

Cascade Utilities

BOARD

Transcript corrections

If a party believes there is an error in the transcript, the party should file a motion with the industrial appeals judge, who will then hold a proceeding and place the burden on the moving party to explain why the transcript is in error and should be changed. **...*In re Cascade Utilities*, BIIA Dec., 04 W1392 (2006)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 06-2-38556-0 SEA.]

Scroll down for order.

1 **Unpreventable employee misconduct defense:** The industrial appeals judge also erred in
2 precluding the employer's attorney from asking Robert Bailie any questions about the employer's
3 safety rules and Accident Prevention Plan (APP), because of the employer's inadvertent failure to
4 attach a copy of its APP to its discovery responses. That ruling prevented the employer from
5 proving its affirmative defense of unpreventable employee misconduct under RCW 49.17.120(5).

6 In its September 9, 2005 discovery responses, the employer indicated that the APP was
7 attached. See, Request for Production No. 1, at 9. The employer agrees that the APP was not
8 actually provided at that time. On September 19, 2005, the Department filed a Motion to Compel
9 Discovery and Deem Admissions. The Department made no mention of the APP. At a hearing on
10 that same date, the industrial appeals judge granted the employer's Motion to Amend Notice of
11 Appeal to include the affirmative defense of unpreventable employee misconduct. On
12 September 22, 2005, the Department's Motion to Compel was heard. The industrial appeals judge
13 ordered the employer to produce Derek McIntyre's statement, the names of three cases in which
14 David Tullis had testified previously, and the amount of compensation being received by company
15 employees. As the employer points out in its Petition for Review, the Department did not ask that
16 the employer be compelled to produce the APP, nor did the industrial appeals judge order the
17 employer to do so.

18 The first hearing to present testimony was held on September 23, 2005. Mr. Bailie, the
19 president of Cascade Utilities, Inc., testified on September 27, 2005. The employer's attorney
20 attempted to ask him questions regarding the company's safety rules and the enforcement of those
21 rules, as required to prove unpreventable employee misconduct. RCW 49.17.120(5); *In re The*
22 *Erection Company (II)*, BIIA Dec., 88 W142 (1990). The assistant attorney general objected, based
23 on the employer's failure to provide copies of safety standards and disciplinary policies during
24 discovery. The Department mistakenly claimed that these items were covered by the Department's
25 Motion to Compel. 9/27/05 Tr. at 177. Based on that representation, the industrial appeals judge
26 directed the employer's attorney as follows: "Okay, Mr. Ehlke. I think what you need to do, if you
27 want to follow this defense, is to only ask questions about which you provided appropriate
28 responses to discovery requests." 9/27/05 Tr. at 181. Throughout the remainder of Mr. Bailie's
29 testimony, the industrial appeals judge consistently sustained the assistant attorney general's
30 objections when the employer asked any questions that might involve enforcement of the
31 company's safety rules.

1 The employer correctly points out that the harsh sanction of excluding testimony is not
2 warranted in the absence of a showing that there was an intentional or willful violation of a court
3 order or some other unconscionable act. *Fred Hutchinson Cancer Research Center v. Holman*,
4 107 Wn.2d 693, 706-707 (1987). Because the industrial appeals judge had not ordered the
5 employer to provide the APP, the employer did not violate a court order under CR 37. There is also
6 no evidence of unconscionable conduct on the employer's part. In fact, the employer listed its
7 Accident Prevention Plan in its September 9, 2005 discovery responses. In addition, the assistant
8 attorney general knew that the employer was raising the unpreventable employee misconduct
9 defense and presumably understood that that would include the requisite proof under
10 RCW 49.17.120(5) and *The Erection Company (II)*.

11 In the past, when faced with the question of whether sanctions are appropriate for a
12 discovery violation, we have required a balancing of interests. In *In re Waheed Al-Maliki*, BIIA Dec.,
13 01 14923 (2003), we held that the least severe sanction should be chosen, so long as the purpose
14 of discovery is not undermined. A more proportionate response to the employer's apparently
15 inadvertent failure to provide a copy of its APP on September 9, 2005 might have been to require
16 the employer to provide the APP, allow the Department time to review it, and schedule additional
17 hearing time, if necessary. Perhaps some imposition of costs would have been warranted.
18 However, under CR 37, *Fred Hutchinson*, and *Al-Maliki*, preventing the employer from proving its
19 affirmative defense was too harsh a sanction.

20 Ultimately, the error was harmless because we have determined that the Department failed
21 to prove a necessary element of the alleged violation of WAC 296-155-657(1)(a) and that Item 1-2
22 must be vacated for that reason. However, had we concluded otherwise, a remand for further
23 hearings would have resulted, with additional costs and delays in the resolution of this appeal. For
24 that reason, we felt the issue warranted some discussion, in order to provide guidance and to avoid
25 similar problems in the future.

26 **Transcript of September 26, 2005 hearing:** The final matter that requires our attention is
27 the manner in which changes were made to the September 26, 2005 transcript of James
28 Gunderson's testimony. In Item 1-1, the employer was cited for failure to perform daily inspections
29 of excavations and the surrounding areas as required by WAC 296-155-655(11)(a). In its Petition
30 for Review, the Department contends that Mr. Gunderson admitted that he failed to inspect the
31 fourth trench excavated on August 9, 2004. The Department relies solely on the following
32 language:

1 Q. (by Employer's Attorney) Okay. Now, when you -- what else -- you talked
2 about what you looked at for -- when you do these inspections. Did you do that
3 specifically for the trenching question on August 9th, 2004, inspect for all those
4 things you just described, before any work was done in the trench that we're
talking about in this case?

5 A. Well, I -- not specifically **four**. Had watched all that, but I -- at one and two
6 [CELL PHONE BEGINS TO RING] and three, I'd been there for the starting of
7 excavation of those. I'm sorry; let me shut this thing off.

8 9/26/05 Tr. at 129-130 (Emphasis added); Petition for Review, at 2.

9 In the original certified transcript, the "four." was a "for--". The industrial appeals judge
10 approved the change from "for--" to "four." in the Proposed Decision and Order. Proposed Decision
11 and Order, at 1.¹ However, that change had already been made in the electronic version of the
12 transcript, based on the assistant attorney general's communication with the court reporter. In its
13 Petition for Review, the employer renews its challenge as to how that change occurred and to the
14 industrial appeals judge's acquiescence.

15 Some background is necessary to understand the significance of this issue. There is a
16 dispute about how many trenches were actually excavated on August 9, 2004, prior to the
17 Department's inspection, three or four. At the September 26, 2005 hearing, Mr. Gunderson testified
18 that there were four. Two days later, he signed a Declaration saying that he had misspoken, and
19 that he should have said three, not four. On September 29, 2005, the employer filed a Motion to
20 Reconcile Trial Testimony to Previous Sworn Testimony and Mr. Gunderson's September 28, 2005
21 Declaration. At an October 10, 2005 hearing, the industrial appeals judge denied that motion
22 because it was untimely and because:

23 I can't allow corrections of every little detail to crop up -- that crops up during a trial
24 to be cured sometime after the fact.

25 I am sure there are -- there were more than one example of some kind of a
26 discrepancy of this or that and it is -- I agree with Mr. Dew in the sense that he
27 relied on what Mr. Gunderson was testifying to and if it wasn't brought to Mr.
Gunderson's attention or if he didn't realize it until after the fact and didn't try to
correct it immediately, then that is just the way it goes.

28 10/10/05 Tr. at 5-6.

29 The employer has renewed its Motion to Reconcile in its Petition for Review.
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32 ¹ The industrial appeals judge actually referred to a portion of the testimony about which there was no dispute, *i.e.*,
9/26/05 Tr. at 130, line 26. Like the parties, we assume he meant to approve the proposed change at line 5.

1 The industrial appeals judge correctly declined to make changes in the September 26, 2005
2 transcript of Mr. Gunderson's testimony when requested to do so by the employer. It would be
3 inappropriate to permit witnesses to second guess themselves after the fact and change their
4 testimony unilaterally. However, that ruling was not the end of the matter.

5 The certified transcript of the September 26, 2005 hearing was filed with the Board on
6 October 11, 2005. On October 24, 2005, the employer asked the industrial appeals judge to set a
7 post-hearing briefing schedule. On October 27, 2005, the industrial appeals judge gave the
8 Department until November 18, 2005, and the employer until December 1, 2005, to file briefs. On
9 November 13, 2005, the Department filed its brief and on December 2, 2005, the employer's brief
10 was received.

11 Then, on December 5, 2005, the assistant attorney general sent a letter to the industrial
12 appeals judge saying: "In reviewing the transcript of James Gunderson I discovered some
13 inconsistencies with my notes and recollection of portions of his testimony. I would like to review
14 the audio tape from the hearing to determine the accuracy of the transcript." Apparently, the
15 attorneys then had a conversation with the industrial appeals judge's judicial assistant on
16 December 8, 2005, during which she requested the assistant attorney general to contact the court
17 reporting company directly. That telephone call was briefly alluded to during a subsequent hearing
18 on February 27, 2006. 2/27/06 Tr. at 3-4, 7.

19 At the February 27, 2006 hearing, the assistant attorney general indicated that he had done
20 as requested by the judicial assistant, and contacted the court reporting company. He was told that
21 the court reporter would listen to the audiotape of the September 26, 2005 hearing and decide
22 whether a correction was warranted. He said: "I had no control over that. It was an independent
23 decision by the court reporter." 2/27/06 Tr. at 7. When he had not heard back regarding what
24 decision had been made, he inquired and discovered that the transcript had already been received.
25 At that point, he contacted the employer's attorney. 2/27/06 Tr. at 7.

26 The Board file shows that one day after the December 8, 2005 phone call, the court reporter
27 sent an internal e-mail to a staff member within the court reporting company. That e-mail was also
28 sent to the Board and reads in part:

29 This is a transcript which was turned in a long time ago, but now a question has
30 arisen with it. Apparently at one point one of the witnesses said the word "four," but
31 because of the context it wasn't clear to me that that was what he meant, and I
32 wrote "for," and then a double dash, as he seemed to suddenly change his tone and

1 his thought. So I have now amended the transcript (it's on line 5 of page 130) and
2 am re-submitting it with the spelling "four," followed by a period. It was the AAG,
3 Brian Dew, who pointed this out, and he has requested that an amended transcript
4 be sent to the judge.

5 I am not attaching a transmittal form, because I'm not sure how it would need to be
6 filled out. If you need me to fill one out or do anything else, just let me know what
7 needs to be done.

8 On January 26, 2006, a staff member in the employer's attorney's office e-mailed the
9 assistant attorney general, saying: "I have read page 130 of Jim Gunderson's transcript, and all the
10 'for' references (on lines 1, 2, and 5) are correct. Where do you see a 'for' that should be 'four'?"
11 The assistant attorney general responded: "Line 5." The employer disagreed with that assessment
12 in a January 27, 2006 e-mail to Board staff, saying:

13 Here is the AG's response as to which line on page 130 of Jim Gunderson's
14 testimony on September 26, 2005 he believes contained a typographical error.
15 The "for" spelling in line 5 is correct as "for" especially when you read the question
16 before Mr. Gunderson's response. It is clear that Mr. Gunderson was restating in
17 his response the same words used in the question. Therefore, if there was a
18 change in the transcript based on the AG's mistaken belief that there was a
19 typographical error, we are not in agreement of [sic] that change.

20 On January 30, 2006, the Department filed a Post-Hearing Reply Brief, in which it argued
21 that: "Mr. Gunderson's admission that he failed to inspect the fourth trench is decisive for this
22 citation item," *i.e.*, Item 1-1. Reply Brief, at 2. In support of this argument, the Assistant Attorney
23 General pointed out that: "The corrected transcript substitutes "four" for "for." Reply Brief, at 1
24 (footnote 1). In response, the employer immediately filed a Motion to Strike Department's Reply
25 Brief on January 31, 2006. The employer strongly protested the way in which the transcript change
26 had been effected. While there are no Board rules directly on point, the employer cited
27 RCW 2.32.250, as well as a number of rules governing transcript changes in other
28 contexts--RAP 9.5(c), WAC 10-08-219, and ELC 11.4(c) and (d). On February 23, 2006, the
29 employer also filed another Declaration from Mr. Gunderson, this one explaining that he meant "for"
30 not "four."

31 The industrial appeals judge set the employer's motion for hearing on February 27, 2006.
32 After oral argument, he reserved ruling. 9/26/05 Tr. at 130. On June 26, 2006, the industrial

1 appeals judge issued his Proposed Decision and Order, in which he denied the employer's Motion
2 to Strike and approved the transcript change, without discussion. Proposed Decision and Order,
3 at 1.

4 If the assistant attorney general believed there was an error in the transcript, his remedy was
5 to file a motion seeking a correction in a timely fashion. As the employer points out, the industrial
6 appeals judge had denied the employer's earlier motion to correct Mr. Gunderson's testimony, in
7 part because he considered it untimely. That motion was filed three days after the hearing. In
8 contrast, the assistant attorney general did not alert anyone to his concerns until December 5,
9 2005, more than two months after the hearing. Once he raised those concerns, the proper
10 procedure would have been to place the burden on the Department, not the employer, to explain
11 why changes were warranted. Instead, the Department was apparently directed to converse with
12 the court reporter. As a result of that conversation, the transcript was changed without any
13 opportunity for the employer to be heard on the issue. The Department then filed a brief making a
14 legal argument based on the now favorable testimony. The industrial appeals judge then shifted
15 the burden to the employer to file an objection to the change and to explain why it should not have
16 been made, rather than requiring the Department to show why it should be made.

17 The integrity of the record before the Board is critical. The assistant attorney general should
18 not have been directed to contact the court reporter on his own. Instead, he should have been
19 directed to file a motion. The industrial appeals judge should then have held a hearing on that
20 motion, and placed the burden on the movant to explain why the transcript should be changed.

21 Considering the record in that light, we conclude that the transcript should not be changed.
22 This is not a case of a clear typographical error or even of a misheard word, since "for" and "four"
23 sound exactly alike. Mr. Gunderson himself says that he meant "for" not "four." That was the court
24 reporter's impression as well when she certified the original transcript. From the context, we think
25 she was correct in her initial impression. Furthermore, on such a critical matter, the Department did
26 not raise its concerns in a timely fashion. For all of these reasons, we deny the Department's
27 request to change the transcript. The original certified transcript therefore remains the official
28 record.

29 We find that no other prejudicial error was committed and all other rulings are affirmed.
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1 **DECISION**

2 The employer was cited for failure to perform daily inspections of excavations and the
3 surrounding areas (Item 1-1, WAC 296-155-655(11)(a)), and failure to protect an employee in a
4 trench deeper than four feet (Item 1-2, WAC 296-155-657(1)(a)). In the Proposed Decision and
5 Order, the industrial appeals judge thoroughly reviewed the evidence. We will only touch on those
6 aspects which are relevant to our decision.

7 Cascade Utilities, Inc., (Cascade) began working on a residential development at Sunny Hill
8 Farm in June 2003, digging trenches and installing pipes, including sewer lines from home sites to
9 the sewer main. The company routinely used a 16-foot long trench box to protect employees
10 installing pipe in the trenches. Rick Goroski, an inspector for the City of Redmond, had performed
11 numerous random inspections at the worksite, without finding any violations. On August 9, 2004,
12 James Gunderson, the foreman and designated "competent person" under WAC 296-155-650(2)(f),
13 arrived at the site at 6:00 a.m. He testified that he visually inspected the area where the employer
14 would be excavating that day and did not see any problems. He determined that the dirt was the
15 same as it had been throughout the project. He also testified that he performed daily visual
16 inspections of all trenches excavated during the project. 9/26/05 Tr. at 120-121; 82.

17 The work crew, consisting of Derrick McIntyre, Stan Zylstra, Mark Beier, and Tony Beier, all
18 arrived by 7:05 a.m. and began work. They excavated four trenches, using the trench box for
19 protection as they installed pipe. Once the pipe was laid, they removed the trench box and
20 back-filled the excavations.

21 Mr. Goroski arrived at the site at 11:00 a.m. When he was within about 10 feet of the
22 excavation pictured in the various photographic exhibits, he saw someone in the trench. He
23 assumed that person was a Cascade employee. Although there is no direct evidence, everyone
24 appears to agree that the person was Mr. Zylstra, who was not called as a witness. None of his
25 fellow employees testified either. It is not known why Mr. Zylstra was in the trench.

26 Mr. Goroski directed Mr. Zylstra to get out of the trench, which he did. There is no
27 description of how he did this, whether he walked out or used a ladder or pulled himself out or
28 required some assistance. That type of information might have provided some evidence as to the
29 depth of the trench where Mr. Zylstra was located. Mr. Goroski posted a stop work order and called
30 the Department. Mike Rochlin, a compliance safety and health officer for the Department, arrived
31 some time before 12:30 p.m. Mr. Rochlin took no measurements of the trench. His fellow
32 compliance officer, Gary Sadowski, apparently did so, but he was not called to testify.

1 In looking at the photographic exhibits, Mr. Goroski could not say where Mr. Zylstra was
2 located in the trench when he saw him. He measured a 7-foot depth in one part of the trench, but
3 said the trench was graded and he did not measure the shallowest part. According to
4 Mr. Gunderson, the trenches were not the usual relatively flat 2 percent grade. They had to be dug
5 at a steeper grade, due to site-specific engineering considerations. 9/26/05 Tr. at 153. The length
6 of the trenches also varied. They were at least as long as the trench box, which was 16 feet, and
7 could be up to 30 feet. The deepest end of each trench was toward the sewer main and the
8 shallowest end was toward the future home site. Like Mr. Goroski, Mr. Gunderson did not know
9 what the trench depth was at its shallowest point, nor did Mr. Gunderson testify to the trench depth
10 elsewhere.

11 Based on this evidence, the industrial appeals judge concluded that the Department had
12 failed to prove a violation of WAC 296-155-655(11)(a) with respect to daily inspections (Item 1-1).
13 In its Petition for Review, the Department challenges that determination, contending that
14 Mr. Gunderson admitted he failed to inspect the fourth trench on August 9, 2004. This argument is
15 based solely on the modification of the transcript, which we have discussed above and disallowed.
16 In the absence of that altered testimony, the Department's argument has no factual basis and is
17 therefore without merit. We agree with the industrial appeals judge's determination that Item 1-1
18 should be vacated.

19 Item 1-2 must also be vacated. WAC 296-155-657(1)(a) provides:
20 Protection of employees in excavations.

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

24 (i) Excavations are made entirely in stable rock; or

25 (ii) Excavations are less than 4 feet (1.22m) in depth and examination of the ground
26 by a competent person provides no indication of a potential cave-in.

27 The industrial appeals judge correctly concluded that the stable rock exception under
28 WAC 296-155-657(1)(a)(i) was inapplicable. The remaining question is whether WAC 296-155-
29 657(1)(a)(ii) applies. As we have already concluded, Mr. Gunderson performed the requisite
30 examination of the ground for indications of a potential cave-in. The Department was therefore
31 required to prove that a Cascade employee was in an excavation at a depth of four or more feet.
32 Otherwise, no protective system was required with respect to that employee. As the employer

1 points out, the Department failed to provide the necessary trench measurements in support of this
2 portion of the citation.

3 The industrial appeals judge concluded that: "There was some question about the depth of
4 the trench, but from Mr. Goroski's impressions and the photographs offered into evidence, there
5 seems to be little question the depth of the trench Mr. Zylstra was in when observed by Mr. Goroski
6 was more than 4 feet deep." Proposed Decision and Order, at 9. The industrial appeals judge
7 apparently inferred that, regardless of where Mr. Zylstra was actually located in the trench, it had to
8 be at least four feet deep. However, in the absence of any evidence regarding what the shallowest
9 depth measurement was, there is no basis for that inference.

10 In a case arising under the Washington Industrial Safety and Health Act, the Department has
11 the burden of proof. WAC 263-12-115(2)(b); *In re Olympia Glass Co.*, BIIA Dec., 95 W445 (1996).
12 During the hearing on the employer's motion to dismiss for failure to present a prima facie case, the
13 assistant attorney general argued that the Department was not required to prove the depth of the
14 trench. 9/26/05 Tr. at 95. However, when, as here, a competent person has determined that there
15 is no indication of a potential cave-in, WAC 296-155-657(1)(a) only requires protective devices
16 when an employee is exposed to the hazard of a trench that is at least four feet deep. Otherwise,
17 the Department would be free to cite an employer no matter how shallow the trench was.

18 The evidence regarding the depth of the trench at the point where Mr. Zylstra was located
19 when Mr. Goroski saw him is sparse, at best. Mr. Goroski was the only witness to the actual event
20 and he had no recollection of what portion of the trench Mr. Zylstra was in when he saw him. The
21 trench itself was graded and no witness provided any depth measurement for the shallowest end.
22 Thus, Mr. Zylstra could have been in a portion of the trench that was less than four feet deep.
23 There is no way of knowing, based on this record. We, therefore, agree with the employer; the
24 Department has failed to prove a necessary element of the alleged violation of WAC 296-155-
25 657(1)(a). Item 1-2 must therefore be vacated.

26 **FINDINGS OF FACT**

- 27 1. On August 9, 2004, a compliance safety and health officer from the
28 Department of Labor and Industries conducted an inspection of
29 Cascade Utilities, Inc., at the Sunny Hill Farm development near
30 NE 117th and 167th in Redmond, Washington. On October 15, 2004,
31 the Department issued Citation and Notice No. 307877639, in which it
32 alleged the following violations: Item No. 1-1, a repeat serious violation
of WAC 296-155-655(11)(a), with a penalty of \$4,500; and Item No. 1-2,
a repeat serious violation of WAC 296-155-657(1)(a), with a penalty of
\$4,500. The total penalty assessed was \$9,000.

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2 On October 22, 2004, Cascade Utilities, Inc., filed its appeal from
3 Citation and Notice No. 307877639, with the Safety Division of the
4 Department of Labor and Industries. The Department elected not to
5 reassume jurisdiction and transmitted the appeal to the Board of
6 Industrial Insurance Appeals, where it was received on November 23,
7 2004.

8 On November 24, 2004, the Board issued a Notice of Filing Appeal and
9 assigned the appeal Docket No. 04 W1392.

- 10 2. During the morning of August 9, 2004, Cascade Utilities, Inc., excavated
11 four trenches for sewer pipes on part of the residential development
12 known as Sunny Hill Farm. The trenches were varied in length and
13 were not the usual relatively flat 2 percent grade. A steeper grade was
14 required, due to site-specific engineering considerations. The extent of
15 the steeper grade is unknown.
- 16 3. The trenches excavated by the employer on August 9, 2004, were
17 situated within Type B soil in that it was cohesive soil as demonstrated
18 by high clay content. This type of soil does not crumble and can be
19 excavated with vertical sideslopes. This type of soil is hard to break up
20 when dry and exhibits cohesion when submerged.
- 21 4. On August 9, 2004, the employer had an employee, James Gunderson,
22 on site at the Sunny Hill Farm development. Mr. Gunderson had the
23 qualifications, training, and knowledge sufficient to be considered a
24 competent person under WAC 296-155-650(2)(f).
- 25 5. On August 9, 2004, at the Sunny Hill Farm development, Mr. Gunderson
26 performed a visual inspection and assessment of the soil that was about
27 to be and was excavated by the employer's crew. As part of his
28 inspection, Mr. Gunderson looked for evidence of a situation that could
29 result in possible cave-ins, indications of failure of protective systems,
30 hazardous atmospheres or other hazardous conditions.
- 31 6. On the morning of August 9, 2004, at the Sunny Hill Farm development,
32 employees of Cascade Utilities, Inc., excavated four trenches, using a
trench box for protection as they installed sewer pipe. Once the pipe
was laid, they removed the trench box and back-filled the first three
excavations. Some time after the trench box had been removed from
the fourth trench, an employee of Cascade Utilities, Inc., was briefly
observed in the trench. It is not known what portion of the trench he
was seen in. At one point, the trench was seven feet deep. It is not
known what the shallowest depth of the graded trench was. The trench
was at least 16 feet long. When directed to do so, the employee exited
the trench. It is not known how he did so, whether he walked out or
used a ladder or pulled himself out or required some assistance.

