

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

POTELCO, INC.,

Appellant,

v.

DEPARTMENT OF LABOR
AND INDUSTRIES,

Respondent.

No. 42452-5-II

UNPUBLISHED OPINION

Van Deren, J. — Potelco, Inc. appeals a citation issued by the Department of Labor & Industries (Department) for a Washington Industrial Safety and Health Act (WISHA)¹safety violation. Potelco argues that (1) the Board of Industrial Insurance Appeals (Board) applied the wrong standard of proof and that (2) the evidence was insufficient to support findings that (a) WAC 296-155-657 applied, (b) Potelco violated WAC 296-155-657, and (c) the violation was serious. We affirm the Board’s decision upholding the Department’s citation against Potelco.

FACTS

I. The Incident

On January 17, 2008, construction workers digging a trench for a storm drain line in Silverdale, Washington, damaged an underground electrical conduit. Assuming the electrical line

¹ Chapter 49.17 RCW.

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was not energized, a construction worker entered the trench to cut the wire. He was injured when the live wire arced. The construction project superintendent, Richard Harris, called the Puget Sound Energy emergency hotline. That call was directed to Puget Sound Energy's subcontractor, Potelco. A Potelco crew responded to the call and remained on-site for approximately five hours. Potelco foreman Ron Torres² entered the trench to repair the conduit. Harris took a photograph of the trench, which shows Torres bent over inside the trench and a shovel handle reaching the midway point of one side of the trench.

Because (1) a construction worker was hospitalized and (2) an electrical union agent filed a complaint, John Fening, a Department inspector, began an investigation of the trench accident. When Fening arrived at the site, the work had been completed and the trench had been covered. Fening learned of Potelco's involvement during his initial meetings with the general contractor and subcontractors of the construction project. Harris provided the photograph of the trench to Fening. After reviewing the photograph provided by Harris and interviewing Harris; Torres; and Potelco safety manager, Bryan Sabari, Fening issued a citation to Potelco for a "[s]erious" violation of WAC 296-155-657(1)(a). The citation stated:

The Employer did not assure his three-man emergency crew employees were adequately protected from cave-ins while repairing a recently dug-up and cut underground electrical utility line in an unshielded, unshored, and poorly sloped/benched trench excavation in Class B soil that was over 10-f[ee]t deep. Failure to adequately protect these three employees from cave-in when working inside this excavation could have resulted in a fatality or serious injuries.

Clerk's Papers (CP) at 38. A penalty of \$2,100 was assessed for the violation.

² At the time of the hearing, Torres was no longer working for Potelco.

II. Administrative Hearing and Procedural History

Potelco appealed the Department's citation, and a hearing was held before an industrial appeals judge (IAJ). During the hearing, Harris and Fening testified on behalf of the Department. Potelco did not present evidence at the hearing.

Harris testified that he estimated the trench to be about 10 feet deep on the highest side and shallower on the other side. Harris did not measure the trench but he took the photograph of the trench with a worker bending over inside. The worker in the trench appeared to be of normal adult height. The IAJ admitted the photograph as evidence.³

Fening testified that he issued a citation to Potelco based on the photograph he received from Harris. Fening stated that he believed the trench to be deeper than 4 feet based on the photograph showing the shovel inside the trench. The 5 foot standard shovel reached to the midpoint of the trench and, by extrapolating, he determined the trench was about 10 feet deep.

Fening also stated that he interviewed Torres, the person photographed in the trench.⁴ During his telephone interview with Fening, Torres stated, "“Yeah, that was me [in the photograph]. I'm the only one that went in the trench.”" CP at 104. Torres also told Fening that he was the only Potelco employee to enter the trench because he did not want to send his workers into a trench that was not adequately protected, even though the subcontractor told him that it was adequately benched.

Fening testified that the photograph showed the trench to be an "unprotected, unshored —

³ This photograph was identified as exhibit 1 at the hearing.

⁴ Torres identified himself as the person in the photograph during a telephone conversation with Fening without seeing the photograph.

improperly shored, unshielded trench excavation.” CP at 92. Although the entire trench was not depicted in the photograph, Fening explained that he could tell that the trench was inadequately protected based on the portion that was photographed. Fening stated that the portion of the trench not shown in the photograph (where workers could enter and exit the trench) would not have any shoring or shielding because that was the area the excavator was digging out. Fening also stated that the area of the trench that was photographed was the portion that should have been secured with adequate shoring or shielding. Fening testified that taking measurements of the slope was unnecessary because he could see that the trench was not adequately protected from cave-ins. He explained that the soil was class B, so the slope would have to be a 1:1 slope, which it clearly was not.⁵

In addition, Fening testified that based on his experience and skill, if the sides of the trench had caved in it could have resulted in a fatality or serious injuries resulting in hospitalization and permanent disability. At the time of the hearing, Fening had worked as a Department compliance safety and health officer for 4 years. Prior to his work with the Department, he had nearly 15 years of experience in commercial industrial construction, including extensive work with excavations. Fening had never investigated a fatal cave-in.

At the close of the Department’s case, Potelco moved to dismiss, arguing that the Department had failed to establish a prima facie case. Potelco also waived presentation of additional evidence. The IAJ did not decide the motion at the hearing. The IAJ issued a proposed decision and order denying the motion to dismiss and affirming the citation that did not expressly state the standard of proof applied to its determination of a serious violation. Potelco

⁵ The maximum allowable slope for excavation in type B soil is 1:1 (or 45 degrees). WAC 296-155-66403, table N-1.

filed a timely petition for review. The Board denied Potelco's petition and adopted the IAJ's proposed order as the decision and order of the Board. Potelco appealed the Board's order to the superior court, arguing that the record lacked substantial evidence to establish a serious violation of WAC 296-155-657. Finding substantial evidence in the record to support the Board's findings of fact, the superior court adopted the Board's conclusions of law by reference and affirmed the Board's order. Potelco timely appeals.

ANALYSIS

I. WISHA Burden of Proof

Our Legislature enacted WISHA “to assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington.” RCW 49.17.010. “WISHA is to be liberally construed to carry out this purpose.” *BD Roofing, Inc. v. Dep’t of Labor & Indus.*, 139 Wn. App. 98, 106, 161 P.3d 387 (2007) (quoting *Inland Foundry Co. v. Dep’t of Labor & Indus.*, 106 Wn. App. 333, 336, 24 P.3d 424 (2001)). RCW 49.17.050(2) requires the Department to adopt occupational health and safety standards that are at least as effective as those promulgated by the United States Secretary of Labor under the federal Occupational Safety and Health Act of 1970 (OSHA).⁶ “Chapter RCW 49.17 authorizes the Department ‘to issue citations and assess penalties against an employer for safety violations.’” *BD Roofing*, 139 Wn. App. at 106 (quoting *Erection Co. v. Dep’t of Labor & Indus.*, 121 Wn.2d 513, 517, 852 P.2d 288 (1993)); *see* RCW 49.17.050, .120, .180. The Department bears the initial burden of proving a WISHA violation. WAC 263-12-115(2)(b); *Erection Co. v. Dep’t of*

⁶ 29 U.S.C. §§ 651-678. We often consider decisions interpreting parallel federal OSHA regulations to determine what constitutes a WISHA violation. *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 147, 750 P.2d 1257, 756 P.2d 142 (1988).

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Labor & Indus., 160 Wn. App. 194, 201, 248 P.3d 1085, *review denied*, 171 Wn.2d 1033 (2011).

To “establish a serious violation of a WISHA safety regulation, the Department ‘must prove that (1) the cited regulation 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.’” *BD Roofing*, 139 Wn. App. at 106-107 (internal quotation marks omitted) (quoting *Wash. Cedar & Supply Co., Inc. v. Dep’t of Labor & Indus.*, 119 Wn. App. 906, 914, 83 P.3d 1012 (2004)); *see* RCW 49.17.180(6) (defining “serious violation”).

II. Judicial Review of Board Decisions

WISHA governs judicial review of decisions issued by the Board. RCW 49.17.140-.150(1). We review a decision by the Board directly, based on the record before the agency. *Legacy Roofing, Inc. v. Dep’t of Labor & Indus.*, 129 Wn. App. 356, 363, 119 P.3d 366 (2005). Factual findings of the Board are conclusive if supported by substantial evidence on the record considered as a whole. RCW 49.17.150(1). Thus, we review the Board’s findings of fact to determine whether they are supported by substantial evidence and whether those findings support the Board’s conclusions of law. *Mid Mountain Contractors, Inc. v. Wash. Dep’t of Labor & Indus.*, 136 Wn. App. 1, 4, 146 P.3d 1212, 1213 (2006). Substantial evidence is evidence in sufficient quantity to persuade a fair-minded person of the truth of the declared premise. *Mowat Constr. Co. v. Dep’t of Labor & Indus.*, 148 Wn. App. 920, 925, 201 P.3d 407 (2009).

III. Standard of Proof

Polteco claims that the Board applied the wrong standard of proof when reviewing its citation. Because Potelco did not preserve this argument before the Board or the trial court, we do not consider it.

Potelco first argues that a party may raise a manifest error affecting a constitutional right for the first time on review under RAP 2.5(a)(3). Potelco then argues that the Board's erroneous application of the wrong standard of proof is a procedural due process violation and, therefore, creates a manifest error affecting a constitutional right, allowing Potelco to raise the issue for the first time on appeal.⁷ Although the manifest constitutional error exception is first argued in Potelco's reply brief, it is in direct response to the Department's argument that Potelco failed to preserve its standard of proof argument.

RCW 49.17.150(1) mandates that "[n]o objection that has not been urged before the board shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." RCW 49.17.150(1). Potelco did not argue that the IAJ had applied the wrong standard of proof in the proposed decision and order in either its petition for review before the Board or in its bench brief before the trial court. Potelco has not alleged at any stage that extraordinary circumstances excuse its failure to preserve the argument.

Allegations of a constitutional claim are not, by themselves, extraordinary circumstances

⁷ We note that in making its claim of constitutional manifest error, Potelco does not address the statutory limitation on our review of claims in RCW 49.17.150 that is "wholly separate from [our] discretion to address issues not raised below." *Dep't of Labor & Indus. v. Nat'l Sec. Consultants, Inc.*, 112 Wn. App. 34, 37, 47 P.3d 960 (2002). RCW 49.17.150(1) mandates that "[n]o objection that has not been urged before the board shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

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under RCW 49.17.150. *See Stockwell Mfg. Co. v. Usery*, 536 F.2d 1306, 1309 (10th Cir., 2007) (interpreting parallel language in OSHA). In *Stockwell*, the Tenth Circuit held that it had no jurisdiction to consider constitutional claims not raised in lower board or court proceedings when the facts upon which a party relied to sustain the constitutional claim were known to it and the party was afforded a full and unrestricted opportunity to present the objection. And the Ninth Circuit cited *Stockwell* as an example of proper dismissal for failure to first present an issue to the agency. *Lloyd C. Lockrem, Inc. v. U.S.*, 609 F.2d 940, 943 (9th Cir. 1979).

Potelco's claim of a constitutional due process violation for the alleged failure of the IAJ to apply the correct standard of proof was known to it upon issuance of the IAJ's proposed order. Potelco had a full and unrestricted opportunity to raise the issue before the Board. It failed to do so. Potelco presents no reason for its failure to present the issue to the Board and none is evident on the record. Therefore, Potelco's constitutional due process claim raised for the first time to this court is barred by RCW 49.17.150(1). We do not consider this claim.⁸

⁸ Were we to consider this claim, we would hold that the Board applied at least the preponderance of the evidence standard. *Wash. Cedar*, 119 Wn. App. at 914 (citing OSHA and its judicial interpretation). The entry of findings indicates a fact finder weighed the evidence. *See In re Dep. of Schermer*, 161 Wn.2d 927, 939-940, 169 P.3d 452 (2007). We may affirm the Board's decision as long as substantial evidence supports the decision under the correct standard. *Erection Co.*, 160 Wn. App. at 205. Here, we hold that substantial evidence in the record supports a finding of each of the required elements of a serious WISHA violation by at least a preponderance of the evidence, thus any error arising from the Board's failure to expressly state the standard of proof is harmless because the Department proved its case by at least a preponderance of the evidence.

IV. Sufficiency of the Evidence

Potelco asserts that substantial evidence did not support the Board's decision: that the Department proved that WAC 296-155-657(1)(a) applied to the trench, that Potelco failed to meet the standard, or that the violation was "serious." We disagree.

A. Application of WAC 296-155-657

To protect employees from cave-ins, WAC 296-155-657(1)(a) requires adequate protective systems in excavations except when the excavation is made entirely in stable rock⁹ or is less than 4 feet deep.¹⁰ The Board found that a Potelco employee entered a trench that was more than 4 feet deep.

Two witnesses estimated the trench depth to be around 10 feet deep—well below the 4 foot depth that triggers the requirement of an adequate protective system designed in accordance with WAC 296-155-657(2) or (3). Harris testified that he estimated the trench to be about 10 feet deep on the highest side and shallower on the other side. He did not measure the depth of the trench. Harris took a photograph of the trench with a worker bending over inside. The worker in the trench appeared to be of normal adult height. The photograph was admitted into evidence.

Fening estimated the depth of the trench based on the photograph he received from Harris,

⁹ There is no argument that the excavation was made in stable rock. Only the depth of the trench is at issue.

¹⁰ WAC 26-155-657(1)(a) states:

Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with subsections (2) or (3) of this section except when:

- (i) Excavations are made entirely in stable rock; or
- (ii) Excavations are less than 4 feet (1.22m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

which showed that a standard 5 foot shovel reached to the midpoint of the trench. He determined the trench was about 10 feet deep, consistent with Harris's estimate. In addition, Fening spoke to Torres, who identified himself as the person in the trench in the photograph and told Fening that he was the only Potelco employee to enter the trench.

Potelco did not submit conflicting evidence of the trench's depth. Potelco objected to Harris's testimony (1) estimating the trench's depth and (2) opining whether anyone other than Potelco's crew would have had any reason to be in the excavation at the time he took the photograph for lack of foundation and speculation, respectively.¹¹ The IAJ overruled the objections, and Potelco did not assign error to the IAJ's evidentiary rulings. Potelco did not object on the basis of hearsay to Fening's testimony about his conversation with Torres. Thus, we consider Potelco's evidentiary arguments only as they affect the weight of the evidence within its sufficiency claim.

Potelco now asserts that the Department is required to present measurements to show that the trench did not comply with requirements. Potelco cites to administrative decisions to support its argument, but many of the cases relied on are merely decisions in which measurements were taken. In *Secretary of Labor v. Scafar Contracting, Inc.*, 18 OSHC (BNA) 1540 (No. 97-0960), 1998 WL 597441 (ALJ), there was conflicting evidence regarding the depth and sloping of the trench, so as to make the secretary's absence of reliable measurements dispositive. Thus, the

¹¹ Under ER 602, "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." A lay witness may state an opinion as long as it is rationally based on the perception of the witness, helpful to the fact finder, and not based on specialized knowledge. ER 701. The IAJ overruled Potelco's objections stating, "I think we're just relying upon essentially a lay witness's observation, and his estimate of what the depth is. May or may not be right, but I think he can at least state his observation," and "[A]nd again, to Mr. Harris's knowledge, if there would have been anyone that had that kind of permission. I can only take it as to Mr. Harris's knowledge." CP at 81, 86.

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holding that Potelco relies on is not helpful to Potelco.¹²

Here, Potelco produced no evidence to contest the Department's reasonable inferences regarding the trench depth. On the facts of this case, the Department was able to meet its preponderance burden without precise measurements. We hold that, even without measurements, substantial evidence supports the Board's finding that a Potelco employee entered a trench over 4 feet deep and, thus, the requirements of adequate protection under WAC 296-155-657 apply.

B. Violation of WAC 296-155-657

The Board found that the trench "was not protected from cave-ins by any type of shoring¹³ device or devices, or adequate sloping." CP at 31. The Board concluded that Potelco permitted an employee to enter a trench that was not protected from cave-ins by an adequate protective system. Potelco argues that substantial evidence does not support the finding or the conclusion of law.

When a trench is more than 4 feet deep and not made entirely in stable rock, WAC 296-155-657 requires employees in an excavation to be protected from cave-ins by an adequate protective system designed in accordance with subsections (2) or (3). Those subsections outline

¹² The language relied on by Potelco stated:

In sum, the cited standard requires that reliable measurements be made, preserved and made part of the Secretary's case in chief. Fulfilling the Secretary's obligation to prove the existence of a violative condition by a preponderance of reliable evidence of record requires more than assumptions and inferences where the violation alleged is that of a standard with specific distances as an integral part of its requirements.

Scafar Contracting, 1998 WL 597441, at *10.

¹³ "Shoring" is a "structure such as a metal hydraulic, mechanical, or timber shoring system that supports the sides of an excavation and which is designed to protect from cave-ins." WAC 296-155-650(2)(r).

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several options for an adequate protective system including “benching,”¹⁴ “sloping,”¹⁵ “support,”¹⁶ and “shielding”¹⁷ systems. WAC 296-155-657(2), (3).

Fening’s testimony that Torres did not send his crew into the trench because he was concerned that the trench was not adequately protected, even though the subcontractor informed him it was adequately benched, supports the finding of fact. Fening also testified that exhibit 1, showed the trench to be an “unprotected, unshored — improperly shored, unshielded trench excavation.” CP at 92. Fening explained that he could determine from the photograph the extent to which the trench was shielded, shored, or benched:

There’s . . . no indication [that] there is [a] shield present inside the trench. There’s no shoring presenting against the trench walls. Obvious. . . . And the slope [or what] appears to be some attempt at a slope onto the right side of the photo[graph]. There is a step there. But that slope is inadequate for the — what we — what we define as a bench-type set-up.

CP at 102. Although the picture relied upon by Fening does not show the entire trench, Fening explained that the portion of the trench not shown (where workers could get in and out) would not have any shoring or shielding because that was the area the excavator was digging out.

Fening testified that the area in which shoring or shielding would have been shown in the picture:

Because you can see, in the back — in the top part of the photo, above the

¹⁴ A “benching system” entails excavating the sides of the trench to form horizontal levels or steps. WAC 296-155-650(2)(d).

¹⁵ A “sloping system” requires that the sides of the trench are inclined away from the excavation. The technical requirements for angle and incline vary depending on the factors such as soil type. WAC 296-155-650(2)(t).

¹⁶ A “support system” entails use of a structure designed to support the sides of a trench. WAC 296-155-650(2)(w).

¹⁷ A “shield system” is a “structure that is able to withstand the forces imposed on it by a cave-in and thereby protect employees within the structure.” WAC 296-155-650(2)(q).

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individual's head, there is — you can see where the slope is. The ground is starting to slope upward here, against the — this is where the excavator would have dragged the dirt at an angle out, and there is no indication of any shoring or shielding in that, or protection in that area there.

CP at 102. Fening also testified that taking measurements of the slope was unnecessary because he could visually look at it. He explained that the soil was class B, so the slope would have to be a 1:1 slope. The maximum allowable slope for excavations in type B soil is 1:1 (or 45 degrees). WAC 296-155-66403, table N-1. Exhibit 1 shows the sides of the trench are clearly more than the allowable 45 degrees.

Potelco additionally argues that a violation cannot be established based on the physical characteristics of the trench alone because a system not otherwise in compliance may comply if designed by a registered professional engineer. *See* WAC 296-155-657(2)(d), (3)(d). This is a somewhat disingenuous argument because Potelco does not allege that the trench was designed by a professional engineer.

Potelco also argues that the Department must present evidence regarding which compliance option was selected and the particularities of its failure to comply. But this type of technical evidence is not required when there was no evidence showing the existence of any support system. Evidence regarding the inadequacy of a support system is not necessary because no support system was used. Exhibit 1 and the testimony about the trench is substantial evidence that the trench was not protected from cave-ins by an adequate protective system. The Board found that the Department had so proven by a preponderance of the evidence, and the record contains substantial evidence to support that finding. The finding supports the conclusion of law that Potelco permitted an employee to enter a trench that was not protected from cave-ins by an

adequate protective system.

C. “Serious” Violation

The Board found that Potelco employees were exposed to the risk of serious injury or death if the trench were to cave in and thus assigned the violation a severity rating of 6. The Board assigned the violation a probability rating of 2, which is not challenged by Potelco. Potelco argues that even if the adequate protection in excavation standard was violated, the Department has not shown that the violation was serious. We again disagree.

A serious violation exists “if there is a substantial probability that death or serious physical harm could result.” RCW 49.17.180(6). “The statute’s ‘substantial probability’ language refers to the likelihood that should harm result from the violation, that harm could be death or serious physical injury.” *Potelco, Inc. v. Dep’t Labor & Indust.*, 166 Wn. App. 647, 656, 272 P.3d 262 (2012). The likelihood that violating the regulation will result in serious or fatal harm is separately accounted for in the penalty amount. *Lee Cook Trucking & Logging v. State, Dep’t of Labor and Indus.*, 109 Wn. App. 471, 481, 36 P.3d 558 (2001); see WAC 296-900-14010.

The penalty imposed under WISHA is determined based on the gravity of the violation. WAC 296-900-14010. “Gravity is calculated by multiplying a violation’s severity rating by its probability rating.” WAC 296-900-14010. Severity rates are based on the most serious injury that could be reasonably expected to occur, while the probability rates describe the likelihood of an injury on a scale from 1 (lowest) to 6 (highest). WAC 296-900-14010. “Violations with a severity rating of 4, 5, or 6 are considered serious [violations].” WAC 296-900-14010. A severity level of 6 corresponds to death, injuries involving permanent severe disability, or chronic irreversible illness. WAC 296-900-14010.

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Fening testified that, based on his experience and skill, if the sides of the trench had caved in, it could have resulted in a fatality or serious injuries resulting in hospitalization and permanent disability. At the time of the hearing, Fening had worked as a Department compliance safety and health officer for 4 years. Before he worked for the Department, he had nearly 15 years of experience in commercial industrial construction including extensive work with excavations. Although Fening had never investigated a fatal cave-in, his testimony that a cave-in could be fatal is based on substantial experience and provides substantial evidence of the seriousness of the lack of worker protection and the likelihood of serious injury or death from a cave-in. Exhibit 1 corroborates Fening's testimony, as it is clear from the picture that a person in the trench could have been completely buried had a cave-in occurred.

We affirm and hold that substantial evidence supports the Board's finding of a serious violation of WAC 296-155-657 with a severity rating of 6, it was proven by a preponderance of

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the evidence, and Potelco's claims fail.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Hunt, J.

Worswick, C.J.