superior Court of Washington for King County. The Superior Court affirmed the BIIA's Decision and Order. The Court admitted there was no record evidence of actual obstruction or negative impact on worker egress resulting from the 23 $\frac{3}{4}$ inch wide passageway, but determined that the mere narrowing of the width of a passageway is, in and of itself, sufficient

to demonstrate unlawful “obstruction” or “adverse impact.”⁴ However, the Court refused to determine, and did not even address, whether the state-established 24-inch clearance requirement for fire doors established a state-mandated lawful width constituting neither unlawful “obstruction” nor “adverse effect” under the citation at issue.

On May 25, 2018, Metier Construction appealed to the Court of Appeals, Division I. The Court of Appeals, on April 15, 2019, in an unpublished opinion, created a definition for WAC 296-155-265(4)(a) since the WAC itself does not define the terms “obstruction” or “adversely affect.” The definition simply calls for any narrowing of a work space and affirmed the Department’s citation stating that Metier Construction’s “stack of drywall in the hallway violated WAC 296-155-265(4)(a).”

On May 3, 2019, Metier Construction filed a Motion for Reconsideration of the April 15, 2019 Court of Appeals Decision. Metier’s motion was based on the Court’s failure to adopt or even address the “24-inch” clearance requirement of the WACs at issue. On May 21, 2019, the Court of Appeals denied Metier’s Motion for Reconsideration.

⁴ “Here, placing the stack of drywall in the hallway violated WAC 296-155-265(4)(a).” April 15, 2019 Decision, P. 11.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Supreme Court may grant review and consider a Court of Appeals opinion if it “involves an issue of substantial public interest that should be determined by the Supreme Court” or “if a significant question of law under the Constitution of the State of Washington or of the United States is involved.” RAP 13.4. This case presents a prime example of an issue of substantial public interest and a significant question of law under the Fourteenth Amendment of the U.S. Constitution.⁵

1. The Court of Appeals’ Interpretation and Application of WAC 296-155-265(4)(a) in a Manner Inconsistent with the Remainder of the At-Issue Chapter Presents an Issue of Substantial Public Interest.

WAC 296-155-265(4)(a) provides that “Storage must not obstruct, or adversely affect, means of exit.” As conceded by the Court of Appeals, WAC 296-155-265(4)(a) does not define the terms “obstruction” or “adversely affect.” The only requirement provided for in WAC 296-155-265 is a 24-inch minimum clearance for pathways of fire doors. WAC 296-155-265(4)(g). Metier Construction raised this defense throughout its appeal. However, the courts overlooked this key defense – that if a 24-

⁵ The Fourteenth Amendment of the U.S. Constitution is attached as A-17.

inch clearance in the pathway of a fire door is sufficient, then a 24-inch clearance of a non-fire door pathway is surely sufficient.

Instead, the Court of Appeals applied an arbitrary standard which “requires employers to store materials in a manner that neither completely blocks a means of exit nor negatively impacts a means of exit even where the means of exit is passable.” April 15, 2019 Decision, P. 11. Every contractor regulated by the Department of Labor and Industries who is required to comply with WAC 296-155-265(4)(a) will be held to this arbitrary standard. Thus, every citation issued by the Department pursuant to WAC 296-155-265(4)(a) will necessarily be litigated, at least at the administrative level, to determine whether the storage of materials “negatively impacted” a means of exit. Thus, there is a substantial public interest in Washington courts’ adoption of this relevant, clear, and easy-to-follow and administer 24-inch clearance standard which already exists in WAC 296-155-265.

2. The Court of Appeals’ Interpretation and Application of WAC 296-155-265(4)(a) Presents a Significant Question of Law Under the Federal Constitution Because the Code is Void for Vagueness Under the Fourteenth Amendment.

A statute is void for vagueness under the Fourteenth Amendment if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. *Myrick v. Bd. Of Pierce County Comm’Rs*, 102 Wn.2d 698, 707-708, 677 P.2d 140 (1984) (holding that a provision in an ordinance is defective because it fails to give fair warning of what manner of conduct will run afoul of the law because the words “fully clothed” are insufficient to satisfy the due process clause) citing *Papachristou v. Jacksonville*, 405 U.S. 156, 92 S. Cit. 839 (1972).

Here, WAC 296-155-264(4)(a) is vague in its requirement of storage of materials so that they must not obstruct, or adversely affect, means of exit. The terms “obstruct” or “adversely affect” do not provide guidance or direction so as to provide fair warning of what manner of conduct will run afoul of the law. According to the Board below, any narrowing of a method of worker egress qualifies. If that were the case,

the statutes and regulations would forbid any storage of materials on a jobsite. This is not the case.

In fact, Metier Construction presented testimony by its employees on the jobsite that the materials they stored which led to the at-issue citation did not at all “obstruct” or “adversely affect” means of exit. CP 41. No contrary evidence was presented by the Department. Despite this testimony, the citation was affirmed and no guidance provided by the Board or the court as to the definition of “obstruct” or “adversely affect.” As in *Myrick*, the at-issue WAC is defective because it fails to give fair warning of what manner of conduct will run afoul of the law in violation of the Due Process Clause of the Fourteenth Amendment and thus should be reviewed.

VI. CONCLUSION

The Court should grant review of the April 15, 2019 Unpublished Decision affirming the Department’s citation pursuant to WAC 296-155-265(4)(a) because: (1) the Court of Appeals’ interpretation and application of WAC 296-155-265(4)(a) in a manner inconsistent with the remainder of the at-issue chapter presents issues of substantial public interest; and (2) the Court of Appeals’ interpretation and application of WAC 296-155-265(4)(a) presents a significant question of law under the Federal Constitution because the Code is void for vagueness under the Fourteenth

Amendment. Otherwise storage of any and all items on the jobsite. except laying them flat on the ground, would be expressly proscribed. For these reasons, this Court should grant review and reverse the Court of Appeal's April 15, 2019 affirmance of issuance of the citation and penalty at issue.

DATED this 19th day of June, 2019.

SEBRIS BUSTO JAMES

/s/ Judd H. Lees

Judd H. Lees, WSBA #10673

Mariya Khilyuk, WSBA #51182

Attorneys for METIER CONSTRUCTION

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I caused the foregoing Petitioner’s Petition for Review to be filed with the Supreme Court of the State of Washington, via electronic filing and served a copy of this document on all parties or their counsel of record on the date below as follows:

| | | |
|--|-------------------------------------|-----------------------|
| Attorney for Respondent: | <input type="checkbox"/> | By United States Mail |
| Michael E. Duggan, AAG | <input type="checkbox"/> | By Legal Messenger |
| Office of the Attorney General | <input type="checkbox"/> | By Facsimile |
| 800 5 th Ave #2000 | <input type="checkbox"/> | By E-Mail |
| Seattle, WA 98104-3188 | <input checked="" type="checkbox"/> | By E-Service |
| michael.duggan@atg.wa.gov | | |

DATED this 19th day of June, 2019, at Bellevue, Washington.

/s/ April L. Jendresen
April L. Jendresen, Legal Assistant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

METIER CONSTRUCTION, INC.,
Appellant,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

No. 78172-3-I

UNPUBLISHED OPINION

FILED: April 15, 2019

SCHINDLER, J. — Metier Construction Inc. stacked drywall sheets in a hallway of an apartment unit under construction. The drywall reduced the width of the only exit. The Department of Labor and Industries cited Metier for violation of the Washington Industrial Safety and Health Act of 1973, chapter 49.17 RCW. The Board of Industrial Insurance Appeals affirmed the citations and the superior court affirmed the decision of the board. We affirm.

FACTS

Metier Construction Inc. was the framing and drywall subcontractor at the construction site of an apartment building in Seattle. Metier instructed the drywall supplier to stack 14 “drywall sheets” in the hallway of an unfinished second-floor unit. One sheet of drywall was 12 feet long, 4 feet 6 inches wide, and 5/8 inches thick and

weighed approximately 106 pounds. The drywall sheets were stacked “on their edge” vertically against the wall in the hallway of the apartment. The hallway was the only means for workers to exit the apartment unit.

On September 24, 2015, the Department of Labor and Industries (Department) safety and health compliance officer Javier Sarmiento was at the construction site. Sarmiento learned an electrical subcontractor had been injured when the drywall stack fell over and broke his left leg. Sarmiento took measurements and photographs of the drywall and hallway, reviewed documents, and interviewed employees who worked for the general contractor CHINN Construction LLC, the subcontractor Metier, and the electrical subcontractor.

On December 15, 2015, the Department issued a citation and notice of assessment to Metier for two “serious” violations and one “general” violation:

Violation 1 Item 1 Violation Type: Serious
WAC 296-155-265(4)(a)

As a hazard creating contractor, the employer did not ensure that exit routes were not obstructed or adversely affected to provide a safe egress for all employees in the building and that a 28 inch width for egress was maintained. Metier construction had stacked and stored drywall in an exit route reducing the exit route width to approximately 18 inches. Exits should be clear and free of obstacles in case employees need to exit the building and give enough clearance to exit if needed during an emergency.

Aisle walkways with less than 28 inch width of clear space to fit through created a high hazard in an emergency, which could cause serious injuries and/or broken bones or permanent disability.

....

Violation 1 Item 2 Violation Type: Serious
WAC 296-155-325(1)(a)

As a hazard creating contractor, the employer did not ensure that storage of construction material shall not create a hazard. The drywall stack was standing on the edge and wasn't secure against falling or collapsing, as a result one employee was injured when the drywall stack collapsed onto his left leg. At least one employee was exposed to crushing hazards type injuries in the event of falling over, which could result in broken bones or permanent disability.

....

Violation 2 Item 1
WAC 296-155-110(9)(b)

Violation Type: General

The employer did not ensure that walk-around safety inspections were documented and available for inspection by personnel of the department. The weekly walk-around safety inspections were not documented at Metier's Construction worksite. No walk-around safety inspection documentation was provided by the employer.^[1]

Metier appealed the citation and notice of assessment to the Department. The Department issued a "Corrective Notice of Redetermination" (CNR) and affirmed the violations. Metier appealed the CNR to the Board of Industrial Insurance Appeals (Board). The Department amended the citation against Metier, reduced Violation 1 Item 1 from a "serious" to a "general" violation, and vacated Violation 1 Item 2.

A number of witnesses testified at the two-day hearing before an industrial appeals judge (IAJ), including Sarmiento, Metier foreperson Erick Dominguez, Metier metal framer Aron Diaz, and Metier workplace safety expert Kurt Stranne. Sarmiento testified the overall width of the hallway near the apartment unit doorway was 38 ½ inches and the angled stack of drywall reduced the width to 23 ¾ inches. Sarmiento testified he measured the hallway width to be 38 ½ inches, reduced the hallway width by subtracting the thickness of 14 sheets of drywall at 8 ¾ inches, and reduced the

¹ Because Metier does not appeal the Board decision regarding Violation 2 Item 1, we do not address the facts related to that violation.

hallway width by 6 more inches at the ground level to allow the drywall to rest at an angle to the wall, for a total hallway width of 23 $\frac{3}{4}$ inches. Sarmiento said the reference in the citation that states the stacked drywall reduced “the exit route width to approximately 18 inches” was error. Because construction workers typically wear tool belts carrying approximately 10 pounds of equipment, Sarmiento said it was inevitable a worker would “sooner or later” tip over the drywall stacked in the hallway.

Foreperson Dominguez did not dispute that he directed the supplier to stack the drywall sheets in the hallway near the exit. Dominguez testified he walked by the stack of drywall, both with and without a tool belt, and did not encounter any problems. Dominguez said he did not see anyone else having trouble walking by the stack of drywall. However, on cross-examination, Dominguez admitted that this was not the “first time the drywall got knocked over.” Dominguez testified that when electrical workers previously attempted to move the stack of drywall to “[w]ork behind it,” the drywall stack fell over.

Metal framer Diaz testified that he walked by the drywall stack “[m]any times” and never had any difficulty walking past the drywall. Both Dominguez and Diaz stated that although Metier had regular safety meetings with general contractor CHINN, no one ever raised a concern about how the drywall was being stored on the construction site.

Workplace safety expert Stranne agreed with the Department calculations that the angled stack of drywall reduced the width of the unit’s exit route to approximately 23 $\frac{3}{4}$ inches. However, based on the assumption that the apartment unit exit doorway is the same as a fire door, Stranne concluded the reduced width was close to the 24-inch clearance required for fire doors under WAC 296-155-265(4)(g).

The IAJ issued a proposed decision and order. The IAJ found the Department proved by a preponderance of the evidence that Metier violated WAC 296-155-265(4)(a). The IAJ noted WAC 296-155-265(4)(a) does not require exit routes to be a particular width but “requires only that stored materials not obstruct or adversely affect a means of exit.” Based on the evidence presented at the hearing, the IAJ found the “drywall that Metier stored in the hallway of the unit adversely affected the means of exit from the unit” and affirmed the decision of the Department.

Metier filed a petition for review of the proposed decision and order with the Board. Metier argued that the stack of drywall did not obstruct or adversely affect the means of exit, the measurements cited by the IAJ were erroneous, and there was no evidence presented to rebut the testimony of Metier employees.

The Board affirmed the decision of the Department. In the “Decision and Order,” the Board notes, “While we concede that there are no specific clearance widths specified in the code, our hearing judge’s point about construction workers with tool belts requiring additional space to safely pass by stacked drywall in a narrow hallway is well taken” and “one could reasonably conclude from the evidence that the stored drywall obstructed the only means of exit from the unit.” The Board entered the following pertinent findings of fact and conclusions of law:

FINDINGS OF FACT

3. . . . The 12-foot long sheets of drywall that Metier Construction, Inc., stored at an angle in the hallway leading to the only means of exit from the unit where Metier and others were working reduced the width of the hallway leading to the exit doorway.
4. The drywall that Metier Construction, Inc., stored in the hallway of the unit where work was being performed adversely affected the only means of ingress and egress into that particular unit.

....

CONCLUSIONS OF LAW

....

2. Metier Construction, Inc., committed a general violation of WAC 296-155-265(4)(a).

....

4. Corrective Notice of Redetermination No. 317938044 issued by the Department on February 4, 2016, is affirmed as modified.^[2]

Metier appealed the Decision and Order of the Board to King County Superior Court. The court affirmed the Decision and Order of the Board.

ANALYSIS

Metier contends substantial evidence does not support the Board's finding that the stack of drywall adversely affected the exit route of the apartment. Metier also argues the Board and superior court erred in failing to apply the 24-inch minimum clearance fire door requirement under WAC 296-155-265(4)(g) to determine whether the stack of drywall obstructed or adversely affected the exit route.

Standard of Review

The Washington Industrial Safety and Health Act of 1973 (WISHA), chapter 49.17 RCW, governs our review. The purpose of WISHA 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. We construe all regulations implemented under WISHA in light of the purpose of the statute. Mid Mountain Contractors, Inc. v. Dep't of Labor & Indus., 136 Wn. App. 1, 4, 146 P.3d 1212 (2006) (citing Adkins v. Alum. Co. of Am., 110 Wn.2d 128, 146, 750 P.2d 1257, 756

² One member of the Board disagreed that Metier violated WAC 296-155-265(4)(a) on the ground that the Department "failed to present any credible evidence to establish that the drywall in any way impeded the ingress and egress of any workers at this construction site."

P.2d 142 (1988)). WISHA gives the Department the authority to promulgate regulations governing workplace safety. RCW 49.17.050. The Department may issue citations and impose penalties when employers violate these regulations. RCW 49.17.120, .180.

In a WISHA appeal, the findings of fact of the Board are conclusive if substantial evidence supports the findings when viewed in light of the record as a whole. RCW 49.17.150(1); Express Constr. Co. v. Dep't of Labor & Indus., 151 Wn. App. 589, 595-96, 215 P.3d 951 (2009). We review the decision of the Board "directly, based on the record before the agency." Legacy Roofing, Inc. v. Dep't of Labor & Indus., 129 Wn. App. 356, 363, 119 P.3d 366 (2005). If substantial evidence supports the findings, we determine whether the findings support the conclusions of law. Mid Mountain, 136 Wn. App. at 4; see RCW 49.17.150(1).

Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise. Mowat Constr. Co. v. Dep't of Labor & Indus., 148 Wn. App. 920, 925, 201 P.3d 407 (2009). We view the evidence and 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). We do not reweigh or rebalance the evidence, nor do we apply anew the burden of persuasion. Rogers v. Dep't of Labor & Indus., 151 Wn. App. 174, 180-81, 210 P.3d 355 (2009). Credibility determinations are for the trier of fact and are not subject to appellate review. Yow v. Dep't of Health Unlicensed Practice Program, 147 Wn. App. 807, 819-20, 199 P.3d 417 (2008).

Substantial Evidence Supports the Finding of the Board

Metier contends substantial evidence does not support the Board finding that the stacked drywall adversely affected worker egress. Metier argues the evidence establishes that no worker, either with or without a tool belt, had any trouble walking through the hallway. Metier argues the Department failed to meet its burden of establishing that the drywall either obstructed or adversely affected a worker's means of exit. We disagree.

When alleging a violation of WISHA regulations against an employer, the Department has the burden of proving the existence of that violation. WAC 263-12-115(2)(b); J.E. Dunn Nw., Inc. v. Dep't of Labor & Indus., 139 Wn. App. 35, 44, 156 P.3d 250 (2007). A "general violation" is any violation of a safety or health standard promulgated under WISHA or of any Department regulation governing conditions of employment that is "determined not to be of a serious nature."³ RCW 49.17.180(3).

To establish a general violation of a WISHA safety regulation, the Department must prove by a preponderance of the evidence the following:

"(1) [T]he 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."

Wash. Cedar & Supply Co. v. Dep't of Labor & Indus., 119 Wn. App. 906, 914, 83 P.3d 1012 (2004) (quoting D.A. Collins Constr. Co. v. Sec'y of Labor, 117 F.3d 691, 694 (2d Cir. 1997)).

³ A "serious violation" is one that causes "a substantial probability that death or serious physical harm could result." RCW 49.17.180(6).

Metier does not dispute that WAC 296-155-265(4)(a) applied, that workers were exposed to the stacked drywall in the exit route, or that it knew or could have known about the location of the drywall sheets. Metier challenges only whether the stack of drywall adversely affected the apartment exit route.

Under WAC 296-155-265(4)(a), employers must comply with the following indoor storage requirements: "Storage must not obstruct, or adversely affect, means of exit." Viewing the evidence in the light most favorable to the Department, substantial evidence supports the Board finding that Metier's placement of the stack of drywall adversely affected the means of exit from the apartment unit.

The record establishes the drywall stacked in the hallway reduced the width of the apartment exit route and the hallway was the only means of exit from the apartment unit. The record also shows the drywall stacked in the hallway presented a hazard.

Despite conceding a "reduction in the width of a hallway could obstruct or adversely affect worker egress," Metier claims the unrefuted testimony of its employees established the stacked drywall did not hinder any workers in the exit route. But the IAJ rejected the testimony of Metier's employees as not credible.

Citing State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce, 65 Wn. App. 614, 618, 829 P.2d 217 (1992), Metier argues the IAJ was required to consider competing testimony or evidence. In Lige, we state that the deference appellate courts give to fact finders "necessarily entails acceptance of the fact[]finder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences." Lige, 65 Wn. App. at 618. But a fact finder's credibility determination does not necessarily turn on the existence of competing testimony. A fact finder can decide a

witness is not credible without regard to contrary testimony. See, e.g., State v. Swan, 114 Wn.2d 613, 666, 790 P.2d 610 (1990) (witness's demeanor is a factor in credibility determinations). Because the IAJ was in a better position to evaluate the credibility of witnesses and weigh the evidence, we will not substitute our judgment for that of the IAJ in reviewing the record on appeal. Callegod v. Wash. State Patrol, 84 Wn. App. 663, 676 n.9, 929 P.2d 510 (1997).

WAC 296-155-265(4)(a)

WAC 296-155-265(4)(a) states that storage must not "obstruct" or "adversely affect" the means of exit. Metier contends the terms "obstruct" and "adversely affect" are analogous. Metier asserts a means of exit must be obstructed in order to be adversely affected. Metier contends the mere narrowing of the width of an exit route does not establish a violation of WAC 296-155-265(4)(a).⁴

We review the interpretation of WISHA regulations de novo. Erection Co., 160 Wn. App. at 201. "Administrative rules and regulations are interpreted as a whole, giving effect to all the language and harmonizing all provisions." Cannon v. Dep't of Licensing, 147 Wn.2d 41, 57, 50 P.3d 627 (2002). "If an administrative rule or regulation is clear on its face, its meaning is to be derived from the plain language of the provision." Cannon, 147 Wn.2d at 56. Regulatory definitions apply and we give any undefined terms their ordinary meaning as defined in the dictionary. Habitat Watch v. Skagit County, 155 Wn.2d 397, 423, 120 P.3d 56 (2005).

⁴ We note Metier took a contrary position in its opening brief. Initially, Metier indicated that the superior court "correctly held that the Department did not have the burden to establish complete obstruction or difficulty moving through" the exit route.

Chapter 295-155 WAC does not define the terms “obstruction” or “adversely affect.” The common meaning of “obstruction” is “a condition of being clogged or blocked.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1559 (2002). By contrast, the term “adversely” means “unfavorably” or “disadvantageously” and the term “affect” means “to produce an effect” or “to produce a material influence upon or alteration in.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, at 31, 35. Applying the definitions in context, WAC 296-155-265(4)(a) requires employers to store material in a manner that neither completely blocks a means of exit nor negatively impacts a means of exit even where the means of exit is passable. Here, placing the stack of drywall in the hallway violated WAC 296-155-265(4)(a).⁵

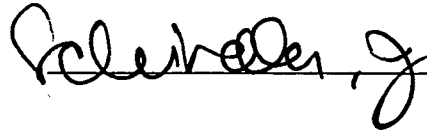
WAC 296-155-265(4)(g)

Metier contends the 24-inch clearance requirement for fire doors under WAC 296-155-265(4)(g)⁶ applies to a violation of WAC 296-155-265(4)(a). Metier raised this argument for the first time in its reply brief filed in superior court. Under RCW 49.17.150(1), “[n]o objection that has not been urged before the board shall be considered by the court” except in “extraordinary circumstances.” See Dep’t of Labor & Indus. v. Nat’l Sec. Consultants, Inc., 112 Wn. App. 34, 37, 47 P.3d 960 (2002) (unlike the permissive language of RAP 2.5(a), RCW 49.17.150 is mandatory). Accordingly, we do not address this argument on appeal.

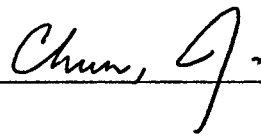
⁵ We also note the exit route was not the only location where Metier could have stored the drywall. Metier foreperson Dominguez testified there were “multiple places” in the apartment unit where the stack of drywall could be stored.

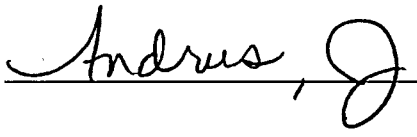
⁶ WAC 296-155-265(4)(g) states, “You must maintain a clearance of 24 inches around the path of travel of fire doors unless a barricade is provided, in which case no clearance is needed. Material must not be stored within 36 inches of a fire door opening.”

We affirm the superior court order affirming the Decision and Order of the Board.

 _____

WE CONCUR:

 _____

 _____

*The Court of Appeals
of the
State of Washington*

RICHARD D. JOHNSON,
Court Administrator/Clerk

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May 21, 2019

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CASE #: 78172-3-I

Metier Construction, Inc., Appellant v. Dept of Labor & Industries, Respondent

Counsel:

Enclosed please find a copy of the Order Denying Motion for Reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

LAW

Enclosure

c: Reporter of Decisions

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

METIER CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

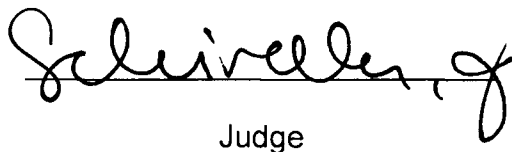
No. 78172-3-I

ORDER DENYING MOTION
FOR RECONSIDERATION

Appellant Metier Construction Inc. filed a motion for reconsideration of the opinion filed on April 15, 2019. Respondent Department of Labor and Industries filed an answer to the motion. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:


Judge

WAC 296-155-265

Fire prevention.

(1) Ignition hazards.

(a) Electrical wiring and equipment for light, heat, or power purposes must be installed in compliance with the requirements of Part I of this standard.

(b) You must locate internal combustion engine powered equipment so that exhausts are well away from combustible materials. When exhausts are piped to outside the building under construction, a clearance of at least 6 inches must be maintained between such piping and combustible material.

(c) Smoking must be prohibited at or in the vicinity of operations which constitute a fire hazard, and must be conspicuously posted: "No smoking or open flame."

(d) Portable battery powered lighting equipment, used in connection with the storage, handling, or use of flammable gases or liquids, must be of the type approved for the hazardous locations.

(e) The nozzle of air, inert gas, and steam lines or hoses, when used in the cleaning or ventilation of tanks and vessels that contain hazardous concentrations of flammable gases or vapors, must be bonded to the tank or vessel shell. Bonding devices must not be attached or detached in hazardous concentrations of flammable gases or vapors.

(f) Workers must not take open lights or open flames near or in an open sewer manhole, gas main, conduit or other similar place until the absence of explosive or harmful gases has been assured. Open lights or flames must not be carried into areas and enclosures where flammable vapors or exposed low flash point solvents exist. Only approved and suitable protected lights must be used.

(2) Temporary buildings.

(a) You must not erect any temporary building where it will adversely affect any means of exit.

(b) Temporary buildings, when located within another building or structure, must be of either noncombustible construction or of combustible construction having a fire resistance of not less than 1 hour.

(c) Temporary buildings, located other than inside another building and not used for the storage, handling, or use of flammable liquids, flammable gases, explosives, or blasting agents, or similar hazardous occupancies, must be located at a distance of not less than 10 feet from another building or structure. Groups of temporary buildings, not exceeding 2,000 square feet in aggregate, must, for the purpose of this part, be considered a single temporary building.

(3) Open yard storage.

(a) You must pile combustible materials with due regard to the stability of piles and in no case higher than 20 feet.

(b) Driveways between and around combustible storage piles must be at least 15 feet wide and maintained free from accumulation of rubbish, equipment, or other articles or materials. Driveways must be so spaced that a maximum grid system unit of 50 feet by 150 feet is produced.

(c) You must keep the entire storage site free from accumulation of unnecessary combustible materials. You must keep weeds and grass down and a regular procedure provided for the periodic cleanup of the entire area.

(d) When there is a danger of an underground fire, you must not use that land for combustible or flammable storage.

(e) Method of piling must be solid wherever possible and in orderly and regular piles. You must not store any combustible material outdoors within 10 feet of a building or structure.

(f) You must provide portable fire extinguishing equipment, suitable for the fire hazard involved, at convenient, conspicuously accessible locations in the yard area. You must place portable fire extinguishers, rated not less than 2A, so that maximum travel distance to the nearest unit must not exceed 100 feet.

(4) Indoor storage.

(a) Storage must not obstruct, or adversely affect, means of exit.

A-15

(b) You must store all materials, handled, and piled with due regard to their fire characteristics.

(c) You must segregate noncompatible materials, which may create a fire hazard, by a barrier having a fire resistance of at least 1 hour.

(d) You must pile material to minimize the spread of fire internally and to permit convenient access for firefighting. You must maintain stable piling at all times. You must maintain aisle space to safely accommodate the widest vehicle that may be used within the building for firefighting purposes.

(e) You must maintain clearance of at least 36 inches between the top level of the stored material and the sprinkler deflectors.

(f) You must maintain clearance around lights and heating units to prevent ignition of combustible materials.

(g) You must maintain a clearance of 24 inches around the path of travel of fire doors unless a barricade is provided, in which case no clearance is needed. Material must not be stored within 36 inches of a fire door opening.

[Statutory Authority: RCW **49.17.010**, **49.17.040**, **49.17.050**, **49.17.060**. WSR 16-09-085, § 296-155-265, filed 4/19/16, effective 5/20/16. Statutory Authority: RCW **49.17.010**, **49.17.040**, **49.17.050**, **49.17.060** and 29 C.F.R. 1910 Subpart Z. WSR 14-07-086, § 296-155-265, filed 3/18/14, effective 5/1/14. Statutory Authority: Chapter **49.17** RCW. WSR 88-23-054 (Order 88-25), § 296-155-265, filed 11/14/88; Order 74-26, § 296-155-265, filed 5/7/74, effective 6/6/74.]

USCS Const. Amend. 14, USCS Const. Amend. 14, § 1

Current through PL 116-18, approved 5/23/19

United States Code Service - Constitution of the United States > CONSTITUTION OF THE UNITED STATES OF AMERICA > AMENDMENTS > AMENDMENT 14

Sec. 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE SERVICE
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SEBRIS BUSTO JAMES

June 19, 2019 - 12:39 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 78172-3
Appellate Court Case Title: Metier Construction, Inc., Appellant v. Dept of Labor & Industries, Respondent
Superior Court Case Number: 17-2-19541-3

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- 781723_Petition_for_Review_20190619123252D1525751_1673.pdf
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Petition for Review
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