

NO. 44918-8-II

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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ACTIVE CONSTRUCTION INC., a Washington Corporation;

Appellant,

v.

WASHINGTON STATE DEPARTMENT  
OF LABOR & INDUSTRIES,

Respondent,

STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

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COURT OF APPEALS  
DIVISION II

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Appeal from Superior Court of Pierce County

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**APPELLANT'S OPENING BRIEF**

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**TABLE OF CONTENTS**

I. INTRODUCTION .....1

II. ASSIGNMENTS OF ERROR .....1

III. ISSUES ..... 1-2

A. Where the Department has failed to meet  
the burden to establish exposure to a hazard ..... 1-2

B. Where the Department incorrectly relied upon  
speculation to determine the duration of alleged  
exposure .....2

IV. STATEMENT OF THE CASE.....2

A. PROCEDURAL BACKGROUND.....3

V. ARGUMENT .....4

A. STANDARD OF REVIEW .....4

1. Where the Department failed to meet  
the burden to establish exposure to a hazard .....5

2. Where the Department incorrectly relied upon  
speculation to determine the duration of alleged  
exposure .....11

VI. CONCLUSION.....13

**TABLE OF CONTENTS**

I. INTRODUCTION .....1

II. ASSIGNMENTS OF ERROR .....1

III. ISSUES ..... 1-2

A. Where the Department has failed to meet  
the burden to establish exposure to a hazard ..... 1-2

B. Where the Department incorrectly relied upon  
speculation to determine the duration of alleged  
exposure .....2

IV. STATEMENT OF THE CASE.....2

A. PROCEDURAL BACKGROUND.....3

V. ARGUMENT .....4

A. STANDARD OF REVIEW .....4

1. Where the Department failed to meet  
the burden to establish exposure to a hazard .....5

2. Where the Department incorrectly relied upon  
speculation to determine the duration of alleged  
exposure .....11

VI. CONCLUSION.....13

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Eatherly Const. Co v. Tennessee Dept. of Labor</i> , 232 S.W.3d 731, 737 (Tenn. Ct. App. 2006).....	8, 9
<i>Secretary of Labor v. Donohue Industries, Inc.</i> , Docket No. 99-0191 (2003).....	7
<i>Trinity Indus., Inc., v. OSHRC</i> , 206 F.3d 539, 542 (5 <sup>th</sup> Cir. 2000) .....	7

### STATE CASES

<i>Adkins v. Aluminum Company</i> , 110 Wn.2d 128, 147 (1988).....	6
<i>Department of Ecology v. Campbell &amp; Gwinn, L.L.C.</i> , 146 Wn.2d 1, 9, 43 P.3d 4 (2002).....	5
<i>Department of Labor &amp; Industries v. Gongyin</i> , 154 Wn.2d 38, 44, 109 P.3d 816 (2005).....	5
<i>J.E. Dunn NW., Inc. v. Dep't of Labor &amp; Indus</i> , 139 Wn. App. 35, 42 156 P.3d 250 (2007).....	4
<i>Mowat Constr. Co. v. Dep't of Labor &amp; Indus</i> , 148 Wn. App. 920, 925, 201 P.3d 407 (2009).....	4
<i>Ino Ino, Inc. v. City of Bellevue</i> , 132 Wn.2d 103, 112, 937 P.2d 154, amended, 943 P.2d 1358 (1997).....	4-5
<i>Olympia Glass Company</i> , 95 W0455.....	7
<i>State v. Ryan</i> , 103 Wn.2d 165, 178, 691 P.2d 197 (1984).....	5
<i>The Quadrant Corporation v. Growth Management Hearings Board</i> , 154 Wn.2d 224, 239, 110 P.3d 1132 (2005).....	5

**OTHER**

*Gary Concrete Prods., Inc.*,  
15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD .....7

*Secretary of Labor v. Fishel Co.*,  
18 O.S.H. Cas. (BNA) ¶ 1530 (O.S.H.R.C.A.L.J. Aug. 28, 1998)..... 8-9

**STATE STATUTES**

RCW 49.17.150(1).....4

RCW 49.17.180(6).....2,5,6

**WASHINGTON ADMINISTRATIVE CODE**

WAC 296-12-115(2)(b) .....8

WAC 296-155-657(1)(a) .....3

WAC 296-900-14005.....11

WAC 296-900-14010.....11

## **I. INTRODUCTION**

Appellant, seeks review of the Superior Court decision affirming a Washington Industrial Safety and Health (“WISHA”) Decision and Order of the Board of Industrial Insurance Appeals (the “Board”) involving the Department of Labor and Industries (the “Department”) citations for trench and shoring violations. CABR p. 21-30)<sup>1</sup>.

## **II. ASSIGNMENTS OF ERROR**

In reference to the Board’s Decision and Order, the Appellant respectfully asserts the following assignments of error:

1. The Appellant excepts to and petitions for review Findings of Fact Nos. 2, 4 and 5 as to the issue of affirmation and penalty calculation;
2. The Appellant excepts to and petitions for review Findings of Fact Nos. 2 and 3 as to the issue of affirmation and penalty calculation;
3. The Appellant excepts to and petitions for review all evidentiary rulings that were adverse to the Appellant .

## **III. ISSUES**

**A. Where the Department has failed to meet the burden to establish exposure to a hazard as the employee at issue was not working in a point at the trench measuring above four feet, nor**

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<sup>1</sup> References to the Certified Appeal Board Record are hereby referred to as “CABR.”  
References to the record transcripts will be referred to as “Tr.”

**can the trench in itself be considered a hazard, as WISHA does not impose strict liability, did the IAJ err in finding the Department established all prima facie elements of the violation as required by RCW 49.17.180(6)?**

**B. Where the Department incorrectly relied upon speculation to determine the duration of alleged exposure and the inspector had no personal knowledge of duration of work, did the IAJ err in finding the Department correctly calculated the penalty amount for the Violation?**

#### **IV. STATEMENT OF THE CASE**

On November 10, 2010, the Appellant was working on a project at 6<sup>th</sup> Ave & N. Fife St. in Tacoma, WA. At the time the Appellant was in the process of replacing the existing water main and grading out certain parts for road widening. (Tr. p. 88).

The Department of Labor and Industries Safety and Health Compliance Officer, Mr. Scott McMinimy (hereinafter “Mr. McMinimy”), initiated an opening conference and site inspection after driving by the worksite and seeing what he perceived was a gentleman in a trench without any shoring. (Tr. p. 11, lines 2-4). Mr. McMinimy acknowledged that at the time he made the worksite observations he was not a certified industrial hygienist, not a certified safety professional; nor experienced a role as a competent person for trenching and excavation work. (Tr. p. 48, lines 9-22).

Despite the requisite expertise, upon completion of the inspection,

Mr. McMinimy issued the following repeat serious citation against the Appellant:

1-1 WAC 296-155-657(1)(a) alleging the employer did not ensure that employees working in an excavation of four feet or more in depth were protected from hazards of cave-ins by adequate protective system or sloping.

The alleged violation assessed a penalty of \$6,600.00

**A. PROCEDURAL BACKGROUND.**

On December 6, 2010, the Department issued one repeat serious violation against the Appellant. The Appellant made a timely appeal of the citation and the Department transferred the Appellant's Appeals to the Board of Industrial Appeals (hereinafter "Board") and a hearing was held on July 21, 2011. On September 16, 2011 the Industrial Appeals Judge (hereinafter "IAJ") issued a Proposed Decision and Order affirming Corrective Notice of Reconsideration Number 314619081. (CABR, p. 21-30).

The Appellant requested and was granted an extension to file review of the Proposed Decision and Order on September 19, 2011. (CABR p. 17). A Petition for Review was filed with the Board on October 20, 2011. (CABR, p. 12-16). The Board denied the Appellant's Petition for Review on November 3, 2011 which resulted in the Proposed Decision and Order becoming the Final Decision and Order of the Board. (CABR p.

1).

As such, Appellant filed a timely appeal to Pierce County Superior Court, and so this matter now respectfully comes before the Court for an administrative review.

The Appellant respectfully appears before this Court urging the Court reverse the Board's Decision and Order as it is contrary to the substantial weight of the record as presented.

## **V. ARGUMENT**

### **A. STANDARD OF REVIEW.**

In cases dealing with alleged violations of the Washington Industrial Insurance and Safety and Health Act (hereinafter "WISHA"), the standard of review is set forth in RCW 49.17.150(1). In a WISHA appeal, the court directly reviews the Board's decision based on the record before the agency. *See 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. *See 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. *See Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 112, 937 P.2d 154, amended, 943 P.2d

1358 (1997).

However, statutory interpretations for questions of law are reviewed by the appellate courts de novo. *See Department of Labor & Industries v. Gongyin*, 154 Wn.2d 38, 44, 109 P.3d 816 (2005). An appellate court's prime construction objective is to "carry out the legislature's intent." *See Department of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). To discern legislative intent, courts will look to the statute as a whole. *See The Quadrant Corporation v. Growth Management Hearings Board*, 154 Wn.2d 224, 239, 110 P.3d 1132 (2005). Further, courts must harmonize statutes and rules to give effect to both. *See State v. Ryan*, 103 Wn.2d 165, 178, 691 P.2d 197 (1984).

- 1. Where the Department has failed to meet the burden to establish exposure to a hazard as the employee at issue was not working in a point at the trench measuring above four feet, nor can the trench itself be considered a hazard, as WISHA does not impose strict liability, the IAJ erred in finding the Department established all prima facie elements of the violation as required by RCW 49.17.180(6).**

The Appellant respectfully asserts the IAJ erred when affirming the Corrective Notice of Redetermination Number 314619081. (CABR 29-30).

Case law and statute uphold the Department's burden of proving "HECK" for serious violations of WISHA. Washington was granted

authority by the federal government to administer the Occupational Safety and Health Act as a state plan administration. As such, the Washington State Department of Labor and Industries has statutory authority to issue a serious citation and levy a monetary penalty for serious violations of a WISHA safety or health code. However, the ability to issue a serious citation is not without limit. Not only must the Department establish that an employee was exposed to a serious hazard (one that could cause serious bodily injury or death), the Department must also establish that the cited Appellant either knew, or should have known of the presence of the violation. In relevant part, RCW 49.17.180(6) declares:

(6) For the purposes of this section, a serious violation shall be deemed to exist in a work place if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use in such work place, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

As WISHA is required to be as effective as the federal OSHA counterpart, Washington courts will consider decisions interpreting OSHA to protect the health and safety of all workers. *Adkins v. Aluminum Company*, 110 Wn.2d 128, 147 (1988). Federal case law has interpreted statues substantially similar to RCW 49.17.180(6). The Occupational Safety and Health Review Commission has provided guidance with regard

to the Department's requirement to affirmatively establish the "knowledge" element necessary to support a safety and health citation. See e.g., *Secretary of Labor v. Donohue Industries, Inc.*, Docket No. 99-0191 (2003). In *Donohue*, the Commission explicitly recognizes that, "Knowledge is a fundamental element of the Secretary of Labor's burden of proof for establishing a violation of OSHA regulations". *Donohue*, citing *Trinity Indus., Inc., v. OSHRC*, 206 F.3d 539, 542 (5<sup>th</sup> Cir. 2000). "To prove the knowledge element of its burden, the Secretary must show that the Appellant knew, or with the exercise of reasonable diligence could have known of the non-complying condition". *Donohue*, 206 F.3d at 542.

Moreover, in order to prove that an Appellant violated an OSHA standard, the Secretary must prove that (1) the standard applies to the working conditions cited; (2) the terms of the standard were not met; (3) employees were exposed or had access to the violative conditions; and (4) the Appellant either knew of the violative conditions or could have known with the exercise of reasonable diligence. *Gary Concrete Prods., Inc.*, 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD.

Furthermore, in a significant decision, the Board held in *Olympia Glass Company*, 95 W0455, that, the Department bears the burden of proof in WISHA cases. The Board declared:

[I]n appeals filed under the Washington Industrial Safety and Health Act (WISHA), it is the Department who has the burden of proving both the existence of a violation and the appropriateness of the resulting penalty. WAC 296-12-115(2)(b). An employer is not required to prove the Department acted arbitrarily in order to prevail in an appeal. Our decision on appeal must determine whether there is sufficient evidence in the record to affirm the Department's citation and the resulting penalty.

If any one element of HECK is missing, the Department's citation *must* be vacated. (*Emphasis added*).

In the case of *Secretary of Labor v. Fishel Co.*, the court found an employee's presence *in a trench was not in itself* considered exposure to an unsafe condition. 18 O.S.H. Cas. (BNA) ¶ 1530 (O.S.H.R.C.A.L.J. Aug. 28, 1998). (*Emphasis added*). In *Fishel*, where there was no evidence that the employee went beyond the encapsulation or any portion of the trench that exceeded statutory height and where the court determined that the employee would not enter the zone of danger there could not be exposure where there would be no reason to enter the "unsafe" portion of the trench. 18 O.S.H. Cas. (BNA) ¶ 1530 (O.S.H.R.C.A.L.J. Aug. 28, 1998).

Furthermore, in the case of *Eatherly Const. Co v. Tennessee Dept. of Labor*, the court again reiterated lack of cave-in protection did not constitute a violation of the regulation with the caveat that without

protection, no employee could enter the specific trench section. 232  
S.W.3d 731, 737 (Tenn. Ct. App. 2006).

Based upon the Findings in *Secretary of Labor v. Fishel Co.* and *Eatherly Const. Co v. Tennessee Dept. of Labor*, the Appellant respectfully asserts the IAJ has erred in the Proposed Decision and Order when stating “consequently, entry into a trench that fails to overall to comply with the applicable safety standard is in and of itself an exposure to a hazard.” (PD&O p. 26, lines 24-25 & *Id.*).

In the present case, the Appellant respectfully asserts the IAJ also erred when stating the record does not support the Appellant’s assertions regarding trench depth at issue and employee positioning in relation to the trench when work was performed. (PD&O p. 6-7).

The uncontroverted testimony is that Mr. Torresin only entered the trench to work on the valve and never entered nor required access to the area of the trench measuring over four feet (Tr. p. 102-103, p. 24-26 & 1-14). Although the compliance officer at issue did not measure the entire trench, Mr. Torresin did do so and would be in the best position to identify and testify to trench facts. (Tr. p. 100, line 23). Mr. Lillybridge reiterated that at no point in time did the replacement project require any employee to actually enter the trench (Tr. p. 129, lines 4-6 & p. 127-128, lines 11-26

& 1-4). Weight of testimony to those who were present onsite and familiar with the trench's actual dimensions should be given deference.

The record reflects the trench at issue did not maintain the same elevation in all areas (Tr. p. 76, lines 1-19). Mr. Mark Lillybridge (hereinafter "Mr. Lillybridge") is a Foreman for the Appellant. (Tr. p. 114, lines 17-26). As a trained competent person, Mr. Lillybridge provided clarification of the soil classification at issue (Tr. p. 122-123, lines 21-26 & 1-9).

Familiarity of the regulations requires knowledge of the relationship between soil classification and angles to determine sufficient slope requirements. As pointed out in the Proposed Decision and Order, Mr. McMinimy recalled his limited understanding of the relation between soil classification and slope angle and was unable to state he followed a specific protocol when "identify" the soil at issue. (PD&O p. 2, lines 11-12, p. 3, lines 13-15; Tr. p. 54-55, lines 17-26 & 1-20).

Appellant respectfully asserts the IAJ erred in the interpretation of photographs as it is not supported by the record as a whole. (PD&O p. 7, lines 3-10). In reality, the photographs demonstrate that there is an angle towards the building and sidewalk and the Compliance Officer did not measure the length of the trench. Thus, the Compliance Officer's measurement of 5' 7" is meaningless because Mr. Torresin did not work in

that area. Because of the angle of the ground, there was no objective evidence that the depth of the trench was the same by the valve and where the Officer took his one and only measurement.

Where the Department has failed to demonstrate exposure to a hazard and the record clearly reflects the Appellant had taken appropriate steps to ensure no employees entered the trench at over four feet, Violation 1-1 must be vacated.

2. **Where the Department incorrectly relied upon speculation to determine the duration of alleged exposure and the inspector had no personal knowledge of duration of work, the IAJ erred in finding the Department correctly calculated the penalty amount for the Violation.**

The Appellant respectfully asserts that the IAJ erred when deferring to the probability score assessed by the compliance officer without referring to where such a conclusion is supported in the record. (PD&O p. 8, lines 27-28).

Under WAC 296-900-14005, WISHA will assess monetary penalties “when a citation and notice is issued for a serious, willful, or egregious violation.” (WAC 296-900-14005). WISHA calculates the base penalty by deferring to a specific amount dictated by statute or by utilizing the more common gravity method. (WAC 296-900-14010). The gravity or “weight” of the violation is established by multiplying severity by probability. *Id.* Severity rates are expressed in whole numbers ranging

from the lowest “one” to the highest “six.” Rates under severity are based on the most serious injury, illness or disease that could be reasonably expected to occur due to a hazardous condition. *Id.* At issue is the probability rate that unlike the severity rate reflects “the *likelihood* of any injury, illness, or disease occurring.” *Id.* (Emphasis added). Similar to the severity rating scale, the probability scale is also based upon a whole number system ranging from the lowest “one” to the highest “six.” When determining probability, the following factors are considered: 1) frequency and amount of exposure, 2) number of employees exposed, 3) instances or numbers of times the hazards is identified in the workplace and 4) how close an employee is to the hazard, 5) weather and other working conditions, 6) employee skill level and training, 7) employee awareness of hazard, 8) pace, speed and nature of the task or work, 9) use of personal protective equipment and 10) other mitigating or contributing circumstances. *Id.*

The record reflects Mr. McMinimy observed an alleged exposure of only one employee for mere minutes supporting a reduction of the probability score (Tr. p. 71). Referring to the aforementioned arguments in Section A, where employees had no need and did not enter the trench at issue where areas were greater than four feet, the current probability score assessed is incorrect.

Assuming arguendo, where the Department can establish the prima facie elements to establish the violations, the citation at issue must be recalculated to reflect a probability score of 1.

**VI. CONCLUSION**

Based on the foregoing, the Appellant respectfully requests the court to reverse the Board's Decision and Order and/or remand the matter with direction as herein supported.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of August, 2013.

AMS Law, P.C.



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**CERTIFICATE OF SERVICE**

I, Kasey Johansen, hereby certify under penalty of perjury under the laws of the State of Washington that on August 30, 2013, I filed with the Court of Appeals Division II, via legal messenger:

**1. APPELLANT'S OPENING BRIEF**

and that I further served a copy via legal messenger upon:

David Matlick, AAG  
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SIGNED in Seattle, Washington on August 30, 2013.

  
Kasey Johansen, Paralegal

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