

92998-0
NO. 92988-0

SUPREME COURT OF THE STATE OF WASHINGTON

POTELCO, INC.,

Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent.

ANSWER TO PETITION FOR REVIEW

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 ORIGINAL

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I. INTRODUCTION

This is a worker safety case involving a routine application of substantial evidence review. The Department cited Potelco for serious violations of the Washington Industrial Safety and Health Act (WISHA) after a Potelco employee was seriously injured on the job. A helicopter came too close to a 115,000-volt transmission line while delivering materials to the company's worksite. Electricity arced from the energized line, down the helicopter's conductive long line, and electrocuted the worker on the ground. The Board of Industrial Insurance Appeals and the superior court affirmed the citations, rejecting Potelco's theory that it could not have known of the violations because it incorrectly assumed that the helicopter's long line was nonconductive.

In an unpublished opinion, the Court of Appeals affirmed. The court correctly determined that substantial evidence supported the Board's findings that Potelco violated the safety regulations and that the company had knowledge of the violative conditions at its worksite. Contrary to Potelco's assertions, this decision has no broader import. Because this case does not present any issue of substantial public interest under RAP 13.4(b)(4), this Court should decline further review of Potelco's appeal.

II. STATEMENT OF ISSUES

Discretionary review is not warranted in this case, but if the Court were to grant review the following issues would be presented:

1. Does substantial evidence support the Board's finding that Potelco had nonqualified employees working with a helicopter near an energized line where there was testimony that these employees lacked awareness of the hazards, did not know how to determine the nominal voltage of a live line, and did not know how to use insulating and shielding materials or insulated tools when working near an exposed energized wire?
2. Does substantial evidence support the Board's finding that Potelco failed to hold a safety conference following a change in hazards where a helicopter operation brought Potelco's employees much closer to an energized line than at other jobsites on the project and it is undisputed that the company did not hold a conference to discuss this change in hazards?
3. Does substantial evidence support the Board's finding that Potelco knew or, through the exercise of reasonable diligence, could have known of the violative working conditions where Potelco knew that its employees were working with a helicopter near an energized line, knew that the worksite was muddy, knew that the helicopter's long line could become conductive when dirty, but did not test the conductivity of the line?

III. STATEMENT OF THE CASE

A. **A Potelco Employee Was Seriously Injured When a Helicopter at Its Worksite Came Too Close to an Energized High Voltage Line**

Potelco is a service provider for Puget Sound Energy that installs high voltage transmission lines. CP 278. In June 2012, Potelco was working on Baker line 2, a high voltage line near Concrete, Washington.

CP 281, 282-83, 374. Baker line 2 was de-energized for the project, but a second high voltage line—Baker line 1—ran parallel to it, approximately 60 feet away. CP 282, 287. Baker line 1 remained energized with 115,000 volts while the work on Baker line 2 was performed. CP 163, 313.

The project required Potelco to rebuild the structures supporting Baker line 2. CP 281-82. The company contracted with Salmon River Helicopters to fly gravel, concrete, and other materials to areas that could not be reached by car or truck. CP 194, 284. CP 288. The helicopter delivered these materials in an aluminum hopper at the end of a “long line.” CP 290.

On the first day that Potelco used the helicopter, it held a short meeting with its workers. CP 197-98. The discussion centered on what to do if the helicopter had an emergency, such as its engine dying. CP 198. There was no discussion of the hazards posed if the helicopter came too close to Baker line 1. CP 197-99, 341-42. Potelco did not identify electrocution as a potential hazard of the helicopter operation. CP 341. It did not discuss how close to Baker line 1 the crew would be working at different jobsites on the project. CP 197-99.

Potelco general foreperson Eric Holmgren attended the meeting. CP 280, 289. Holmgren heard the helicopter pilot say that the helicopter’s long line was made of Kevlar. CP 292, 308. Holmgren knew that Kevlar

can become conductive when dirty and that an electrician should determine if an object near an energized line conducts electricity. CP 304. In fact, although the long line had a Kevlar covering, there was also an extension cord inside it, allowing the helicopter to jettison the hopper in an emergency. CP 229-30. This made the long line conductive. CP 229-31. Potelco presented no evidence that it inquired into the conductivity of the long line, and Holmgren testified that he did not know if anyone tested the long line for conductivity. CP 316. No evidence established that the helicopter pilot was an electrician or had any electrical safety training. *See* CP 289-92, 308.

Potelco decided to use civil workers to assist the helicopter at the worksite.¹ CP 302. Shane Wheeler was the foreperson of a crew that included Alan Jesmer and Randy Chapple. CP 191, 195, 322. Potelco had not trained these employees to work on or near energized electrical lines. CP 166, 178-80, 193, 205-07, 342-44. To work near such lines, an employee must be “trained and competent” to identify the exposed live parts of electric equipment, to determine the nominal voltage of the live parts, and to use “special precautionary techniques, personal protective equipment, insulating and shielding materials, and insulated tools for

¹ The typical duties of Potelco’s civil workers included installing roads, excavating holes, and providing materials and support to the company’s electrical workers. CP 280-81.

working on or near exposed energized parts of electric equipment.” WAC 296-45-065(1)(a)-(d). Neither Wheeler nor Jesmer possessed these skills. CP 178-81, 205-07. Instead, Potelco had taught them to simply stay away from live wires. CP 193.

Wheeler’s crew was tasked with installing anchors for Baker line 2’s new supporting structures. CP 194-95, 324-27. The last jobsite was near a power pole designated structure 4/3.² CP 283, 327. Structure 4/3 was located at a point where Baker line 1 and Baker line 2 turned at an angle. CP 285. Part of the jobsite—designated as anchor hole A—was nearly directly under Baker line 1, just over five feet from the area beneath the energized line. CP 225-26, 330. This was much closer to the live transmission line than any other area where the crew had worked. CP 201-02, 205, 346. The location of the worksite resulted in the helicopter coming much closer to Baker line 1 than it had at previous jobsites. CP 344-45.

Potelco did not stop work and hold a conference with Wheeler’s crew to discuss the hazards created by the helicopter flying so much closer to the energized transmission line. CP 341-42. There was no discussion about anchor hole A’s proximity to Baker line 1. CP 202. None of the

² The power pole was designated structure 4/3 based on its distance from transmission line’s origin at Baker dam. Structure 4/3 was approximately 4.3 miles from the dam. CP 283.

workers were aware of the hazards posed by the helicopter's long line coming too close to the energized line. CP 181, 205, 331.

On the last delivery of the day, the pilot brought the helicopter over anchor hole A and began to lower the hopper. CP 176, 202-03, 330. As Wheeler reached toward it, electricity from the energized Baker 1 line arced from the hopper to the ground. CP 176, 20304, 300. The electricity traveled through Wheeler's body, throwing him back several feet. CP 203, 299.

Wheeler sustained serious injuries. CP 233. He suffered flash burns from the electrical contact. CP 299. His injury was classified as an electrocution. CP 182, 299, 375. Following the accident, Wheeler was hospitalized at Harborview Medical Center in the burn unit for two weeks. CP 182.

B. The Department Cited Potelco For Failing To Hold a Conference When the Hazards of the Helicopter Operation Changed and for Failing To Ensure That Only Properly Qualified Employees Worked On or Near the Unguarded High Voltage Line; the Board Affirmed the Citations

The Department cited Potelco for safety and health violations under WISHA. It cited the company for a serious violation of WAC 296-45-325(1) for failing to ensure that only employees who were qualified to assess the hazards of the jobsite worked on or near the unguarded high voltage line. CP 79-81. It also cited Potelco for a serious violation of

WAC 296-45-67507(2) for failing to hold a conference when there was a change in hazards relating to the helicopter operation.³ CP 79-81.

The Board affirmed these violations. It found that Wheeler and Jesmer were not qualified to be working near the energized transmission line because they lacked the training to understand the special hazards posed by working in close proximity to an energized power line. CP 71-72 (FF 8). It emphasized that these employees did not have the knowledge or skills to protect themselves from such hazards:

In particular, nether [sic] Mr. Wheeler nor Mr. Jesmer were trained in the skills and techniques necessary to distinguish exposed live parts from other parts of electric equipment, the skills and techniques necessary to determine the nominal voltage of exposed live parts, the minimum approach distances corresponding to the voltages to which they were exposed, and the proper use of the special precautionary techniques, personal protective equipment, insulating and shielding materials, and insulated tools for working on or near exposed energized parts of electric equipment.

CP 71-72 (FF 8).

The Board found that the proximity of anchor hole A to the energized Baker 1 line presented a new hazard at structure 4/3, given that the helicopter was required fly much closer to Baker line 1 at this jobsite than it had at any other site:

³ Two additional violations were vacated by the Board, which concluded that they were essentially identical to Potelco's violation of WAC 296-45-325(1). CP 63. The Department did not appeal this determination, and these violations are not at issue in this appeal.

The work that Potelco was performing, at anchor hole A where Mr. Wheeler was injured, was so much closer to Baker line 1 than other locations Potelco had workers working with a helicopter that had a conductive long line, that it constituted a change in the hazard that Potelco's workers were exposed to.

CP 72 (FF 9). The Board explained that "there should have been a conference before work began at structure 4/3 to make sure all workers understood the hazard they would face, and the protections that needed to be taken." CP 72 (FF 10).

Finally, the Board found that Potelco had knowledge of the violative working conditions, noting specifically that Potelco knew or, through the exercise of reasonable diligence, could have known that the helicopter's long line was conductive. CP 71 (FF 6). The Board noted that Kevlar becomes conductive when dirty and that Potelco either knew, or should have known, "there was a good chance that after two days of work delivering gravel and concrete in a muddy location, that the long Kevlar line could have become contaminated, even if it was not conductive to begin with." CP 64-65. The Board found that the line had an extension cord inside it, that the line was conductive, and that Potelco knew, or with the exercise of reasonable diligence, could have known that it was conductive. CP 71 (FF 5, 6).

C. The Superior Court and Court of Appeals Affirmed the Board

The superior court affirmed the Board, and the Court of Appeals affirmed the superior court. *Potelco, Inc.*, No. 73735-0-I, slip op. at 1 (March 7, 2016). The Court of Appeals explained that substantial evidence supported the Board's finding that Wheeler and Jesmer were not qualified to be working with the helicopter's long line near the energized transmission line. Slip op. at 8. The court noted that both workers admitted that they lacked awareness of the hazards, that they did not know how to determine the nominal voltage of a live line, and that they did not know how to use insulating and shielding materials or insulated tools when working near an exposed energized wire. Slip op. at 8-9. Because WISHA regulations require such training and competency, neither worker was a qualified employee as defined by WAC 296-45-035. Slip op. at 8.

The court held that substantial evidence also showed that there was a change in hazards during the helicopter operation. Slip op. at 12-13. This was because “[s]tructure 4/3 was closer to the energized Baker line 1 than any other place Potelco worked while the helicopter was in use.” Slip op. at 12-13.

Finally, substantial evidence showed that Potelco knew or, through the exercise of reasonable diligence, could have known of these violative conditions. Slip op. at 8-11. Like the Board and the superior court, the

Court of Appeals rejected Potelco's argument that it reasonably relied on the helicopter pilot's statement that the long line was made of nonconductive Kevlar. The court explained that Potelco's general foreperson had admitted that an electrician should determine if an object near an energized wire is conductive and that there was no evidence the helicopter pilot had such training. Slip op. at 10. Furthermore, given that Kevlar becomes conductive when dirty, "the likelihood of dirtiness 'after two days of work delivering gravel and concrete in a muddy location' was enough to render unreasonable Potelco's assumption that the line was nonconductive." Slip op. at 10-11.

IV. ARGUMENT

A. **Discretionary Review Is Not Warranted Where Potelco Simply Asks This Court To Reweigh the Evidence**

No issue of substantial public interest is raised by the Court of Appeals' correct application of substantial evidence review. Potelco points to no error by the court. It does not contend that an incorrect standard was applied; nor does it argue that the evidence relied on by the court was not sufficient to support the Board's findings. Instead, in its statement of the issues, Potelco merely points to other evidence in its favor, implicitly requesting that this Court reweigh the evidence.

Such an argument provides no basis for review. Like the Court of

Appeals, this Court does not reweigh the evidence or substitute its own judgment on substantial evidence review. *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001); *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 34, 891 P.2d 29 (1995). Because Potelco simply asks this Court to reweigh the evidence, the company's request for discretionary review should be denied.

B. There Is No Issue of Substantial Public Interest Where the Court of Appeals' Decision Applies Only To Potelco

The issues in this case apply only to Potelco. The Court of Appeals affirmed the Board's findings and conclusions based on the particular conditions at Potelco's worksite. Because the company's appeal has no wider significance, it does not raise an issue of substantial public interest.

Contrary to Potelco's assertion, this case would not "clarify whether Potelco, or any other employer, may reasonably rely upon outside contractors to accurately describe their equipment and capabilities." Pet.

10. This issue relates to Potelco's knowledge of the violative conditions at its worksite.⁴ Under WISHA, knowledge is established where the

⁴ The issue is not, as Potelco would have it, whether an employer has a "duty to independently test the characteristics of equipment owned and operated by a third party at the employer's worksite." Pet. 2. It is well established that every employer has a specific duty to comply with WISHA regulations. *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 153, 750 P.2d 1257, 756 P.2d 142 (1988). The issue is whether there is substantial evidence to support the Board's finding that Potelco knew, or through the exercise of reasonable diligence, could have known of the violative conditions at its worksite. Potelco's attempt to transform a routine application of substantial evidence review into a question of law is without merit.

employer knew or, through the exercise of reasonable diligence, could have known of the violative condition. *Erection Co., Inc v. Dep't of Labor & Indus.*, 160 Wn. App. 194, 206-07, 248 P.3d 1085 (2011). "Reasonable diligence involves several factors, including an employer's obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence." *Erection Co.*, 160 Wn. App. at 206-07 (internal quotation omitted).

Here, based on the specific facts of this case, the Court of Appeals affirmed the Board's determination that Potelco's alleged reliance on its subcontractor, Salmon River Helicopters, was not reasonable. The court explained that substantial evidence showed that Potelco could have learned the helicopter's long line was conductive had it exercised proper diligence. Slip op. 9-11. Potelco knew that an electrician should determine the conductivity of the line, knew that Kevlar becomes conductive when dirty, and knew that the helicopter had been delivering materials to a muddy location. Under these circumstances, any exercise of reasonable diligence would include testing the line. But Potelco's manager testified that he did not know if anyone had tested it for conductivity. CP 316. As the Court of Appeals explained, Potelco's "unquestioning reliance" on the helicopter pilot's statement that the line was made of Kevlar did not constitute reasonable diligence. Slip op. at 9.

Furthermore, it was Potelco and not Salmon River Helicopters that had expertise about electrical work. In its petition for review, Potelco improperly cites to evidence that is not in the record, quoting at length from “Salmon River’s publicly available website.” Pet. 3-4; *see* RAP 9.11; *State v. Ziegler*, 114 Wn.2d 533, 541, 789 P.2d 79 (1990). No evidence of the website was introduced before the Board. No witness mentioned it at hearing. Because there was no evidence that Salmon River Helicopters had any special expertise in high voltage safety, for this reason as well, the Court of Appeals correctly affirmed the Board’s determination that Potelco’s alleged reliance on this contractor did not constitute reasonable diligence. This fact-specific determination does not raise an issue of substantial public interest.

Potelco is also incorrect that its appeal has any far-reaching implications for when an employer may use civil workers at worksites around powerlines. *See* Pet. 10. The Board did not deem Wheeler and Jesmer unqualified because they were not licensed electricians but rather because they did not meet the training and competency requirements of WAC 296-45-065(1). Because Potelco knew or, with the exercise of reasonable diligence, could have known that these employees would be working in close proximity to a live high voltage line, it was not appropriate for Potelco to assign them to this task. The Board decided

nothing more, and this determination does not constitute an issue of substantial public interest.

Finally, the Board's finding that there was a change in hazards during the helicopter operation was specific to Potelco's worksite. Where a helicopter using a conductive long line begins flying into close proximity with an energized high voltage line, the employer should hold a conference with workers on the ground to discuss the new hazards associated with this change in operations. This unremarkable determination also does not raise an issue of substantial public interest. This Court should deny Potelco's petition for review.

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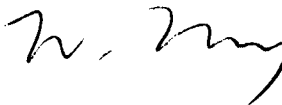
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V. CONCLUSION

This Court should deny Potelco's petition for review where the company simply asks the Court to reweigh the evidence. Because Potelco's appeal raises no issue of substantial public interest, its petition for review should be denied.

RESPECTFULLY SUBMITTED this 3rd day of June, 2016.

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OF THE STATE OF WASHINGTON

POTELCO, INC,

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v.

WASHINGTON STATE
DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

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The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the DEPARTMENT'S ANSWER TO PETITION FOR REVIEW and this DECLARATION OF MAILING in the below described manner:

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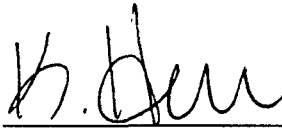
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RESPECTFULLY SUBMITTED this 3rd day of June, 2016.



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Good afternoon, Mr. Carpenter,

Attached for filing in the above-mentioned matter is the Department's Answer to Petition for Review and Declaration of Mailing.

Please contact me with any questions.

Thank you,

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