

NO. 43327-3

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

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PILCHUCK CONTRACTORS, INC.,

Appellant,

v.

DERPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF  
WASHINGTON,

Respondent.

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

This is an appeal under the Washington Industrial Safety and Health Act (WISHA), RCW 49.17. The Department of Labor and Industries (Department) cited Pilchuck Contractors, Inc., for violating WISHA regulations requiring employers to protect its workers from the hazards of excavations. Pilchuck appealed the citation to the Board of Industrial Insurance Appeals (Board). Under RCW 49.17.150, it is the Board's decision that is reviewed by this Court. The Board affirmed two of the three violations in the Department's citation.<sup>1</sup> Pilchuck appealed the Board's order to Pierce County Superior Court, which affirmed the Board's order.

Substantial evidence in the record shows that Pilchuck allowed its employees to enter an approximately eight-foot-deep excavation (trench) that (1) had excavated dirt piled less than two feet away from the edge of the trench in violation of WAC 296-155-655(10)(b) and (2) was inadequately protected from cave-ins in violation of WAC 296-155-657(1)(a). Because death or serious physical harm could result if a trench such as this one were to cave-in and crush the workers inside, the

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<sup>1</sup> The Department did not challenge the order vacating one of the three violations from the citation. The Board's decision is attached as Appendix A.

Department properly cited Pilchuck for a serious WISHA violation and did not abuse its discretion in assessing a penalty of \$6,300.

## II. COUNTERSTATEMENT OF THE ISSUES

1. Does substantial evidence support the Board's finding that Pilchuck violated WAC 296-155-655(10)(b) when photographic evidence and testimony in the record establish that the piles of excavated dirt came to rest at the edge of the trench and clearly not two feet away?
2. Does substantial evidence support the Board's finding that Pilchuck violated WAC 296-155-657(1)(a) when photographic evidence and testimony in the record established that the trench walls were over eight feet deep and therefore was beyond the capacity of the single shoring jack that was used to guard the workers against a possible cave-in?
3. Does substantial evidence support the Board's finding that Pilchuck could have known with the exercise of reasonable diligence of the trenching hazards when the testimony showed that Pilchuck's main course of business was trenching for utilities, when the hazard was in plain view, and when the supervising foreman knew of the hazard?
4. Does substantial evidence support the Board's finding that Pilchuck failed to meet its burden regarding the affirmative defense of unpreventable employee misconduct when Pilchuck failed to show that it was taking adequate steps to discover safety rule violations and was effectively enforcing its safety program?
5. Does substantial evidence support the Board's finding that the penalty calculation was reasonable and correct, such that the Department did not abuse its discretion in setting the probability rating in the "low medium" range based on mitigating factors presented by Pilchuck?<sup>2</sup>

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<sup>2</sup> Pilchuck's table of contents, assignment of errors, statement of issues, and headings regarding its challenge to the penalty calculations refers to violations 1-1 and 1-3 from the citation. The Department believes Pilchuck's reference to violation 1-1 is a clerical error because the Board vacated violation 1-1. The Department addresses

### III. COUNTERSTATEMENT OF THE CASE

On June 16, 2009, Inspector John Korzenko, a compliance safety and health officer with the Department, was dispatched to a Pilchuck worksite after receiving an anonymous call regarding a possible imminent danger to workers at that work site. BR Korzenko at 14.<sup>3</sup> The worksite was part of the Sound Transit construction project. BR LaRue at 5.

When Inspector Korzenko arrived at the work site, he observed three employees working in a trench. Jeff Heaton, one of the three employees seen in the trench, was identified as the foreman and the competent person for the work site. BR Korzenko at 16-17. A competent person is the employee who is supposed to be able to recognize hazards and have the authority to tell employees exposed to the hazard to get away. BR Korzenko at 12-13, 18-21; WAC 296-155-012. Pilchuck's training materials define competent person as: "an individual who is capable of identifying existing and predictable hazards or working conditions that are hazardous, unsanitary, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them." BR Ex. 7.

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Pilchuck's arguments as referring to violations 1-2 and 1-3, as that would appear consistent with Pilchuck's argument as a whole and with the Board's order on appeal.

<sup>3</sup> "BR" refers to the certified appeal board record, which is the record on review. Transcripts of the Board hearing are referred to as "BR" followed by the witness name. Exhibits are referred to as "BR Ex."

Inspector Korzenko performed a walk around inspection of the site in which he took photos, conducted interviews, and took measurements. BR Korzenko at 22-23, BR Exs. 1-3. The work site was determined to be approximately 15 feet long, 40 inches wide, and approximately eight to ten feet deep near its center point. BR Korzenko at 25-30.

The inspector observed that piles of excavated materials had been placed at the edge of the trench. BR Korzenko at 28. Photos taken by the inspector depict the piles of excavated material coming to rest at the edge of the trench, not at least two feet away from the edge as required by WAC 296-155-655(10)(b). *See* BR Ex. 1. 2.

After the walk around inspection, Inspector Korzenko requested additional documents from Pilchuck, which included the manufacturer's specifications, recommendations, and limitations for the shoring used on walls of the trench at the job site, and the relevant portions of the company's safety program and safety meeting minutes. BR Korzenko at 33-34.

As its method to protect against cave-in in the trench, Pilchuck used a support or shield system called the Speed Shore system. *See* BR Heaton at 103. In such cases, the manufacturer's tabulated data is used to determine the proper selection and construction of the shoring system. WAC 296-155-657(3)(a). According to the Speed Shore manufacturer's

tabulated data, only one hydraulic cylinder is required in each vertical plane for excavations six feet deep or less. However, excavations six to ten feet in depth require the use of two hydraulic cylinders in each vertical plane. BR Korzenko at 41; BR Ex. 4 at 4. The inspector observed only hydraulic jack being used, instead of the two that is required for excavations of eight feet in depth. *See* BR Korzenko at 53.

Following the inspection, the Department issued a citation and notice against Pilchuck. BR Korzenko at 43-44. The citation contained three serious violations. One violation was for failing to ensure safe means of access and egress from the trench. A second violation was based on Pilchuck's failure to keep the excavated material at least two feet away from the trench as required by WAC 296-155-655(10)(b). The third violation was for inadequate shoring (using an approved method of preventing the trench walls from caving-in on the workers) as required by WAC 296-155-657(1)(a). BR Korzenko at 50-53.

Pilchuck appealed the citation to the Board. On September 23, 2010, the industrial appeals judge issued a proposed decision and order that vacated the first violation regarding assuring a safe means of access and egress to the site, but affirmed the remaining violations. Pilchuck petitioned the full Board for review of the proposed decision. The Board

denied the petition for review and adopted the proposed decision as the final order.

Pilchuck appealed the Board's order to Pierce County Superior Court and the order was affirmed. Pilchuck appealed to this Court.

#### IV. STANDARD OF REVIEW

In a WISHA appeal, this Court directly reviews the Board's decision 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). The Board's findings of fact are conclusive if they are supported by substantial evidence when viewed in light of the record as a whole. *Mowat Constr. Co. v. Dep't of Labor & Indus.*, 148 Wn. App. 920, 925, 201 P.3d 407 (2009) (citing RCW 49.17.150(1)). Evidence is substantial if it is sufficient to convince a fair-minded person of the truth of the declared premise. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 112, 937 P.2d 154, *amended*, 943 P.2d 1358 (1997).

The deferential substantial evidence review "entails acceptance of the fact-finder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences." *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992).

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 Pilchuck did not assign error to any of the findings of fact of the Board and they are verities on appeal.

The WISHA penalty amount is reviewed for an abuse of discretion. *Danzer v. Dep't of Labor & Indus.*, 104 Wn. App. 307, 326, 16 P.3d 35 (2000). A fact-finder abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Kelley v. Centennial Contractors Enters., Inc.*, 169 Wn.2d 381, 386, 236 P.3d 197 (2010).

WISHA statutory provisions and regulations must be interpreted in light of WISHA's stated purpose of ensuring safe and healthful working conditions for all Washington workers. *Elder Demolition, Inc. v. Dep't of Labor & Indus.*, 149 Wn. App. 799, 806, 207 P.3d 453 (2009) (citing RCW 49.17.010). In interpreting WISHA, courts look for guidance to federal cases interpreting similar provisions of the federal Occupational Safety & Health Act (OSHA). *Id.* This Court gives great deference to the Department's interpretation of WISHA. *See Lee Cook Trucking & Logging v. Dep't of Labor & Indus.*, 109 Wn. App. 471, 478 n.7, 36 P.3d 558 (2001).

## V. SUMMARY OF THE ARGUMENT

The Department is responsible for enforcing WISHA. In this role, it enacts rules that protect workers from unsafe working conditions by imposing certain duties on employers, and it inspects employers to ensure that they and their employees use safe work practices.

Here, substantial evidence supports the findings that Pilchuck employees were exposed to serious safety hazards that presented a substantial probability of serious bodily injury. Photos and testimony by the inspector and by the foreman provide substantial evidence for the finding that the spoils were not at least two feet away from the edge as required by WAC 296-155-655(10)(b). Testimony by the inspector and by the foreman provide substantial evidence supporting the finding that the trench was eight feet deep and failed to have two hydraulic jacks in violation of WAC 296-155-269-15-657(1)(a).

The record supports finding Pilchuck had the requisite knowledge of its employees' exposure to serious hazardous conditions. Substantial evidence established that Pilchuck knew of the presence of the hazard associated with the work being performed by its employees, as Pilchuck's main course of business was trenching. Furthermore, the hazards were in plain view and the supervising foreman knew of the hazards at the work site at issue. Pilchuck relied upon its foreman to note and avoid these

hazards, but took no steps to assure the foreman was properly performing his duties. Under these circumstances, the foreman's knowledge is imputed to Pilchuck.

Additionally, substantial evidence supports the Board's conclusion that Pilchuck failed to meet its affirmative, strict burden of showing that the violations at issue were due to employee misconduct. The violations were not due to an isolated incidence of unforeseeable and unpreventable misconduct. Pilchuck's worksite visits to determine safety compliance were non-existent and there was little evidence of substantive discipline for safety violations related to the cited incident. Pilchuck failed to establish that it took adequate steps or had the ability to discover and correct violations of its safety rules. Thus, the employer failed to establish that it took the required necessary steps to discover and correct violations of its safety rules, or that enforcement of its safety program was effective in practice and not just in theory.

Finally, there is substantial evidence supporting the basis for the penalty issued against Pilchuck. The calculations were based upon factors supported in the record and included factors proffered by Pilchuck. Therefore the issuance of the penalty in this case was not an abuse of discretion, and the penalty should be affirmed.

## VI. ARGUMENT

### A. Substantial Evidence Supports The Board's Finding That Pilchuck Violated WAC 296-155-655(10)(b) When Photographic Evidence And Testimony In The Record Establish That The Piles Of Excavated Dirt Came To Rest At The Edge Of The Trench And Was Not Two Feet Away

Employers are statutorily mandated to comply with all rules and regulations the Department promulgates under WISHA. *Superior Asphalt & Concrete Co. v. Dep't of Labor & Indus.*, 121 Wn. App. 601, 604, 89 P.3d 316 (2004) (citing RCW 49.17.060(2), the "specific duty clause"). Unlike under WISHA's general duty clause,<sup>4</sup> citations under this specific duty clause do not require the Department to prove that a hazard exists. *Supervalu, Inc. v. Dep't of Labor & Indus.*, 158 Wn.2d 422, 433-34, 144 P.3d 1160 (2006). Rather, the standards set forth in properly promulgated rules and regulations presume a hazard, and the Department must only show that the standard in question was violated. *Id.*; *Mowat Constr.*, 148 Wn. App. at 930.

Accordingly, to make a prima facie case of a serious violation of a specific rule under WISHA, the Department bears the initial burden of proving the following elements:

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<sup>4</sup> The general duty clause obligates an employer to "furnish to each of his employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his employees." RCW 49.17.060(1). A violation of this clause requires proof that the employer failed to protect the workplace from a recognized hazard. *Supervalu, Inc. v. Dep't of Labor & Indus.*, 158 Wn.2d 422, 433, 144 P.3d 1160 (2006).

(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; (4) the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition; and (5) there is a substantial probability that death or serious physical harm could result from the violative condition.

*J.E. Dunn Nw.*, 139 Wn. App. at 44-45 (internal quotation omitted).

Pilchuck appears to challenge the sufficiency of the evidence to support element two of the test—that Pilchuck failed to meet the requirements of WAC 296-155-655(10)(b). Brief of Appellant (App. Br.) at 17-19.

**1. WAC 296-155-655(10)(b) Addresses The Proper Placement Of Excavated Materials To Protect Workers From Cave-Ins And Falling Objects**

The Department cited Pilchuck for violation of WAC 296-155-655(10)(b), which states:

(10) protection of employees from loose rock or soil. (b) Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least two feet (.61 m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

The proper placement of excavated materials in a trenching operation is important for two reasons, to protect against cave-ins and falling objects. The vertical wall of an excavation continually wants to collapse.

BR Korzenko at 87. The placement of excavation materials near the excavation site increases the load on the vertical wall. *Id.* The closer the excavation material is to the trench wall, the greater the added pressure or weight is added to the wall. BR Korzenko at 82. Increased load, especially in Class C soil (the least stable soil) increases the likelihood of collapse or cave-in. BR Korzenko at 51, 88. Excavated materials placement is also important because materials can roll in and/or fall off the pile and injure workers. BR Korzenko at 51.

**2. Substantial Evidence Supports The Board's Finding That Pilchuck Violated WAC 296-155-655(10)(b)**

Inspector Korzenko testified that he observed the piles of excavated materials had been placed at the edge of the trench. BR Korzenko at 28. Photos of the trench taken at the time of the inspection support Inspector Korzenko's testimony. BR Exs. 1, 2. These photos depict the piles of excavated material coming to rest at the edge of the trench, not at least two feet away from the edge as required by WAC 296-155-655(10)(b).

Jeff Heaton, Pilchuck's foreman and competent person at the work site, testified that he was the one who determined where the excavated materials would be deposited. BR Heaton at 105. Mr. Heaton explained that he placed the piles close to the edge of the trench because the crew

was working in a tight spot next to the railroad tracks and there was not a lot of room to place eight feet worth of dirt. See BR Heaton at 107, 111.

Pilchuck's brief ignores this testimony and the full content of the picture exhibits and instead asks this Court to reweigh the contested testimony of its witnesses. App. Br. at 17. Pilchuck focuses its attention to only a small portion of the work site where it argues the shore boards rose above the lip of the trench where the boards may serve to hold back the excavated materials. *Id.* While portions of the shoring boards Pilchuck used at the work site did rise above the top of the trench, those shorings were located at the shallow end of the trench, and not in the area of the trench where the employees were working. BR Korzenko at 83; BR Exs. 1, 2. Due to their location, the shorings offered no protection from the excavation materials piled at the edge of the middle portion of the trench where the employees were working.<sup>5</sup>

Pilchuck also argues there were no objective measurements of the spoil piles presented in the record to support that the spoil piles were less than two feet away from the edge of the trench. App. Br. at 18. But, as Inspector Korzenko testified, he did not measure how far the spoil piles

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<sup>5</sup> Pilchuck refers to Mr. Heaton as establishing an "optical illusion" per se. App. Br. at 19. The full testimony offered by Mr. Heaton that follows the excerpt noted by Pilchuck in support of an "optical illusion" provides an admission by Mr. Heaton that excavated materials "weren't back far enough. I know that." BR Heaton at 125.

were from the trench because, “it was clear that the spoils pile was deposited right at the edge of the excavation.” BR Korzenko at 28.

The testimony of Inspector Korzenko and Jeff Heaton and the pictures depicting the work site are sufficient to convince a fair-minded person of the truth that Pilchuck failed to place the excavated materials at least two feet away from the edge of the trench or use a retaining device to prevent materials from falling or rolling into the trench as required WAC 296-155-655(10)(b).

**B. Substantial Evidence Support The Board’s Finding That Pilchuck Violated WAC 296-155-657(1)(a) When Photographic Evidence And Testimony In The Record Established That The Trench Walls Were Over Eight Feet Deep**

Pilchuck also appears to challenge the sufficiency of the evidence supporting the finding that Pilchuck failed to meet the requirements of WAC 296-155-657(1)(a). *See* App. Br. at 19-20.

**1. WAC 296-155-657(1)(a) Applies Because Substantial Evidence Establishes That The Trench Was Approximately 8 To 10 Feet Deep**

The Department cited Pilchuck for violation of WAC 296-155-657(1)(a), which requires employers to protect employees in an excavation from cave-ins by an “adequate protection system.” Protection systems can be either a sloping and benching system or a support system, shield system or other protective system. WAC 296-155-657(2), (3).

Subsection (3) of the WAC describes support systems, shield systems, and other protective systems, including shoring, and also provides four alternatives for compliance. WAC 296-155-657(3). Support systems, shield systems, and shoring are all three defined to require a structure constructed out of some material, such as timber or metal. See WAC 296-155-650(q), (r), (w) (definitions); see also WAC 296-155-657(3) (“Designs . . . shall be selected *and constructed* by the employer . . . .”) (emphasis added). Unless a protective system is designed in accordance with written data or engineered design that have been produced to the Department upon request, the system must be constructed of timber or aluminum. See WAC 296-155-657(3), WAC 296-155-66401, WAC 296-155-66405, WAC 296-155-66407.

Here, Pilchuck argued the excavation was protected by a support or shield system via a Speed Shore system. See BR Heaton at 103. According to the Speed Shore manufacturer’s tabulated data, which is used under WAC 296-155-657(3)(a), excavations six to ten feet in depth require the use of two hydraulic cylinders in each vertical plane. BR Korzenko at 41; BR Ex. 4 at 4. Pilchuck argues, without citing to any specific facts, that the trench was less than six feet deep. App. Br. at 19-20. But, substantial evidence supports the Board findings that the trench

was more than six feet deep. In fact the Board found it was over eight feet deep. BR at 37 (Finding of Fact No. 5).

Inspector Korzenko estimated the trench to be at least eight feet deep, not including the height of the excavated materials deposited at the edge of the trench. Inspector Korzenko did not directly measure the depth of the excavation wall because in his opinion the excavation was too unsafe to enter and conduct the measurement. BR Korzenko at 25. He noted the excavation materials pile brought the depth of the trench up substantially from eight feet. His estimate was based in part on the eight foot length of the sheets of shielding against the walls of the trench. BR Korzenko at 26, 30. It was also based on counting the rungs on the ladder in the trench, which were approximately one foot apart. BR Korzenko at 63, 88. Inspector Korzenko counted nine rungs from the bottom of the ladder to the upper portion of the trench wall. BR Korzenko at 63. A picture of the trench with the ladder corroborates Inspector Korzenko's testimony. BR Ex. 1.

Estimates constitute substantial evidence. It has long been held in Washington that lay witnesses can properly testify to an estimate of distance "or some similar matter" when it is within common perception and about which experts have no advantage over lay persons. *See Baird v. Webb*, 160 Wash. 157, 161-63, 294 P. 1000 (1931). Lay witness opinion

testimony is also admissible if it is rationally based on the witness' perception and is helpful to a clear understanding of the testimony or the determination of a factual issue. Wash. Evid. R. 701. "[T]o hold that a witness could not testify to the distance between objects, or the distance a given object could be seen from a particular stand-point familiar to him, unless he had actually measured the distance, would entail intolerable expense and delay in the administration of the law . . . ." *Baird*, 160 Wash. at 162 (quoting *Gulf, C. & S. F. R. Co. v. Washington*, 49 F. 347, 349 (8th Cir. 1892)).

Moreover, WISHA inspectors would be subject to unsafe conditions if they had to measure the depth of a trench that is not protected from cave-ins. Inspector Korzenko testified that he did not enter the trench to measure its depth because it was unsafe. BR Korzenko at 25. The public policy behind WISHA is to ensure safe working conditions (RCW 49.17.010), not create unsafe conditions for those enforcing the Act.

Inspector Korzenko's estimate of the trench depth is corroborated by the testimony of Pilchuck's working foreman and competent person, Jeff Heaton. Mr. Heaton testified that the crew was working off the plans for the new rail so the crew had to measure the excavation site. The depth was measured with a tape measure. BR Heaton at 106-07. He testified

that the trench was eight to eight and a half feet in depth, maybe more. *Id.* In discussing why he placed the spoils pile so close to the edge of the trench Heaton said: "Not a whole lot of room to put eight feet worth of dirt, so that's why it was so close." BR Heaton at 111. Finally, it should be noted that Mr. Heaton also described the length of the shore boards to be eight feet long by four feet wide. BR Heaton at 105-106. These eight feet long boards are shown to come up the very edge of the trench in pictures of the trench. *See* BR Ex. 1. Ample evidence supports the Board's finding that the trench was over eight feet deep. *See* BR at 37.

**2. Pilchuck Failed To Properly Utilize The Speed Shore System To Protect Its Employees From Cave-Ins**

The excavation was cut into Class C soil that was over eight feet deep. Under such conditions, the Speed Shore manufacturer's specifications required the use of two cylinders per shielding. BR Ex 4. Pilchuck does not contest it failed to use two cylinders per shielding as required by the manufactures tabulated data. It also failed to place three consecutive shields in a row on each side of the excavation as required by the manufactures specifications. BR Korzenko at 53. These facts provide substantial evidence that Pilchuck exceeded the load provided by the manufacture's tabulated data for the Speed Shore system and therefore its workers were exposed to cave-ins.

Pilchuck argues that Inspector Korzenko acknowledged a lack of exposure to a hazard. App. Br. at 20. No such acknowledgement is in the record. To prove that workers had access to a violative condition requires the Department to show “by ‘reasonable predictability that, in the course of [the workers’] duties, employees will be, are, or have been in the zone of danger.’” *Mid Mountain Contractors, Inc. v. Dep’t of Labor & Indus.*, 136 Wn. App. 1, 5, 146 P.3d 1212 (2006). Here, the workers were working in a trench more than eight feet deep with inadequate shoring and were within the “zone of danger” of the hazardous condition.

The Board’s finding that Pilchuck violated WAC 296-155-657(1)(a) is supported by substantial evidence.

**C. Substantial Evidence Supports The Board’s Finding That Pilchuck Could Have Known Of The Trenching Hazards When The Testimony Showed That Pilchuck’s Main Course Of Business Was Trenching For Utilities, When The Hazards Where In Plain View, and When The Supervising Foreman Was Aware Of The Hazard**

For a “serious” violation, the Department must show that there is a substantial probability that death or serious physical harm could result from a condition which exists, or from practices which are used in the work place, *unless the employer did not, and could not with the exercise of reasonable diligence, know of the violative condition.* RCW 49.17.180(6) (emphasis added).

Pilchuck implies that the Department relied on a strict liability standard to establish that Pilchuck knew of the presence of the violative condition. *See* App. Br. at 9-22. Specifically, Pilchuck mischaracterizes the Department's case as simply resting on establishing the foreman's knowledge of the hazards at the worksite. Pilchuck ignores additional evidence in the record that established, not only that the foreman knew of the hazards, but that the hazards were foreseeable and Pilchuck failed to take all reasonable steps to protect its employees from the hazards. The Board specifically found that Pilchuck had constructive knowledge - Pilchuck *could have known* the trenching hazards were present at the worksite since the hazards were foreseeable and that Pilchuck was not taking adequate steps to discover safety rule violations within the company. BR at 37. Substantial evidence in the record supports this finding.

The record provides that Pilchuck had constructive knowledge of the violative conditions at the worksite. The violations were in plain view and readily observable in a conspicuous location proximate to employees. *See* discussion *infra* C.1. In addition, Pilchuck's foreman knew of the violative conditions and Pilchuck could have known of the violation with the exercise of reasonable diligence. Here, Pilchuck did not take all the measures available to prevent the occurrence, including but not limited to

its past efforts to discover, document, and discipline safety violations. *See* discussion *infra* C.2.

Here, substantial evidence supports the Board's finding that the Department established the requisite employer knowledge.

**1. The Department Showed Constructive Employer Knowledge By Establishing That With The Exercise Of Reasonable Diligence, Pilchuck Could Have Known Of The Presence Of The Hazard**

The knowledge requirement may be satisfied by proof either that the employer actually knew, or with the exercise of reasonable diligence, could have known of the presence of the violative condition. *Wash. Cedar & Supply Co. v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 914, 83 P.3d 1012 (2003). The Board has consistently held that "employer knowledge" in this context means knowledge of the hazardous conduct or condition and *does not require knowledge of a specific incident. In re Gen. Sec. Serv. Corp.*, BIIA Dec., 96 W376, 1998 WL 960837 (1998)(emphasis added).

The Board found that "Pilchuck Contractors, Inc., could have known with the exercise of reasonable diligence that the violations of WAC 296-155-655(10)(b) and WAC 296-155-657(1)(a) were occurring at its job site[.]" BR at 37. Substantial evidence established that Pilchuck knew of the presence of the hazards associated with the work being

performed by its employees through its training program. The Board observed “Pilchuck Contractors are in the trenching business. They are digging in multiple sites in Puget Sound every work day. They take pains to educate their workers in trenching safety. They knew or should have known that trenching hazards were potentially present at this site.” BR at 35. Pilchuck provides a Safety Orientation and Trenching and Excavation Training seminar for all its employees. BR Martinez at 134-137; BR Ex. 6; BR Ex. 8. Indeed, since Pilchuck is in the trenching business, it would be hard to imagine many if any jobs where Pilchuck management would not be aware that its employees would be exposed to potential cave-in hazards.

Regardless, Pilchuck failed to exercise reasonable diligence to discover the hazards that were present at the cited job site. “Reasonable diligence involves several factors, including an employer’s obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence.” *Erection Co., v. Dep’t of Labor & Indus.*, 160 Wn. App. 194, 206-07, 248 P.3d 1085 (2011) (quoting *Kokosing Constr. Co., Inc., v. Occupational Safety & Hazard Review Comm’n*, 232 Fed. Appx. 510, 512 (6th Cir. 2007)) Constructive knowledge of a violative condition may be demonstrated by the Department in a number of ways, “including evidence showing that the

violative condition was readily observable or in a conspicuous location in the area of the employer's crews." *Erection Co.*, 160 Wn. App. at 207; *BD Roofing, Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 98, 109, 161 P.3d 387 (2007) (citing *Kokosing Constr. Co.*, 17 O.S.H. Cas. (B.N.A.) at 1871-72); *In re Wilder Constr. Co.*, BIIA Dckt. No. 06 W1078, 2007 WL 3054874 (2007) (citing Mark A. Rothstein, *Occupational Safety and Health Law*, § 5:15 (7th ed. 2007)).

In *Kokosing*, the Commission found that where a compliance officer testified that he observed unguarded rebar in plain view when he entered a work area, the "conspicuous location, the readily observable nature of the violative condition, and the presence of Kokosing's crews in the area warrant a finding of constructive knowledge." *Kokosing Constr. Co.*, 17 O.S.H. Cas. (B.N.A.) at 1871-72.

Evidence that the hazard was "in plain view" will establish an employer's constructive knowledge of a violative condition. *Erection Co., Inc.*, 160 Wn. App. at 207; *In Re Wilder Constr. Co.*, 2007 WL 3054874. Here, the unsafe working conditions in the trench were in plain view. In fact, the hazard was so readily apparent that it was called to the Department's attention by an anonymous observer. BR Korzenko at 14. Pilchuck failed to inspect the work site to discover a readily apparent hazard.

**2. A Foreman's Knowledge Of A Hazardous Condition May Be Imputed To The Employer As The Hazards Were Foreseeable**

Further, knowledge should be imputed to the employer through its supervisory agent Jeff Heaton, who was identified as the foreman and competent person, when the hazards were foreseeable and preventable. Knowledge or constructive knowledge may be imputed to the employer through a supervisory agent under the facts of this case. *See New York State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98, 105 (2nd Cir. 1996); *Sec'y of Labor v. Danis Shook Joint Venture XXV*, 19 O.S.H. Cas. (B.N.A.) 1497, 2001 O.S.H.D. (C.C.H.) P 32397, 2001 WL 881247, \*4-\*5 (O.S.H.R.C. 2001) (actual or constructive knowledge of an employer's foreman can be imputed to the employer.). "An employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer." *Sec'y of Labor v. A.P. O'Horo Co.*, 14 O.S.H. Cas. (B.N.A.) 2004, 1991 O.S.H.D. (C.C.H.) P29223, 2001 WL 881247, \*3-\*4 (O.S.H.R.C. 1991).

In *New York State Elec.*, an OSHA inspector happened upon an equipment operator using a jackhammer without wearing eye protection. The inspector addressed the issue with another worker that was identified as the crew leader. The employer argued it had no knowledge of the

equipment operator's conduct by imputation from crew leader because the crew leader was not a supervisory employee and, in any event, the crew leader had no knowledge or constructive knowledge of the equipment operator's conduct. The court found substantial evidence supported that the crew leader had constructive knowledge because the crew leader was working nearby and the violations were easy to see. But the matter was remanded to determine if the crew leader was a supervisory employee. *New York State Elec.*, 88 F.3d at 110 (2nd Cir. 1996).

In *O'Horo*, a foreman observed the trenching process that resulted in inadequately sloped walls. The commission found that in light of the foreman's "supervisory status, his knowledge is imputable to O'Horo and establishes a prima facie showing of knowledge." *O'Horo*, 2001 WL 881247, \*3-\*4 (O.S.H.R.C. 1991).

In *Shook*, a supervising foreman's actual knowledge of his own failure to wear personal protective equipment was imputed to his employer. *Shook*, 2001 WL 881247, \*4-\*5.

Supervisor knowledge is imputed to the employer unless the employer can show that it has taken all necessary steps to comply with WISHA, including adequate supervision of its supervisory personnel. *Niagra Mohawk Power Corp.*, 7 O.S.H.C. (B.N.A.) 1447, 1449, 1979 WL 8449 (1979). "[I]t is not sufficient simply to communicate safety rules to

supervisor . . . The employer must make a specific showing that its safety rules were effectively enforced, by discipline if necessary.” *Id.*

Here, Pilchuck’s foreman, Jeff Heaton, had specific knowledge of the cave-in hazards on June 16, 2009. At the time the citation was issued, Mr. Heaton was the working foreman and equipment operator. BR Heaton at 97. He also was the competent person and had training in soil classification and what cave-in prevention method was to be used in connection with the excavation. BR Heaton at 98, 103; *see also* WAC 296-155-012. As Pilchuck’s competent person at the worksite, Mr. Heaton had the responsibility of recognizing hazards and the authority to tell employees exposed to the hazard to get away. Mr. Heaton knew the depth of the trench was at eight and a half feet deep at the point the employees were working, because he measured the depth with a tape measure. BR Heaton at 107. Finally, Mr. Heaton also had Speed Shore Manufacture’s tabulated data to determine the number of hydraulic cylinders required to properly guard against a cave-in. BR Heaton at 103.

Imputation of a supervising foreman’s knowledge of a hazard to the employer is in accord with the remedial purpose and liberal construction mandate behind WISHA. *See* RCW 49.17.180; *Inland Foundry Co., v. Dep’t of Labor & Indus.*, 106 Wn. App. 333, 336, 24 P.3d 424 (2001). When an employer entrusts to a supervisory employee its

duty to assure employee compliance with safety standards, it is neither unreasonable nor in error of law to charge the employer with constructive knowledge through the supervisor. The employer should not be able to delegate its supervisory responsibility and then deny that it is responsible for the consequences of that delegation. Pilchuck failed to provide adequate oversight of Mr. Heaton on the job site in question.

Here, Jeff Heaton's immediate supervisor was the job superintendent. Mr. Heaton identified the job superintendent as a man named Ryan, but apparently worked with him so infrequently that he could not recall Ryan's last name. BR Heaton at 99-100. Mr. Heaton testified he worked with Ryan only on this project. BR Heaton at 100. He saw Ryan on the job site: "Maybe twice a week or more. If he got you lined out, he would leave you alone to do your job. Unless there was some kind of problem, he would come by and check with you." BR Heaton at 102.

At the time of the WISHA inspection, Marvin LaRue was the general superintendent for Pilchuck. BR LaRue at 4-5. He was at the project three to four times a week. BR LaRue at 5. He had six or seven crews he supervised at the Sound Transit project and he tried to visit the crews 15 to 20 minutes a day, two to three times a week. BR LaRue at 13. Mr. Heaton testified that Mr. LaRue usually attended the Monday morning

safety meetings and his attendance on the job site was “hit-and-miss from there”. BR Heaton at 102.

The Sound Transit project was not the only project Mr. LaRue was managing. At the time of the citation he was managing four to five other projects for Pilchuck, traveling throughout the Puget Sound area from his Kirkland office, working eleven to twelve hours a day. BR LaRue at 19-20.

According to Mr. LaRue, there had been an intermediate level supervisor in between himself and Mr. Heaton, whom he identified as Ryan Catola. Mr. LaRue referred to this person as a “site superintendent” Mr. Heaton had previously referred to him as a “job superintendent”. Mr. Catola was a full time Pilchuck employee assigned exclusively to supervise the Sound Transit job site. Mr. LaRue estimated that Mr. Catola probably worked nine hours a day five to six days a week. BR LaRue at 21-22.

Apparently Mr. Catola left employment with Pilchuck sometime after Pilchuck started the Sound Transit. BR LaRue at 22. When Catola left, his position was never filled. Mr. LaRue took over all of Mr. Catola’s responsibilities in addition to his own. BR LaRue at 22-23. Mr. Catola had already left employment with Pilchuck by the time of the June 16, 2009 inspection by the Department. BR LaRue at 22.

Mr. LaRue was not present at the time the ground was broken on the job site on June 15, 2009. Mr. LaRue was not on the job site at the time of the June 16, 2009 inspection. BR LaRue at 25-26. He arrived at the job site the day after the inspection and met with the crew to discuss the WISHA inspection.

Pilchuck did not take the necessary steps to replace the site superintendent when he walked off the job without notice. Instead Pilchuck allowed the site superintendent's 45 to 54 hour a week responsibilities to be absorbed by the general superintendent, who was already by his own admission working 11 to 12 hours a day. BR LaRue at 20, 22. These constraints make it extremely difficult if not impossible to take effective steps to supervise employees, take the necessary steps to discover and correct safety violations, and operate a consistent and effective disciplinary system.

Pilchuck's argues that there was little more it could do to monitor the foreman and competent person at the job site. App. Br. at 24. Such an assertion is disingenuous when Pilchuck was solely responsible for appointing Mr. Heaton as the foreman and competent person at the job site and then created the circumstances by which it failed to have the adequate personnel to monitor his compliance with established safety standards.

As a result, Mr. Heaton's knowledge is imputed to Pilchuck. Even the decision upon which Pilchuck in large part relies, *W.G. Yates*, acknowledged that the inquiry into whether a supervisor's knowledge of violations was foreseeable may include a broader inquiry into "the employer's safety policy, training, and discipline." *W.G. Yates & Sons Constr. Co., Inc., v. Occupational Safety & Health Review Comm'n*, 459 F.3d 604, 608-09 (5th Cir. 2006) (citing *Horne Plumbing & Heating Co. v. Occupational Safety Health Review Comm'n*, 528 F.2d 564, 568-69 (5th Cir. 1976)).

As the holding in *W.G. Yates* directs, the record here provides more than just evidence of the Pilchuck foreman's knowledge.<sup>6</sup> The Department established the knowledge prong of its prima facie case through substantial evidence showing Pilchuck's foreman had supervisory authority over the safety of the work site, Pilchuck had no effective safety monitoring system for its supervisor, the hazard was in plain view, and the supervisor had knowledge of the hazard.

**D. Substantial Evidence Supports The Board's Findings That Pilchuck Did Not Meet Its Burden Of Proof For Employee Misconduct When Pilchuck Failed To Take Adequate Steps To**

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<sup>6</sup> Pilchuck also cites to *Pennsylvania Power & Light Co. v. Occupational Safety & Health Review Comm'n*, 737 F.2d 350 (3d Cir. 1984), and *Mountain States Tel. & Tel. Co. v. Occupational Safety & Health Review Comm'n*, 623 F.2d 155 (10th Cir. 1980), for requiring more than proof of a supervisor's misconduct to infer employer knowledge. App. Br. at 15. As those cases dictate, the record here goes beyond simply proof of a supervisor's misconduct.

**Discover Safety Violations And When Its Safety Program Was Not Effective In Practice**

Pilchuck asserts that, even assuming that its workers violated the rules requiring shoring protection and placement of excavated materials and that it had the requisite knowledge of the violations, the violation should be excused because Pilchuck alleges it met its burden of proof regarding the affirmative defense of “employee misconduct.” App. Br. at 35-38.

But, substantial evidence in the record, including the lax supervision by Pilchuck’s management combined with Pilchuck’s failure to establish that it took all feasible steps, including adequate steps to discover safety rule violations and effectively enforce its safety program in practice steps, supports the Board’s rejection of this assertion. Pilchuck’s disciplinary system was not clear to workers and was not strictly enforced. BR at 37. Further, Pilchuck did not take adequate steps to discover violations, such as performing random safety checks. *Id.* Ultimately, Pilchuck was unable to establish that its safety program was effective in practice, and accordingly was unable to meet its strict burden under law in advancing the affirmative employee misconduct defense.

**1. Employers Must Prove That They Took All Feasible Precautions In Monitoring and Sanctioning Its Employees In Order To Show That A Violation Was Idiosyncratic And Unforeseeable**

RCW 49.17.120(5) provides for the affirmative defense of “unpreventable employee misconduct,” allowing an employer to avoid liability upon showing the following:

- (i) A thorough safety program, including work rules, training, and equipment designed to prevent the violation;
- (ii) Adequate communication of these rules to employees;
- (iii) Steps to discover and correct violations of its safety rules; and
- (iv) Effective enforcement of its safety program as written in practice and not just in theory.

*Wash. Cedar & Supply Co.*, 119 Wn. App. at 911.<sup>7</sup>

The employer must prove in advancing an “employee misconduct” defense that its enforcement of safety has been effective in practice as well as in theory. RCW 49.17.120(5)(iv); *Brock v. L.E. Myers Co.*, *High*

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<sup>7</sup> As noted above, a similar provision is found in the OSHA. See *Brock*, 818 F.2d at 1277. In construing the OSHA provision, federal courts have recognized the affirmative defense of “unpreventable employee misconduct.” Before the *Washington Cedar* decision, in the absence of Washington appellate decisions on this issue the Board properly relied upon federal decisions construing OSHA. See *Jeld-Wen of Everett*, BIIA Dec., 88 W144, 1990 WL 205725 (1990); *Erection Co.*, BIIA Dec., 88 W142, 1990 WL 255020 (1990). In *Jeld-Wen* at \*7, the Board adopted the leading federal case on “employee misconduct,” *Brock*, 818 F.2d 1270. *Jeld-Wen* followed *Brock* and held that “unpreventable employee misconduct” is an affirmative defense for which the employer bears the burden of proof. In 1999, the Legislature codified *Brock* in RCW 49.17.120. Laws of 1999, ch. 93, § 1. The bill report notes that the legislation merely codifies existing case law. Final Bill Report to SB 5614.

*Voltage Div.*, 818 F.2d 1270, 1277 (6th Cir. 1987). While each of the four parts of the above test must be met by the employer in order to meet its burden of proof, *Brock* emphasizes that merely showing a good “paper program” does not demonstrate “effectiveness in practice.” *Id.*

*Brock* emphasizes that an employer will be strictly held to its burden of proof on each element of the test. *Id.* *Brock* notes that the employer’s duty includes providing “training, supervision, and disciplinary action designed to enforce the rules.” *Id.*

Further, the employer must show that the conduct of its employees in violating the employer’s safety policies was:

[i]diosyncratic and unforeseeable . . . we emphasize that the employer who wishes to rely on the presence of an effective safety program to establish that it could not reasonably have foreseen the aberrant behavior of its employees must demonstrate that program’s effectiveness in practice as well as in theory.

*Id.*

Under Washington case law, to show that a safety program is effective in practice, “evidence must support the employer’s assertion that the employees’ misconduct was an isolated occurrence and was not foreseeable.” *BD Roofing v. Dep’t of Labor & Indus.*, 139 Wn. App. 98, 111, 161 P.3d 387 (2007); *Wash. Cedar & Supply Co.*, 119 Wn. App. at 912. Conduct that can be prevented by feasible precautions by the

employer is not idiosyncratic or unforeseeable. Richard P. Shafer, J.D., Annotation, *Employee Misconduct as Defense to Citation*, 59 A.L.R. Fed. 395, §2 (1982).

In addition, the employer must establish that it took sufficient steps to discover and correct violative conduct by its employees. *Erection Co.*, 160 Wn. App. at 207. In other words, the employer must establish it exercised reasonable diligence in making attempts to discover and correct work place hazards and violations of established work rules. Rothstein at §5:27 (citing *Sec'y of Labor v. Sw. Bell Tel. Co.*, 19 O.S.H. Cas. (BNA) 1097, 2000 O.S.H. Dec. (CCH) P 32198, 2000 WL 1424806 (O.S.H.R.C. 2000); *Sec'y of Labor v. Maniganas Painting Co.*, 19 O.S.H. Cas. (BNA) 1102, 2000 O.S.H. Dec. (CCH) P 32202, 2000 WL 1424790 (O.S.H.R.C. 2000)). Evidence submitted by an employer to establish the defense must include more than testimony; evidence must include documentation supportive of its claims that it took steps to discover and correct violations. *BD Roofing*, 139 Wn. App. at 113 (citing *Legacy Roofing, Inc. v. Dep't of Labor & Indus.*, 129 Wn. App. 366, 119 P.3d 366 (2005)). The employer must present sufficient evidence to support its claim that it effectively implements and enforces its program. *Id.* In the *BD Roofing* case, the court found that the employer failed to provide documentary evidence that it actually inspected and disciplined employees for rule

violations. *Id.* at 113. “The fact that a company’s written policy on the date of the inspection provided that an employee could face dismissal for failing to follow the employer’s safety protocols is not sufficient evidence that the employer actually enforced the policy or dismissed any employees.” *Id.* The court therefore rejected BD Roofing’s argument because the employer had failed to submit any evidence indicating it had consistently enforced its discipline policy. *Id.* at 114.

In *Legacy Roofing*, the court upheld the Board’s finding that the employer’s steps to discover and correct safety violations were inadequate to deter future violations, the company’s unannounced inspections were infrequent, and employees caught violating the rules were not consistently counseled or fined. *Legacy Roofing*, 129 Wn. App. at 365. The court held that Legacy’s program was not “effective in practice as well as in theory.” *Id.* at 367.

**2. Involvement Of A Supervisory Employee Raises An Inference Of Lax Enforcement**

Here a foreman is involved. “[I]n cases involving negligent behavior by a supervisor or foreman which results in dangerous risks to employees under his or her supervision, *such fact raises an inference of lax enforcement and/or communication of the employer’s safety policy.*” *Brock*, 818 F.2d at 1277 (emphasis added); *see also Donovan v. Capital*

*City Excavating Co., Inc.*, 712 F.2d 1008, 1010 (6th Cir. 1983) (actions of supervisor are imputed to the company).

Where a supervisory employee is involved, as here, “the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor’s duty to protect the safety of employees under his or her supervision.” *Sec’y of Labor v. Archer-Western Contractors, Ltd.*, 15 O.S.H.C. 1013, 1991 O.S.H.D (C.C.H.) P ¶29,317, 1991 WL 81020, \*5 (O.S.H.R.C. 1991).

Ultimately however, the proper focus in employee misconduct cases is on the effectiveness of the employer’s implementation of its safety program and not on whether the employee misconduct is that of a foreman as opposed to an employee. “Congress has specifically imposed on the employer the ‘responsibility to assure compliance by his own employees. Final responsibility for compliance with the requirements of this Act remains with the employers.’” *Brock*, 818 F.2d at 1277 (quoting S. Rep. 1282, 91st Cong. 2d Sess. 10-11, *reprinted in* 1970 U.S. Code Cong. & Admin. News 5177, 5182).

**3. Pilchuck’s Employee Misconduct Defense Fails Because It Failed To Establish That It Took All Feasible Steps To Discover, Document, And Sanction Violations**

Pilchuck’s employee misconduct defense fails because it failed to establish that it took all feasible steps to monitor for, discover, document,

and sanction violations, thus ultimately failing to establish that its program was effective in practice where a foreman, noted by Pilchuck to be “one of our top guys” and two employees worked in an eight and half foot deep trench without sufficient protection from cave-ins. BR Martinez at 152. The Board found that Pilchuck “did not take adequate steps to discover safety rule violations within the company as of June 16, 2009.” BR at 37. The Board also found that Pilchuck “was not effectively enforcing its safety program in practice as of June 16, 2009.” *Id.* These findings are supported by substantial evidence.

The only documentary evidence Pilchuck submitted in support of its affirmative defense were: (1) the company’s excavation training program; (2) documentation of safety meetings; and (3) a *post-accident* discipline document for Mr. Heaton. BR Exs. 6, 8-10, 11. Although it appears on paper at first blush that Pilchuck has a thorough safety program, it certainly did not take the necessary steps to discover and correct violations of its safety rules, as the Board found. *See* BR at 12, 13.

Supervision is necessary to take steps to discover and correct safety violations. The record shows a lack of effective supervisory oversight. Jeff Heaton only saw his direct supervisor on the site once. BR Heaton at 102. He only saw Marvin LaRue, the general superintendent, at the job site on a “hit and miss” basis. *Id.* Mr. LaRue

had responsibilities for multiple crews and multiple job sites. BR LaRue at 13, 19-20. According to Mr. LaRue, there had been an intermediate level supervisor in between himself and Mr. Heaton, who worked a full-time job. BR LaRue at 21-22. Pilchuck did not take the necessary steps to replace the site superintendent when he walked off the job without notice. BR LaRue at 22-23. Instead Pilchuck allowed the site superintendent's 45 to 54 hour a week responsibilities to be absorbed by the general superintendent, who was already by his own admission working 11 to 12 hours a day. As previously noted, these constraints make it extremely difficult if not impossible to take effective steps to supervise employees, take the necessary steps to discover and correct safety violations, and operate a consistent and effective disciplinary system. This would also include the ability to perform random safety checks on its workers. Pilchuck failed to establish its program was effective in practice.<sup>8</sup>

Upon hearing testimony from Pilchuck's foreman, safety director, and general superintendent, the Board observed it was not convinced "that

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<sup>8</sup> The lack of detail and the manner in which the post-accident discipline document was drafted is telling of the insufficiency of Pilchuck's discipline process. See BR Ex. 11. Mr. LaRue testified that he had prepared the warning to Mr. Heaton before meeting with the crew the day after the inspection. BR LaRue at 27-30. He issued the written warning apparently under an incorrect impression that the Department had already issued a violation (the Department did not issue the citation until July 6, 2009). It is noted that the written warning does not provide any details regarding the substance of the warning. When questioned regarding issuing the written discipline, Mr. LaRue testified that issuance of the written discipline was "paperwork, okay. If [Mr. Heaton] is getting a citation, I need to make sure that I covered myself with a written warning to the man." BR LaRue at 30.

the company had a sufficient system of random safety checks or that the disciplinary system was clear to workers and strictly enforced.” BR at 36. “It was somewhat unclear whether the superintendent of the project or the safety officer was responsible for seeing to discipline when a safety rule was violated.” *Id.* “It also appeared that application of discipline was somewhat variable depending on the circumstances of each violation.” *Id.* Pilchuck argues that there is no requirement that the disciplinary policy needs to be clear to workers. App. Br. 36. Pilchuck’s argument fails to recognize that a clear disciplinary policy is key in deterring future violations.

Pilchuck’s failure to adequately engage in or document self-inspection or employee discipline for rule violations is similar to the factual situations in *BD Roofing* and *Legacy Roofing* where in each case the employee misconduct defense was rejected. Here, Pilchuck failed to present documentation of safety violations, consistent enforcement of its progressive discipline policy, and documented site visits; it certainly could not establish that a paper program was effective in practice and not just in theory.

Further, as the supervisory foreman at the job site, Mr. Heaton was delegated responsibility for ensuring that employees worked safely, were protected from hazards, and that hazards to which Pilchuck employees

could be exposed were corrected before allowing work to continue. BR Korzenko at 16-17; BR Ex. 7. Thus, the inference of lax enforcement and/or communication of the employer's safety policy should be applied in this case. *Brock*, 818 F.2d at 1277.

Pilchuck claims it could not have known that its foreman would violate the safety rules by taking short cuts. App. Br. at 36. But if Pilchuck engaged in and documented regular inspections, this type of behavior could have been corrected. Despite his safety responsibilities, it is undisputed that Mr. Heaton allowed the serious hazardous conditions at the site to exist unabated. Mr. Heaton allowed Pilchuck employees (including himself) to work within an eight and a half foot deep trench without proper protection from cave-ins. Mr. Heaton's failure to correct these hazards resulted in Pilchuck employees being exposed to possible death or serious injury. Pilchuck was unable to show that it took all feasible steps to enforce its safety program, and ultimately, that its program was effective in practice.

The Board's findings of fact that Pilchuck was not taking adequate steps to discover safety rule violations within the company and not effectively enforcing its safety program in practice is supported by substantial evidence in the record.

**E. Substantial Evidence Supports Board's Finding That The Penalty Calculation Was Reasonable And Correct**

Pilchuck also challenges the "low to medium" probability level assigned to the violations by the Department and affirmed by the Board. App. Br. at 39; BR at 37-38. Because there is substantial evidence supporting the basis for the penalty and therefore not an abuse of discretion, the penalty should be affirmed. *See Danzer*, 104 Wn. App. at 326. Penalties issued for a WISHA violation are determined by reference to RCW 49.17.180(7), which states as follows:

The director, or his authorized representatives, *shall have authority to assess all civil penalties provided in this section*, giving due consideration to the appropriateness of the penalty with respect to the number of affected employees of the employer being charged, the gravity of the violation, the size of the employer's business, the good faith of the employer, and the history of the previous violations.

(Emphasis added.)

The above statutory factors are considered in the Department's penalty work sheet, which is used to compute the initial penalty for a WISHA violation. The Department codified its interpretation of this portion of the statute in WAC 296-900-14010. *Danzer* described the system of penalty calculation as follows:

The Department first rates the potential severity of the injuries that the safety violation could cause and then rates the probability of such an injury, using a scale of 1 to 6 for

each. The Department then multiplies the severity and probability factors to determine the “gravity” factor, a number between 1 and 36. This factor determines the base penalty for the violation. The Department then adjusts the base penalty by (1) the employer’s good faith (rated as excellent, good, fair, or poor); (2) the employer’s size; and (3) the employer’s claims history (rated as good, average, or poor). It then multiplies the adjusted base penalty by the number of days the employer has failed to abate the violation.

*Danzer*, 104 Wn. App. at 319-20.

As noted, above, the probability rating is used to establish the base for a penalty. Probability describes the likelihood of an injury occurring considering the circumstances. WAC 296-900-14010. Here, Pilchuck specifically argues that the Department failed to consider specific factors in addressing the probability rating while calculating the penalty against Pilchuck. These include: (1) training provided to the workers; (2) a tailored safety program; (3) a competent person on site; (4) and the presence of some shoring. App. Br. at 41. But, Pilchuck fails to establish that the factors it cites were not considered by the Department or the Board.

The record reflects that the Department assessed the probability score for the above violations at three (a low to medium probability). BR Korzenko at 75. This calculation considered the inadequacy of the protective system used, that there were three employees directly in the

“zone of danger,” the likelihood of a cave-in and whether the employees should be able to get to safety. Factors such as the shoring that was used for the conditions, number of employees, the exposure time, and employees’ ability to egress from the trench were considered. BR Korzenko at 54. The employee’s statements regarding the exposure time, their training, and Mr. Heaton’s qualification as a competent person at the work site were acknowledged and factored into the calculation. These factors helped lower the probability score. BR Korzenko at 76-80.

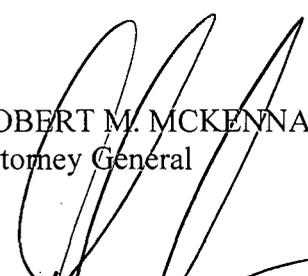
The Board’s order found the testimony of Inspector Korzenko “persuasive in how he reached a probability factor of three.” BR at 35. The citation reasonably took into account the moderating factors that lowered the score to the low middle range. *Id.* The Department did not abuse its discretion in calculating the penalty amounts. The Board’s finding that the penalty calculation by the Department for both violations to be reasonable and correct is supported by substantial evidence. *See* BR at 37. The penalty amounts should be affirmed.

## VII. CONCLUSION

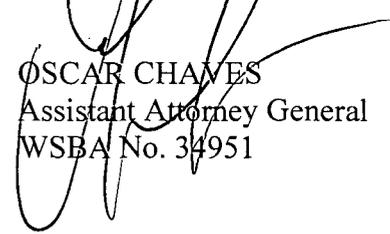
For the foregoing reasons, the Department respectfully requests that this Court affirm the superior court’s March 29, 2012 decision, thereby affirming the Board’s November 22, 2010 Order.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of September,

2012.



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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON

1 IN RE: PILCHUCK CONTRACTORS, INC. ) DOCKET NO. 09 W0005  
2 CITATION & NOTICE NO. 313224354 ) PROPOSED DECISION AND ORDER

3 INDUSTRIAL APPEALS JUDGE: Timothy L. Wakenshaw

4 APPEARANCES:

5 Employer, Pilchuck Contractors, Inc., by  
6 AMS Law, P.C., per  
7 Aaron K. Owada  
8

9 Employees of Pilchuck Contractors, Inc., by  
10 Operating Engineers Local #612,  
11 None  
12 Laborers Local #252  
13 None  
14 Plumbers & Pipefitters Local #32,  
15 None

16 Department of Labor and Industries, by  
17 The Office of the Attorney General, per  
18 W. Martin Newman

19 In Docket No. 09 W0005, the employer, Pilchuck Contractors, Inc., filed an appeal with the  
20 Board of Industrial Insurance Appeals on July 13, 2009, from Citation and Notice No. 313224354 of  
21 the Department of Labor and Industries dated July 6, 2009. In this Citation and Notice, the  
22 Department found the firm to have committed a serious violation of WAC 296-155-655(3)(b), a  
23 serious violation of WAC 296-155-655(10)(b), and a serious violation of WAC 296-155-657(1)(a) for  
24 a total penalty of \$9,450. The Department order is **AFFIRMED AS MODIFIED**.

25 **PROCEDURAL AND EVIDENTIARY MATTERS**

26 On November 4, 2009, the parties agreed to include the Jurisdictional History in the Board's  
27 record. That history establishes the Board's jurisdiction in this appeal.

28 The deposition of Jeff Heaton taken August 6, 2010, was published upon receipt at the  
29 Board of Industrial Insurance Appeals and all objections and motions to strike made therein are  
30 overruled and denied. Deposition Exhibit Nos. 1 through 3 correspond with Exhibits Nos. 1 through  
31 3, and will not be added to the Board's exhibits.

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ISSUES PRESENTED

1. Whether Pilchuck Contractors, Inc., violated WAC 296-155-655(3)(b) at a job site in Tacoma, Washington on or about June 16, 2009, by not having sufficient means of egress from an excavated trench?
2. Whether Pilchuck Contractors, Inc., violated WAC 296-155-655(10)(b) at a job site in Tacoma, Washington on or about June 16, 2009, by not placing or keeping materials or equipment at least two feet from an excavated trench?
3. Whether Pilchuck Contractors, Inc., violated WAC 296-155-657(1)(a) at a job site in Tacoma, Washington on or about June 16, 2009, by not sufficiently protecting its workers from a cave-in by means of an adequate protective system in accordance with the WAC?
4. Whether Pilchuck Contractors, Inc. had or should have had knowledge of the hazardous exposure to its workers at the job site in question on or about June 16, 2009?
5. If any of the cited violations are deemed to have occurred at the job site on or about June 16, 2009, whether Pilchuck Contractors, Inc., has established the affirmative defense of employee misconduct as defined in RCW 49.17.120(5) with regard to those violations?

EVIDENCE PRESENTED

The Department presented John Korzenko, the Department's safety compliance officer who performed the inspection on Pilchuck's work site on June 16, 2009 in Tacoma, Washington. He arrived at the work site at 9 a.m.

Mr. Korzenko drove past the work site and noticed the trench depicted in Exhibit Nos. 1 through 3 and noticed that a worker was climbing out of the trench using the sling that was attached to bucket of the excavator and the shield. The ladder shown in the exhibits was not in the trench at that time. The worker scrambled and pulled himself up and out using the sling. Mr. Korzenko directed the workers to put the ladder in the trench once he made contact with them.

There were three workers in the trench when he arrived. Jeff Heaton was still in the trench. He admitted he was the foreman and the 'competent person'. Mr. Korzenko also spoke to another worker who was identified as Scott Stone. The inspector learned that the excavation had to do with communications lines.

Mr. Korzenko then went through a list of questions directed at the 'competent person', and Mr. Heaton answered those questions positively about his understanding of trenching safety and what his responsibilities were. He determined that Mr. Heaton was the 'competent person'. He also interviewed Mr. Stone about the trench and what was going on.

1 The inspector classified the soil where the trenching was occurring as Type C which the  
2 least cohesive type of soil. He went through the employer's rights with Mr. Heaton and got his  
3 consent to open an inspection.

4 Mr. Korzenko proceeded to inspect the site and estimate measurements. He did not get in  
5 the trench but estimated and obtained Mr. Heaton's agreement on them. The trench was about  
6 15 feet long and he measured with a tape that it was 40 inches across at the top in Exhibit No. 2  
7 where the sledge hammer is laying. He estimated that the trench was at least eight feet deep  
8 based on the shielding which is generally 4 by 8 and these were resting on the four foot side. The  
9 spoils pile rose above that. The slope of the spoils pile was 35 to 40 degrees and he used an  
10 inclinometer to measure that angle. He also noted that the spoils pile was to be set back two feet  
11 from the edge of the trench and it was obviously not as shown in the exhibit photos. He explained  
12 that the trench was a different depth in different areas. In some places it was four feet or less.

13 Next, Mr. Korzenko did the closing conference with Jeff Heaton. At a later time he reviewed  
14 the inspection with Marv Larue and Ron Martinez before writing his report. He checked for an  
15 accident prevention program, records of safety meetings, and the tabulated data for the shoring.  
16 He concluded that the company's accident prevention program was sufficient.

17 Mr. Korzenko requested information from the company and received copies of the accident  
18 prevention program and the tabulated data for the speed shoring used by the company. These  
19 materials indicated that any trenches deeper than four feet needed means of egress in the form of  
20 ladders, ramps or stairs. The tabulated data from the shoring company indicated that for trench  
21 depths of 6 to 10 feet, two hydraulic jacks would be needed vertically to hold the shoring.

22 The inspector recommended that three citations be issued. The first was a violation of  
23 WAC 296-155-655(3)(b). Mr. Korzenko noted that no means of egress was provided for three  
24 workers in a trench 8 to 10 feet deep as a violation of the WAC. The citation was considered  
25 serious because the risk of cave in included injury and possible death.

26 The parties stipulated that the three citations' penalties were all calculated the same way  
27 with a severity rating of 6 and a probability rating of 3. A good faith deduction of 20 percent was  
28 given and a 10 percent deduction given for a good history. There was no deduction for size  
29 because the company employs over 250 people. The inspector explained that he assigned a  
30 probability of three on all three penalty calculations based on a 'low medium' probability. He took  
31 into account the depth of the trench and that it was in Type C soil with some sloughing off  
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1 appearing in the trench. He also took into account that the three workers were in the trench for only  
2 a limited amount of time, but that the shoring was not adequate.

3 The inspector noted that the second citation was for a violation of WAC 296-155-655(10)(b).  
4 This code requires that any spoils pile from a trench be at least two feet away from the edge of the  
5 trench and in this case it was not. The hazard is that the weight of pile will cause the trench to cave  
6 in if it is too close. The citation was serious because the hazard of a cave in involves injury or  
7 death as a possibility.

8 Mr. Korzenko identified the third citation as a violation of WAC 296-155-657(1)(a) which  
9 essentially involved the inadequate shoring in the trench. He explained that the soil type was C  
10 which was the most prone to caving in. He explained that the tabulated data required the use of  
11 two hydraulic jacks for each shoring sheet and the shoring sheets were not close enough together.  
12 The serious hazard was, again, from a possible cave in with injury or death a possibility. There  
13 were three workers exposed to this hazard.

14 On cross examination, the inspector admitted that the general superintendant for the  
15 company on that project, Marvin Larue, was not on the site at the time of the inspection.  
16 Mr. Korzenko admitted that his inspection was the first time he saw the site and he did not see what  
17 it looked like before the excavation began. The inspector did not measure the length of the trench  
18 but estimated it to be 15 feet. Scott Stone was the worker who got out of the trench using the sling  
19 when he first came onto the work site.

20 He did not measure the depth of the trench at any point. He admitted that the trench was  
21 deepest in the middle and got more shallow toward the ends. The ladder in Exhibit No. 1 shows  
22 nine rungs, a foot apart, to the top of the trench, but the inspector admitted the ladder was at an  
23 angle. He also admitted that the width at the top of the trench varied from the 40 inch  
24 measurement he had taken in one location. He admitted that the workers were between the  
25 shoring boards shown in Exhibit No. 3 where the shovel is laying.

26 For the requirements of shoring as described in Exhibit No. 4, Mr. Korzenko admitted  
27 sheeting is used to prevent raveling or sloughing and that if that is not present you can simply use  
28 the hydraulic jacks alone. He admitted that under six feet deep that only one hydraulic jack is  
29 required.

30 Mr. Korzenko admitted that he reviewed the company's safety plan and concluded they had  
31 adequate safety training in trenching. The company had weekly safety meetings which were  
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1 sufficient as well. He also concluded the company was conducting at least weekly safety  
2 inspections.

3 The inspector admitted that he scored the probability for the penalty at a 3. He took into  
4 account that the workers in the trench were there for about five minutes and were trained in trench  
5 safety. He knew that a 'competent person' was on the site. Some shoring installed in the trench  
6 also lowered the probability. He admitted that most of the spoils pile was more than two feet away  
7 from the edge of the trench.

8 Mr. Korzenko admitted he was at the site for an hour and a half and there were no cave-ins  
9 or sloughing in the trench while he was there.

10 The Department presented the testimony of Jeff Heaton, the equipment operator and  
11 foreman on the job site that was inspected on June 16, 2009. He began working for Pilchuck  
12 Contractors in 2000 and left the company early in 2010.

13 Mr. Heaton detailed the various safety training he has received by the company over the  
14 years. This included annual meetings and training for foreman that included detailed training  
15 regarding trenching safety. He has received specific training in the 'competent person' designation  
16 for a work site.

17 At the particular work site on the day of the inspection he was the foreman. They had been  
18 on that particular site for two days. They were lowering Sprint fiber pipe into the trench when it  
19 broke and they were in the act of putting a splint on it so they could continue. They had put in the  
20 shoring and were in the process of doing that when the inspector showed up.

21 His crew had three or four workers in it that day. His immediate supervisor was a man  
22 named Ryan, and above him was Marvin Larue. He reported to Ryan almost every day on the  
23 project. Mr. Larue was usually at the Monday morning safety meeting and then intermittently after  
24 that.

25 On the day of the inspection, Mr. Heaton was the individual who determined how the trench  
26 safety was going to occur and what shoring, if any, was going to be used. He had the tabulated  
27 data for the shoring but did not specifically refer to it on that day. He simply directed that shoring be  
28 put in as shown in Exhibit Nos. 1 through 3, thought it looked safe, and entered the trench. He  
29 noted that a ladder was in the trench originally. It was removed because he needed two men in the  
30 trench to splint the break and there wasn't enough room to work with the ladder there. The  
31 inspector appeared when the ladder was removed. He did not recall the strap or sling being there,  
32 although he noted that was how they helped place the shoring sheets into the trench.

1 He admitted he was the one who decided where the spoils pile was going to be. He also  
2 admitted that they needed to be eight and a half deep for where the pipe was going. They  
3 measured from the top of the trench in spots as they went to make sure they were that deep. He  
4 admitted that the soil type was C at the work site. It was granular in nature and caved in easily.

5 He admitted he was in the trench at the time the inspector appeared and that it was with  
6 another worker. They did not have a ladder in the trench.

7 Mr. Heaton stated that he received a written warning of employee misconduct for his  
8 behavior that day from his employer. It noted that he should have called the safety department  
9 when the inspector showed up and he went against the training that the company provided. He had  
10 no other form of discipline.

11 On cross examination, Mr. Heaton noted that the work space at the site of the inspection  
12 was tight with private property on one side and the railroad on the other side. He knew that the  
13 spoils pile was to be two feet from the edge of the trench.

14 He agreed that the trench was shallower at the ends. He also stated that even if the trench  
15 was three feet deep at the ends the spoils pile may have impeded any egress from the ends. He  
16 could not be more specific from just his memory and without seeing the photos. Mr. Heaton initially  
17 testified by telephone without the photos. He explained that the photos may not help him testify as  
18 to exact measurements and that only being at the site would allow him to do that.

19 Mr. Heaton acknowledged that the work in the trench was going on between the shoring with  
20 the single hydraulic jack. He acknowledged that speed shoring can be used with the jacks alone or  
21 with sheeting. He thought the area was safe as shored. He admitted that they usually did not go  
22 as deep in their trenching as they did on the day of the inspection. They had plenty of shoring  
23 available on that day at that work site.

24 As far as the spoils pile is concerned, Mr. Heaton recalled that shoring had been put in the  
25 immediate area of the work and it was level with the top of the trench. He thought the load bearing  
26 soil had been taken care of by the shoring. He didn't think the spoils pile needed to be back from  
27 the edge because of the shoring. He admitted he should have pushed the spoils pile back further  
28 from the edge, but could not because of the tightness of the work area.

29 Mr. Heaton admitted that he attended the safety meetings and trainings as indicated in  
30 Exhibit Nos. 6, 7, 8, and 10. He received the pocket guide regarding 'competent person' that is  
31 Exhibit No. 5.

1 He admitted that Exhibit No. 11 was the written warning he received as a result of the  
2 citation. He had never been disciplined for trenching violations before. He was aware of the  
3 company's policy that he could be terminated if he received a third disciplinary action by the  
4 company.

5 The testimony of Mr. Heaton was continued by deposition with his testimony on August 6,  
6 2010. He now had Exhibit Nos. 1 through 3 to reference with a grid system as to where on the  
7 photo he was referring to.

8 Mr. Heaton referred to Exhibit No. 1 and the shoring board on the left and closest to the front  
9 of the photo. He noted this was a 4 by 8 sheet and much of it is sticking out of the trench. He also  
10 noted that at the top of the trench at that board, the spoils pile was two feet back from the edge. He  
11 explained that the two men in the trench were working right where the ladder was and not in the  
12 trench closer to the excavator. He also identified the work area in exhibit three as the space where  
13 the shovel is shown at the bottom of the trench.

14 Mr. Heaton was directed to Exhibit No. 2 and explained that the two pieces of shoring braced  
15 by the hydraulic jack are probably only six feet long and so the trench was only six feet deep at the  
16 center. He also agreed that the trench at the steel plate in the foreground of the photo was only  
17 2 1/2 feet deep and the incline from the middle of the trench to the steel plate slopes up  
18 dramatically and could provide a means of egress out of the trench. He agreed that this slope  
19 could be considered a ramp as a means of egress.

20 Continuing referring to Exhibit No. 2, Mr. Heaton noted that the shoring boards with the jack  
21 were actually up above the top of the trench and would have kept the spoils pile from coming into  
22 the trench. He stated the spoils pile itself sloped at a one to one ratio.

23 He estimated they were working in the trench for about 15 minutes. He also noted they were  
24 in the trench to splint the pipe and measure it for fabrication on the day before the inspection. On  
25 the day of the inspection, it was to complete the splint in a permanent way. They were not able to  
26 put the permanent splint on before the inspection so the exhibit photos do not show the permanent  
27 fix.

28 The employer presented the testimony of Ron Maritnez, the safety director for the company.  
29 He is in charge of safety and training. This includes training on excavation and trench safety  
30 because that is such an integral part of what the company is involved in. He has held this position  
31 for 11 years.

32

1 With every new employee hired by the company there is a safety orientation that is provided  
2 that includes safety in trenching and excavation. There is also additional individualized training that  
3 focuses on what a particular worker is going to be doing. Some workers come from the union  
4 where they have also received similar training.

5 Mr. Martinez identified Exhibit No. 6 as some excavation training materials that were  
6 provided by a third party who did some training for them. He identified Exhibit Nos. 7 and 8 as the  
7 same. He identified Exhibit No. 5 as the pocket guide that the company provides to workers in  
8 general and workers designated as the 'competent person' in particular. This guide was specifically  
9 provided to Jeff Heaton. It includes guides to speed shoring and the jacks used.

10 Mr. Martinez stated that sheeting or shoring is not always needed with the use of jacks. He  
11 referred to Exhibit No. 4 for manufacturer's tabulated data on the use of vertical shores. He noted  
12 at page 4 at section 5.1 that "Sheeting is used only to prevent local raveling or sloughing of the  
13 trench face between the vertical shores." In Exhibit No. 5 it notes that there can be space or  
14 spaces between the shoring sheets as well. He agreed that in Exhibit No. 4 at page 4, section 5.6  
15 stated that only one hydraulic jack was necessary for trenches six feet or less in depth. The soil  
16 type does not matter for this particular rule.

17 Mr. Martinez identified Exhibit No. 9 as the roster of people who attended the referenced  
18 training in March 2007. Mr. Heaton's name appears there.

19 He identified Exhibit No. 10 as the safety meeting minutes. He reiterated prior testimony that  
20 the company has weekly safety meetings. The exhibit shows that Heaton attended safety meetings  
21 in 2008 and 2009. These meetings involved trenching issues, vibration as it affects trenching, and  
22 using trenching boxes and the dangers of sloughing soil in a trench.

23 Mr. Martinez stated that at the time of the inspection, the company was taking steps to insure  
24 that safety rules were being followed in the field. He listed those steps as the weekly safety  
25 meetings, the various training provided the workers, the tools and safety equipment provided  
26 workers, and follow-up inspections.

27 He noted that Marvin Larue was also responsible for seeing that workers were following the  
28 safety rules. He noted that Ryan Katola was hired to help with spot checks on the project that was  
29 involved in the inspection. Mr. Katola reported directly to Mr. Larue.

30 Mr. Martinez stated that Mr. Heaton had not had any safety issues raised prior to this  
31 inspection. He had worked for the company a long time and was considered well seasoned. He  
2 received an award in 2007 from the company for his outstanding safety record.

1 Mr. Martinez stated that Exhibit No. 11 was the written disciplinary warning received by  
2 Jeff Heaton on June 17, 2009 regarding the citation involved in this appeal. He noted that the  
3 disciplinary policy was in the handbook. There were three warnings with possible termination on  
4 the third warning. Punishments included a written or verbal warning, time off without pay of three  
5 days to a week, and termination. He noted that each disciplinary action was dependant on the  
6 seriousness of the situation and the circumstances of the incident. 6/17/10 Tr. at 153. In this case,  
7 Mr. Heaton received a written warning. He was not involved in determining the level of discipline  
8 that Mr. Heaton received. He believed that the company's protocols regarding discipline had been  
9 followed in this case.

10 On cross examination, Mr. Martinez indicated that he did not have a copy of the employee  
11 handbook with the disciplinary policy in it with him. He stated that there is no standardized  
12 investigation that the company performs on its own when a state compliance officer has visited one  
13 of their work sites. It depends on the circumstances. 6/17/10 Tr. at 161. If he does get to the site  
14 while the compliance officer is there, he observes what has happened and assesses the situation  
15 for additional training if needed.

16 Mr. Martinez is a salaried employee of the company and reports directly to the president,  
17 David Nelson. He explained that when an inspection occurs from a state compliance officer, there  
18 is no particular procedure for notifying people in management other than workers reporting to their  
19 supervisors. At some unknown point the management would report the incident to him. If  
20 Mr. Heaton had reported the incident to him, he would have contacted the superintendant on the  
21 site to discuss the situation. In this case that would have been Marvin Larue.

22 Again, Mr. Martinez reiterated that the disciplinary system involved verbal and written  
23 warnings, time off without pay, and termination. He noted that circumstances dictated which is  
24 used in a given circumstance. 6/17/10 Tr. at 172.

25 He estimated that the company has approximately 60 crews working in the field on any given  
26 day.

27 Finally, the employer presented the testimony of Marvin Larue, the superintendant on the  
28 project that was involved in the job site that was inspected. He was unemployed at the time of his  
29 testimony but had worked for Pilchuck Construction for 14 years prior to his lay off. He was the  
30 superintendant for the project at issue.

31 Mr. Larue testified that he was visiting the project and its crews in that general location three  
32 to four times per week. Ensuring safety is one of his job duties. He agreed that the company

1 places a value on enforcing safety rules and that is made real with at least weekly safety meetings  
2 and yearly mandatory safety training for key employees including foremen.

3 He has over 25 years experience and training in trenching and excavation. He described the  
4 different forms of speed shoring including the sheets and the jacks. He noted that sheets are often  
5 times cut to size. He also noted that the sheets typically have hand holes for gripping on each side  
6 of the sheets. He stated he could not see the holes in the bottom ends of the sheets shown in  
7 exhibit two with the jack holding them up. He stated that the sheets in Exhibit No. 2 had been  
8 altered or cut.

9 He stated that Jeff Heaton was one of his most trusted foreman. He was willing to send him  
10 out of state on a project because of his reliability. He had not had any problems with Mr. Heaton  
11 with regards to trench safety before this inspection. He estimated that spot checked Mr. Heaton's  
12 crew around the time of the inspection two to three times per week.

13 He acknowledged that ramps and ladders are proper means of egress out of a trench that is  
14 deeper than four feet.

15 He admitted that he issued and signed the disciplinary warning that is marked as Exhibit  
16 No. 11. He did this to let Heaton know about the seriousness of the situation and also to let Sound  
17 Transit know that the company was on top of it. He noted that a first safety violation in the  
18 company is just a written warning unless it is a more severe violation. The day after the inspection  
19 he met with the whole crew and went over the safety issues and told them to use the shoring  
20 supplies.

21 On cross examination, Mr. Larue stated he was probably supervising six or seven crews on  
22 the project at the time of the inspection. He was also managing three or four other projects at the  
23 same time. He did a lot of traveling between the different projects.

24 He was not at the work site when the trench was initially dug that is shown in Exhibit Nos. 1  
25 through 3. Mr. Larue stated that Mr. Heaton called him when the inspector showed up at the work  
26 site. Mr. Larue told Mr. Heaton to notify the safety department of the company right away and  
27 Mr. Heaton did. He stated that he knew that because he talked to the safety department later. He  
28 noted that an internal investigation into the circumstances of the inspection would typically be done  
29 by the safety officer in the company and he would help if asked.

30 He did not know the depth of the trench and admitted that he was never there when the  
31 trench was open. He only has seen the photos in Exhibit Nos. 1 through 3. He did not know the  
2 depth of the trench but stated that ladder rungs are typically one foot apart.

1 DECISION

2 I am persuaded that Citation No. 1-1 should be vacated. This is the citation regarding the  
3 means of egress. The applicable WAC section refers to "ramps" as an appropriate means of  
4 egress and Exhibit No. 7 defines ramps as including one consisting of soil. The factual testimony  
5 from the inspector and Mr. Heaton acknowledged that the 15 foot trench sloped up at both ends to  
6 less than four feet. Taken all this together, I am convinced that these ramps provided a safe means  
7 of egress for the workers in the trench. Citation No. 1-1 shall be vacated along with its penalty.

8 I am equally convinced, however, that Citation Nos. 1-2 and 1-3 occurred and were properly  
9 cited.

10 Despite the conflicting testimony of Mr. Heaton regarding the depth of the trench at its  
11 deepest point, it was clearly over eight feet deep based on the ladder rung estimate as shown in the  
12 photograph exhibits. Mr. Heaton acknowledged initially that they needed to go eight and a half feet  
13 down to get what they were after and that this was deeper than most of their work on this project. It  
14 was also clear that only one shoring jack was used for the trench walls at this depth and that the  
15 tabulated data requires two. Mr. Heaton admitted he had the data but did not consult it that day. I  
16 find that Citation No. 1-2 was correctly cited.

17 Likewise, the photographs clearly show the spoils pile coming to rest at the edge of the  
18 trench and clearly not two feet away. This was occurring not on just one side of the trench but on  
19 both sides. Testimony was elicited by the employer to establish that the shoring sheets at the  
20 deepest part of the trench came above the top of the trench to hold the spoils pile back. I don't  
21 think this was sufficient to comply with the WAC section and, clearly, this retaining feature was not  
22 present along the length of the trench on both sides. I find that Citation No. 1-3 was correctly cited.

23 The employer only contested the 'probability' portion of the penalty calculation. I found the  
24 testimony of Mr. Korzenko persuasive in how he reached a probability factor of three. He took into  
25 account the moderating factors and this lowered it to the middle of the range. This was reasonable.

26 On the question of employer knowledge of the hazard involved, I find that  
27 Pilchuck Contractors are in the trenching business. They are digging in multiple sites in Puget  
28 Sound every work day. They take pains to educate their workers in trenching safety. They knew or  
29 should have known that trenching hazards were potentially present at this site.

30 Finally, I am not convinced that the employer met its burden regarding the affirmative  
31 defense of employee misconduct. The company should be commended for its emphasis on safety  
32 and training and they clearly do a good job at getting this kind of information into the hands and

1 heads of its workers. I am not convinced, however, that the company had a sufficient system of  
2 random safety checks or that their disciplinary system was clear to workers and strictly enforced. It  
3 was somewhat unclear whether the superintendent of the project or the safety officer was  
4 responsible for seeing to discipline when a safety rule was violated. It also appeared that  
5 application of discipline was somewhat variable depending on the circumstances of each violation.  
6 This defense was and is not meant to be an easy showing for employers and Pilchuck Contractors  
7 did not meet all the elements in this appeal.

8 I am vacating Citation No. 1-1 and its attendant penalty and affirming Citation Nos. 1-2 and  
9 1-3 in their entirety.

10 **FINDINGS OF FACT**

- 11 1. On June 26, 2009, the Department of Labor and Industries issued an  
12 Inspection Report in response to an inspection near the intersection of  
13 Chandler Street and Tacoma Way in Tacoma, Washington with a  
14 closing conference on June 16, 2009. The Department issued Citation  
15 and Notice No. 313224354 on July 6, 2009 to Pilchuck Contractors, Inc.,  
16 The Citation and Notice cited the firm for a serious violation of  
17 WAC 296-155-655(3)(b), a serious violation of WAC 296-155-  
18 655(10)(b), and a serious violation of WAC 296-155-657(1)(a) for a total  
19 penalty of \$9,450. On July 9, 2009, the firm filed a Notice of Appeal of  
20 the Citation and Notice with the Department of Labor and Industries  
21 Safety Division, and on July 13, 2009, the file was transmitted to the  
22 Board of Industrial Insurance Appeals where the appeal was assigned  
23 Docket No. 09 W0005.
- 24 2. The trench at the inspected work site of Pilchuck Contractors, Inc., on  
25 June 16, 2009 in Tacoma, Washington was approximately 15 feet long  
26 and 40 inches wide across its top. The excavation was in type C soil  
27 which was granular and not very cohesive. At its deepest point, where  
28 the Pilchuck employees were working, the trench was over eight feet  
29 deep. The trench sloped up at each end to a depth of less than four  
30 feet. The bottom edge of the spoils pile from digging the trench was  
31 less than two feet from the edge of the trench on both sides of the  
trench. There were three employees working in this trench in this  
condition for at least a few minutes, and in the deepest part of the  
trench. At the deepest part of the trench it was shored with two sheets  
of board separated by a single speed shoring hydraulic jack.
3. On June 16, 2009, Pilchuck Contractors, Inc., did not violate  
WAC 296-155-655(3)(b), and the soil ramps on each end of the 15 foot  
trench provided a sufficient means of egress from the trench.

- 1 4. On June 16, 2009, Pilchuck Contractors, Inc., did violate WAC 296-155-  
2 655(10)(b) by having a trench where the edge of the spoils pile was less  
3 than two feet from the edge of trench on both sides with insufficient  
4 retaining devices in these areas.
- 5 5. On June 16, 2009, Pilchuck Contractors, Inc., did violate WAC 296-155-  
6 657(1)(a) by not having two speed shoring hydraulic jacks supporting  
7 the trench walls where the trench was over eight feet deep, and as  
8 required by the manufacturer's tabulated data.
- 9 6. Pilchuck Contractors, Inc., could have known with the exercise of  
10 reasonable diligence that the violations of WAC 296-155-655(10)(b) and  
11 WAC 296-155-657(1)(a) were occurring at its job site that was inspected  
12 on June 16, 2009 in Tacoma, Washington.
- 13 7. The penalty calculations by the Department of Labor and Industries for  
14 the violations of WAC 296-155-655(10)(b) and WAC 296-155-657(1)(a)  
15 by Pilchuck Contractors, Inc. on June 16, 2009 were reasonable and  
16 correct.
- 17 8. Pilchuck Contractors, Inc., had a thorough safety program in place on  
18 June 16, 2009 designed to prevent the kind of violations cited by the  
19 Department of Labor and Industries on that day.
- 20 9. Pilchuck Contractors, Inc., was adequately communicating its safety  
21 rules and procedures to its employees as of June 16, 2009.
- 22 10. Pilchuck Contractors, Inc., was not taking adequate steps to discover  
23 safety rule violations within the company as of June 16, 2009.
- 24 11. Pilchuck Contractors, Inc., was not effectively enforcing its safety  
25 program in practice as of June 16, 2009.

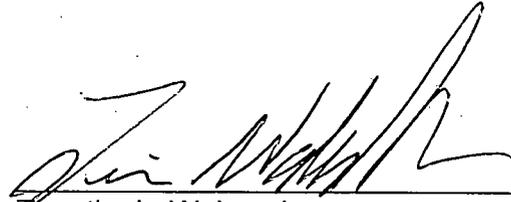
#### CONCLUSIONS OF LAW

- 26 1. The Board of Industrial Insurance Appeals has jurisdiction over the  
27 parties to and the subject matter of this appeal.
- 28 2. On June 16, 2009, Pilchuck Contractors, Inc., did not commit a serious  
29 violation of WAC 296-155-655(3)(b).
- 30 3. On June 16, 2009, Pilchuck Contractors, Inc., did commit a serious  
31 violation of WAC 296-155-655(10)(b) and the assessed penalty of  
32 \$3,150 is correct.
4. On June 16, 2009, Pilchuck Contractors, Inc., did commit a serious  
violation of WAC 296-155-657(1)(a) and the assessed penalty of \$3,150  
is correct.
5. Pilchuck Contractors, Inc., did not establish the affirmative defense of  
employee misconduct as contained in RCW 49.17.120(5)(a).

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6. Citation and Notice 313224354 issued by the Department of Labor and Industries is modified to vacate Citation 1-1 regarding WAC 296-155-655(3)(b) and its penalty, and to affirm Citation Nos. 1-2 and 1-3 and their penalties for a total penalty of \$6,300.

DATED: SEP 23 2010

  
\_\_\_\_\_  
Timothy L. Wakenshaw  
Industrial Appeals Judge  
Board of Industrial Insurance Appeals

RTIFICATE OF SERVICE BY MAIL

I certify that on this day I served the attached Order to the parties of this proceeding and their attorneys or authorized representatives, as listed below. A true copy thereof was delivered to Consolidated Mail Services for placement in the United States Postal Service, postage prepaid.

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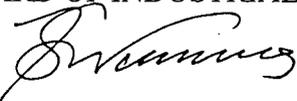
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Dated at Olympia, Washington 9/23/2010  
BOARD OF INDUSTRIAL INSURANCE APPEALS

By:   
J. SCOTT TIMMONS  
Executive Secretary

In re: PILCHUCK CONTRACTORS INC  
Docket No. 09 W0005

FILED  
COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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43327-3-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

PILCHUCK CONTRACTORS, INC.,

Appellant,

v.

DEPARTMENT OF LABOR AND  
INDUSTRIES OF THE STATE OF  
WASHINGTON,

Respondent.

CERTIFICATE OF  
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on the below date, I caused to be served the Brief of Respondent, Department of Labor and Industries and this Certificate of Service in the below-described manner.

**Via First Class United States Mail, Postage Prepaid to:**

Aaron Owada  
AMS Law PC  
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Lacey, WA 98516

**Via First Class United States Mail, Postage Prepaid + 1 Copy to:**

Mr. David Ponzoha  
Court Administrator/Clerk  
Court of Appeals, Division Two  
950 Broadway, Suite 300  
Tacoma, WA 98402

Signed this 27 day of September, 2012, in Tumwater, Washington

by:



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