

Supreme Court No. 89660-7

Court of Appeals, Division I, No. 69219-4-I

SUPREME COURT OF THE STATE OF WASHINGTON

POTELCO, INC.,

Plaintiff/Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Defendant/Respondent.

APPELLANT POTELCO, INC.'S PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The petitioner is Potelco, Inc., a Washington corporation that performs utility construction services. Potelco asks this Court to accept review of the Court of Appeals' decision, which affirmed the Superior Court's entry of summary judgment against Potelco.

II. THE COURT OF APPEALS' DECISION

The Court of Appeals filed an unpublished decision in this matter on November 12, 2013. A copy of that decision is attached hereto as Exhibit A.

III. ISSUE PRESENTED FOR REVIEW

Should the doctrine of equitable tolling apply, even without specific evidence of bad faith by the Department of Labor and Industries or diligence by an employer, when (a) an employer has only 15 days to appeal a Citation for an alleged violation of the Washington Industrial Safety and Health Act of 1973 ("WISHA"); (b) an employer files an appeal shortly after that timeframe; and (c) allowing the appeal will serve the purposes of the underlying statute?

IV. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

On December 20, 2010, The Department of Labor and Industries issued Potelco a Citation for alleged WISHA violations. (CP 142-146). The next day, Potelco receptionist Julia Miles signed for delivery of the Citation, which was sent by certified mail to Potelco's Sumner office. (CP 147). Ms. Miles followed her usual procedure for distributing company mail, and placed the Citation in the mailbox of Bryan Sabari, Potelco's Director of Safety. (CP 118).

At that time, Mr. Sabari was the only Potelco employee who handled citations from the Department. (CP 131-32). Unfortunately, he was away from the office at the time Potelco received the Citation. (CP 127). In fact, due to the nature of his position, Mr. Sabari frequently worked outside the office to train managers, meet with customers, attend legal proceedings, and to help restore energy service during severe weather emergencies or storm outages. (CP 123-25, 128-29).

That particular December, Mr. Sabari was away from the office from before Christmas until at least January 10, 2011, for personal and

work-related reasons. (CP 127-28). During his absence, a substantial amount of mail accumulated on Mr. Sabari's desk. (CP 134-35). When Mr. Sabari returned and discovered the Citation, he immediately sent a copy to Riddell Williams P.S., counsel for Potelco. (CP 132-33). Riddell Williams filed an appeal on behalf of Potelco that same day, January 19, 2011, only three working days beyond the statutory timeframe allowed for an appeal. (CP 149-51).

B. PROCEDURAL BACKGROUND

Potelco appealed the Citation to the Department on January 19, 2011. (CP 149-51). The Department forwarded Potelco's appeal to the Board of Industrial Insurance Appeals (the "Board"), and a hearing was held at the Board's Seattle office before Judge Metzger on February 16, 2012. (CP 107-140). The Board considered a single issue – whether Potelco's appeal should be dismissed because it was filed after the statutory timeframe allowed for an appeal. (CP 109). It did not address the merits of the Citation. On April 26, 2012, the Board issued its final Decision and Order dismissing Potelco's appeal. (CP 13-14). Potelco appealed the Board's Decision and Order to the Skagit County Superior Court (*Potelco, Inc. v. Dep't of Labor and Indus.*, Skagit County Cause

No. 12-2-00884-4, Notice of Appeal (filed 5/10/2012)). The Department then filed a motion for summary judgment, arguing that Potelco's appeal was time-barred. (CP 154-162). Potelco filed a cross-motion for summary judgment, arguing that under the circumstances of the case, the Board should have applied equitable tolling and considered the merits of Potelco's appeal. (CP 1-7). On August 6, 2012, Superior Court Judge Meyer heard the parties' oral arguments, and then affirmed the Board's Decision and Order. (CP 8-9). Potelco timely appealed to the Court of Appeals on August 15, 2012. (*Potelco, Inc. v. Dep't of Labor and Indus.*, Skagit County Cause No. 12-2-00884-4, Notice of Appeal to Washington State Court of Appeals, Division I (filed 8/15/2012)).

V. ARGUMENT

The Supreme Court Should Accept This Petition for Review Because it Involves a Matter of Substantial Public Interest

RAP 13.4(b)(4) states that a petition for review will be accepted if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. Such is the case here.

WISHA was enacted "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. The statute itself recognizes that it was enacted for the “public interest.” *Id.*

RCW chapter 49.17 authorizes the Department to issue citations and assess penalties against employers for WISHA violations. RCW 49.17.120, 49.17.130, 49.17.180. WISHA’s requirements, however, are not always well-defined. At times, an employer will appeal a citation because it believes the conduct at issue actually complied with WISHA’s requirements. When the Department addresses the merits of such appeals, employers and the Department increase their understanding of WISHA. This can result in safer working conditions by educating the Department, employers, and employees about the application of the regulations at issue on appeal.

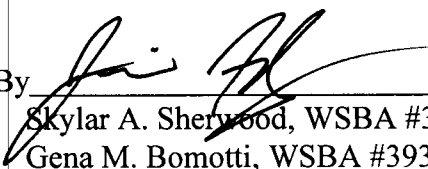
This Petition will determine whether Potelco and the Department are given the opportunity to appeal the underlying Citation on its merits. As previously noted, an appeal on the merits would lead to a better understanding of WISHA, which was enacted specifically for the “public interest.” RCW 49.17.010. Thus, this Petition involves a matter of substantial public interest that should be determined by the Supreme Court.

VI. CONCLUSION

Potelco respectfully requests that the Court accept Potelco's Petition for Review, because it involves a matter of substantial public interest.

DATED this 12th day of December, 2013.

RIDDELL WILLIAMS P.S.

By 
Skylar A. Sherwood, WSBA #31896
Gena M. Bomotti, WSBA #39330
Josias Flynn, WSBA #44130
Attorneys for Appellant Potelco, Inc.

CERTIFICATE OF SERVICE

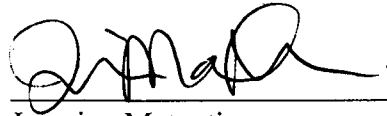
I, Jazmine Matautia, certify that:

1. I am an employee of Riddell Williams P.S., attorneys for Appellant Potelco, Inc. in this matter. I am over 18 years of age, not a party hereto, and competent to testify if called upon.
2. On Thursday, December 12, 2013, I served a true and correct copy of the foregoing document on the following party, attorney for Respondent, via hand delivery, and addressed as follows:

Paul Michael Weideman
Washington Attorney General's Office
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Seattle, Washington, this 12th day of December, 2013.



Jazmine Matautia

EXHIBIT A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

POTELCO, INC.,

Appellant,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

No. 69219-4-I

DIVISION ONE

UNPUBLISHED OPINION

FILED: November 12, 2013

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STATE OF WASHINGTON
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BECKER, J. — Potelco Inc. challenges the dismissal of its appeal of a citation for alleged violations of the Washington Industrial Safety and Health Act of 1973, chapter 49.17 RCW. Potelco appealed the citation three days after the statutory deadline of 15 working days. The company argues the Board of Industrial Insurance Appeals erred by failing to equitably toll the deadline and dismissing its appeal, and the superior court erred by affirming the Board's dismissal. Because Potelco fails to identify any circumstances that would warrant equitable tolling, we affirm the dismissal.

The Washington Industrial Safety and Health Act (WISHA) authorizes the Department of Labor and Industries to issue citations and assess penalties against employers for onsite safety violations. RCW 49.17.120, .130, .180. On

December 20, 2010, the Department issued a citation to Potelco for violations of three safety regulations at its worksite in Bow, Washington. A Department inspector had found Potelco failed to ensure that the operator of its excavator machine had a seatbelt (a repeat serious violation), failed to ensure its employees working in a trench were protected from a cave-in (a serious violation), and provided data for different hydraulic shoring than what was being used in the trench. The citation carried a penalty of \$1,300. Under RCW 49.17.140(1), the company had 15 working days from receipt of the citation to appeal it, not including weekends and holidays. The citation informed Potelco of the 15-day deadline. The Department mailed the citation to Potelco's Sumner office by certified mail with return receipt requested.

On December 21, 2010, Potelco receptionist Julia Miles signed the return receipt. Potelco had 15 working days from that date—that is, until January 13, 2011—to appeal the citation. Miles followed office protocol and placed the citation in the mailbox of Bryan Sabari, Potelco's director of safety at the time. Miles could not recall whether Sabari was in the office on December 21.

Sabari testified before an industrial appeals judge that he was the only Potelco employee responsible for handling citations. He was away from the Sumner office from sometime before Christmas until at least January 10, 2011, on vacation and business trips. He could not recall when exactly he returned to

the office, but it was sometime during the week of January 10. During his absence, his mail had exceeded the capacity of his inbox and “they had just started to pile all my mail and documents on top of my desk.” No one was assigned to go through Sabari’s mail for citations and notices while he was away. Sabari testified that the citation at issue here “was at the bottom of all the piles of mail that took me several days to go through.” When he discovered the citation, he sent it immediately to Potelco’s counsel at Riddell Williams. The firm filed an appeal that same day, January 19, 2011, which was three working days after the statutory deadline.

On February 16, 2012, Industrial Appeals Judge Michael Metzger held a timeliness hearing at which he considered testimony from Sabari and Potelco’s receptionist, Miles. On March 16, the judge issued a proposed decision and order dismissing Potelco’s appeal as untimely and rejecting the argument that the time limit of RCW 49.17.140(1) should be equitably tolled. Potelco petitioned for review before the Board of Industrial Insurance Appeals. The Board denied the petition and adopted Judge Metzger’s proposed decision as its final decision and order. Potelco appealed to Skagit County Superior Court. The Department filed a motion for summary judgment, arguing that Potelco’s appeal was time barred. Potelco filed a cross motion for summary judgment, arguing that under the circumstances of this case, the Board should have applied equitable tolling

and considered the merits of its appeal. The superior court affirmed the Board's decision and granted the Department's motion for summary judgment dismissal. Potelco appeals.

Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Clements v. Travelers Indem. Co., 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). Here, the material facts are undisputed. The only question is whether the Board erred by failing to equitably toll the statutory deadline and dismissing Potelco's appeal as untimely.

A citation that is not timely appealed "shall be deemed a final order of the department and not subject to review by any court or agency." RCW 49.17.140(1); Erection Co. v. Dep't of Labor & Indus., 121 Wn.2d 513, 517, 852 P.2d 288 (1993). If Potelco's appeal—filed three working days after the statutory deadline—was untimely, "the citation became final" and Potelco "lost all rights to appeal it to the Board." Danzer v. Dep't of Labor & Indus., 104 Wn. App. 307, 317, 16 P.3d 35 (2000), review denied, 143 Wn.2d 1020 (2001).

Citing Danzer, Potelco argues the Board should have equitably tolled the timeframe to appeal and considered the merits of its appeal. In Danzer, a manufacturer employer asked the court to apply the doctrine of equitable tolling

to extend the statutory deadline for filing an appeal of a citation. “The doctrine of equitable tolling permits the court, under ‘appropriate circumstances,’ to allow an action to proceed even though a statutory time limit has elapsed.” Danzer, 104 Wn. App. at 318, citing Millay v. Cam, 135 Wn.2d 193, 206, 955 P.2d 791 (1998). “The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff.” Millay, 135 Wn.2d at 206. “In Washington equitable tolling is appropriate when consistent with both the purpose of the statute providing the cause of action and the purpose of the statute of limitations.” Millay, 135 Wn.2d at 206.

The Danzer court recognized that no Washington cases had applied equitable tolling in the context of appealing WISHA citations. But citing federal cases under the federal Occupational Safety and Health Act, the court suggested that WISHA’s statutory deadline might be extended under circumstances that justify equitable tolling, that is, “if the employer could show that the delay in filing was caused by the agency’s deception, the agency’s failure to follow proper procedures, or other agency actions that misled or confused the petitioner.” Danzer, 104 Wn. App. at 318-19, citing Sec’y of Labor v. Barretto Granite Corp., 830 F.2d 396, 399 (1st Cir. 1987); Capital City Excavating Co. v. Donovan, 679 F.2d 105, 110 (6th Cir. 1982).

As in Danzer, Potelco can point to no Department action that deceived or

confused the company into missing the deadline. Nor can Potelco show the diligence required by Millay. Sabari, Potelco's director of safety, testified that he was familiar with the timeframe for appealing citations because during his seven years with the company, Potelco had appealed every citation it received, about 20 total. He was aware of the inspection that led to the citation at issue here, and thought he was present at the closing conference on the citation.

Nonetheless, Sabari and Potelco failed to arrange for someone to review Sabari's mail for citations during his extended absence from the office. Upon his return, it took Sabari several days to discover the citation "at the bottom of all the piles of mail." This does not amount to diligence. As in Danzer, "there is no basis to apply the doctrine of equitable tolling in this case." Danzer, 104 Wn. App. at 319.

Potelco recognizes that "Courts typically permit equitable tolling to occur only sparingly, and should not extend it to a garden variety claim of excusable neglect." City of Bellevue v. Benyaminov, 144 Wn. App. 755, 761, 183 P.3d 1127 (2008) (internal quotation marks omitted) (quoting State v. Robinson, 104 Wn. App. 657, 667, 17 P.3d 653 (2001)), review denied, 165 Wn.2d 1020 (2009). Nevertheless, the company argues for an extension of the equitable tolling doctrine to situations where "(1) a statute of limitations is an extremely short time period, and (2) a party files an appeal shortly thereafter, and (3) allowing the

appeal will serve the purposes of the underlying statute," even where there is no evidence of bad faith or diligence. We decline Potelco's invitation to fashion a new rule that would apply to its "garden variety claim of excusable neglect." Benyaminov, 144 Wn. App. at 761 (internal quotation marks omitted) (quoting Robinson, 104 Wn. App. at 667).

Because the circumstances do not justify equitable tolling, Potelco's appeal was correctly dismissed as untimely.

Affirmed.

WE CONCUR:

