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Court of Appeals
Division I
State of Washington

NO. 73226-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

POTELCO, INC.,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

DEPARTMENT OF LABOR & INDUSTRIES BRIEF OF RESPONDENT

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I. INTRODUCTION

It is an employer's responsibility to enforce its safety rules to ensure a safe workplace. Potelco, Inc., failed at that duty. A Potelco employee was seriously injured while working without protective grounding on a high voltage transmission line. The Department of Labor and Industries cited the company under the Washington Industrial Safety and Health Act (WISHA) for failing to create an equipotential zone (EPZ) at the worksite. An EPZ provides temporary grounding that protects workers from electrocution and death. The Board of Industrial Insurance Appeals and the superior court affirmed the Department's citations.

The Board properly rejected Potelco's argument that unpreventable employee misconduct excused the violations, finding that the company did not take adequate steps to discover and correct safety violations and failed to effectively enforce its safety program in practice. Substantial evidence supports these findings where Potelco's own foreman broke the company's safety rules, management usually warned employees of upcoming safety inspections, and workers routinely violated safety regulations without receiving discipline. Substantial evidence also shows that Potelco did not adequately enforce its own written accident prevention program and that it knew of the violations. This Court should affirm.

II. ISSUES

1. Does substantial evidence support the Board's finding that Potelco failed to prove unpreventable employee misconduct where Potelco did not take adequate steps to discover and correct safety violations and did not effectively enforce its safety program in practice?

2. Does substantial evidence support the Board's finding that Potelco failed to effectively enforce its written accident prevention program where workers usually were informed in advance of safety inspections, employees routinely violated safety rules, and Potelco rarely disciplined its workers for safety violations?

3. Does substantial evidence support the Board's finding that Potelco knew of the violations where the violations occurred in plain view and a Potelco foreman witnessed the violative conduct?

III. STATEMENT OF THE CASE

A. Potelco Knew that the De-Energized Transmission Line at Its Sedro-Woolley Worksite Could Become Charged with Dangerous Electrical Energy through Induction

Potelco is a utility contractor that installs and maintains high voltage transmission lines. CP 9. In March 2011, Potelco was working on a de-energized high voltage line in the Sedro-Woolley area. CP 9, 187. A second high voltage line, roughly 30 feet away, ran parallel to the de-energized line for approximately 25 miles. CP 187. The proximity of the two lines made it possible for the de-energized line to become charged by the live line through a mechanism known as induction. CP 9. The induction hazard was especially great because the lines ran parallel to each other for so great a distance. CP 9, 247, 352, 521-22, 524.

The project involved the replacement of transmission poles and wires. CP 9, 187. Potelco management knew that this would require bringing the transmission line to the ground. CP 443. To reduce the induction hazard, Potelco planned to "cut air" into the de-energized line before work began. CP 187. This would involve breaking the de-energized line into sections to reduce the length of line that could become energized through induction. CP 10, 299, 326.

The Department's safety standards for electrical workers require the creation of an equipotential zone before working on de-energized transmission lines. WAC 296-45-345(3). To establish an EPZ, "[t]emporary protective grounds shall be placed at such locations and arranged in such a manner as to prevent each employee from being exposed to hazardous differences in electrical potential." WAC 296-45-345(3). An EPZ protects workers from the risk of electrocution and death. CP 355-56, 358-59, 473. When working on transmission lines that are lying or hanging near the ground, Potelco's safety rules required that workers use conductive mats to create an EPZ. CP 360-61, 473-74, 515.

At a safety meeting before work began, Potelco management discussed the induction hazard and the plan to cut air into the line with Potelco's workers. CP 188. Safety coordinators Larry Rupe and George Bellos went through Potelco's safety procedures, including equipotential

grounding. CP 297-99, 329-30, 444-47. Potelco did not tell workers to use conductive mats to create an EPZ when working on the ground. CP 273-74, 297-99, 330.

B. Potelco Did Not Tell Gavin Williams's Work Crew to Delay Work on the Transmission Line until the Induction Hazard Had Been Reduced

Gavin Williams was foreman of a crew that consisted of Bill Sword (lineman), Robb Schwilke (line equipment operator), Kathryn Evans (fourth-step apprentice), and Brent Murphy (second-step apprentice). CP 187. As the crew's foreman, Williams was responsible for enforcing safety rules at the worksite. CP 11, 466. Potelco authorized him to stop work and discipline crew members for breaking safety rules. CP 11, 466. Williams had the power to terminate an employee for a safety violation. CP 459-60.

On the first day of the project, Potelco assigned the crew to work on a section of the line near two transmission poles. CP 188. The crew planned to lower the transmission wires to the ground, remove the old poles, set new poles in place, and lift the wires back onto the new poles. CP 304-05. By working on the ground, the crew could complete the project more quickly. CP 305, 306-07. The mentality of the crew was "production, production, production." CP 305-06.

Potelco made no arrangements to notify the crew when air had been cut into the de-energized line. CP 10, 255, 450, 514, 517-18. The crew was not told to wait for notification to begin its work.[1] CP 10, 249, 255, 275-76, 318-19, 326, 517-18.

C. Potelco Did Not Establish an Equipotential Zone before Beginning Work on the Transmission Line

Upon arriving at the worksite, Williams's crew could not find a high voltage tester to check if the de-energized transmission line was charged with electrical energy. CP 322-23, 582. Instead, Williams and the lineman, Bill Sword, used a crescent wrench to "fuzz" the line. CP 188, 308-09, 322-23, 582. "Fuzzing" is a method to test for voltage where a metallic object is held near a conductor while listening for a cracking or buzzing noise. CP 308, 590. Williams and Sword told other crew members that they did not hear anything when they fuzzed the transmission line. CP 322-23.

Potelco did not create an EPZ before beginning work on the line. CP 188-89, 307, 320-21. The protective grounds available at the worksite

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[1] Potelco incorrectly asserts that Williams's crew was supposed to wait until air had been cut into the transmission line, characterizing the crew's work on the date of the incident as "unauthorized." App's Br. 7-8. Instead, as the Board found, Potelco did not tell its work crews to wait until air had been cut into the line to begin their work. CP 10. Although Potelco assigns error to this finding, it provides no argument as to why the Board was incorrect. In such circumstances, the finding is a verity. *See In re Estate of Lint*, 135 Wn.2d 518, 531-33, 957 P.2d 755 (1998). In any case, ample evidence supports the Board's finding on this issue. Schwilke and Evans testified that the crew was not told to await notification to begin work on the line. CP 249, 255, 263-65, 275, 326.

were not long enough to establish an EPZ. CP 304-05, 307. The crew did not have conductive mats to create an EPZ on the ground. CP 273-74, 307-08, 330. Evans had never seen conductive mats while working at Potelco. CP 307-08.

Williams knew that the crew did not establish an EPZ before beginning to work on the line. CP 10. Williams wanted to impress his superiors and felt pressure to replace at least one pole before the end of the day. CP 324.

D. A Potelco Employee was Seriously Injured When He Contacted the Transmission Line without Protective Grounding

Potelco did not cut air into the de-energized transmission line before the crew began its work. CP 189. The line had become charged with dangerous electrical energy through induction. CP 9, 189, 276. At the worksite, Sword and Evans began to lower the transmission line to the ground. CP 189, 251-52. They lowered the line until it floated about ten feet above the ground. CP 189.

Williams tried to secure the transmission line using a tool called slack blocks. CP 189. He planned to capture the line and then bring it to the ground with his hands. CP 189. Williams could not capture the line, and Brent Murphy, the second-step apprentice, tried to grab it. CP 189.

When Murphy touched the transmission line, he suffered serious electrical shock injuries due to induction. CP 9, 189, 356.

Paramedics arrived and airlifted Murphy to Harborview Medical Center in Seattle, where he was placed into an induced coma. CP 189, 435. Fortunately, Murphy survived and eventually recovered from his injuries. CP 435.

E. Potelco Violated Its Written Accident Prevention Program When It Failed to Establish an EPZ

Potelco's written accident prevention program required an EPZ when working around overhead transmission lines. The company's safety manual stated: "To make the work area safer around overhead transmission lines create an Equipotential Zone by using temporary protective grounding equipment." CP 362. The failure to create an EPZ violated Potelco's accident prevention program. CP 189.

Potelco's accident prevention program also prohibited fuzzing as a method of testing for voltage. CP 363. The safety manual explained that "this method is considered unreliable and shall not be used." CP 363. Williams and Sword violated Potelco's safety rules when they used a wrench to fuzz the transmission line. CP 188, 308-09, 322-23, 582.

F. The Department Cited Potelco for Failing to Create an EPZ and Failing to Effectively Enforce Its Written Safety Program, and the Board and the Superior Court Affirmed

The Department cited Potelco for failing to create an EPZ and for failing to effectively enforce its written accident prevention program.[2] The Department classified these violations as serious violations. CP 132-38. Potelco appealed to the Board. CP 127. It did not dispute that it failed to create an EPZ or that its crew violated the company's written safety program. CP 188-89. Instead, Potelco argued that its failure to create an EPZ resulted from unpreventable employee misconduct, that it effectively enforced its written safety rules, and that the cited violations were not serious because the company could not have known of the violations even with the exercise of reasonable diligence. CP 26-33.

At hearing, Schwilke and Evans testified about Potelco's safety program. They explained that a foreperson or general foreperson would usually warn workers of Potelco's site inspections, allowing employees to avoid being caught breaking safety rules. CP 288-89, 290-91, 311, 316-17. Potelco workers routinely violated safety regulations, but the company rarely disciplined employees, even in instances where a foreperson observed the violations. CP 256-57, 283, 286-87, 309-11, 315. Most

[2] This brief focuses only on these two citations. The third citation—Potelco's failure to determine the hazardous conditions at its worksite—was vacated by the Board and is not at issue in this appeal.

Potelco employees viewed production as more important than safety. CP 323.

Potelco safety coordinator Rupe testified that Potelco did not usually document verbal warnings to employees, even though failing to do so violated Potelco's written disciplinary policy. CP 516, 522-23, 774. In the two years before the incident, Potelco took only five disciplinary actions against employees. CP 500. There was no evidence that any of these actions was the result of a safety inspection. CP 500-05.

The Board rejected Potelco's unpreventable employee misconduct defense. CP 12. It found that the company did not take adequate steps to discover and correct safety violations where its employees were warned of upcoming safety inspections:

> Potelco did not take adequate steps to discover and correct violations of its safety rules because Potelco employees were informed in advance that Potelco would conduct a safety inspection in the majority of safety inspections Potelco's safety inspectors made. Potelco workers would then take steps to correct any safety violations they and their foreman knew about.

CP 11 (Finding of Fact (FF) 11).

The Board found that Williams's involvement in the EPZ violation also demonstrated that the company did not effectively enforce its safety program:

> Potelco did not effectively enforce its safety program in a manner that was effective in practice as demonstrated by the failure on March 28, 2011, of its work site foreman, Williams, to mandate that his crew establish temporary protective grounds placed at such locations and arranged in such a manner as to prevent each employee from being exposed to hazardous differences in electrical potential.

CP 11 (FF 12).

The Board likewise found that Potelco did not effectively enforce its written accident prevention program, explaining that the company had failed to adequately enforce its own disciplinary policy:

> Potelco's safety inspectors routinely gave out verbal warnings that were either not written up or not followed up, in direct contradiction of Potelco's own progressive discipline policy. The net effect was that a Potelco worker could get a number of verbal warnings and receive no progressive discipline for repeating the same safety violation. That fact created an environment where Potelco's employees readily ignored some safety rules to perform work faster.

CP 11-12 (FF 13).

Finally, the Board determined that the violations were properly characterized as serious violations. CP 12. It rejected Potelco's assertion that it did not know of the violations. CP 11. The Board explained that given Williams's presence at the worksite, Potelco knew, or in the exercise of reasonable diligence could have known, that no EPZ had been established. CP 11 (FF 9).

Potelco appealed to superior court. CP 776. The superior court affirmed, finding that substantial evidence supported the Board's decision. CP 776-77, 796-98. Potelco now appeals.

IV. STANDARD OF REVIEW

In a WISHA appeal, the court directly reviews the Board's decision based on the record before the agency. *J.E. Dunn Nw., Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 35, 42, 156 P.3d 250 (2007). The Board's factual findings are conclusive if supported by substantial evidence, when considering the whole record. RCW 49.17.150(1); *Mowat Constr. Co. v. Dep't of Labor & Indus.*, 148 Wn. App. 920, 925, 201 P.3d 407 (2009). Evidence is substantial if it is sufficient to convince a fair-minded person of the truth of the declared premise. *Mowat Constr.*, 148 Wn. App. at 925.

The court will not reweigh the evidence. *Zavala v. Twin City Foods*, 185 Wn. App. 838, 867, 343 P.3d 761 (2015). Rather, it views the evidence in the light most favorable to the prevailing party at the Board, here the Department. *See Frank Coluccio Constr. Co. v. Dep't of Labor & Indus.*, 181 Wn. App. 25, 35, 329 P.3d 91 (2014). If substantial evidence supports the Board's findings, the court then reviews whether the findings support the conclusions of law. *Erection Co., Inc v. Dep't of Labor & Indus.*, 160 Wn. App. 194, 202, 248 P.3d 1085 (2011).

WISHA statutes and regulations are construed "liberally to achieve their purpose of providing safe working conditions for workers in Washington." *Frank Coluccio Constr.*, 181 Wn. App. at 36; RCW 49.17.010. The court gives substantial weight to the Department's interpretation of WISHA. *Frank Coluccio Constr.*, 181 Wn. App. at 36.

V. ARGUMENT

Substantial evidence supports the Board's decision. Potelco does not dispute that it failed to establish an EPZ; nor does it contend that Williams and his crew complied with the company's written accident prevention program. The Court should reject Potelco's argument that there was unpreventable employee misconduct where Potelco failed to prove that it takes adequate steps to discover and correct safety violations or that it effectively enforces its safety program in practice.[3] The company's own foreman directed the violation, its management usually warned employees of upcoming safety inspections, and Potelco workers routinely violated safety rules without receiving discipline. Substantial evidence supports the Board's determination that Potelco did not prove the elements of unpreventable employee misconduct.

[3] Potelco raises the same defense in a separate appeal that also involves the company's failure to establish an EPZ. *Potelco, Inc. v. Dep't of Labor & Indus.*, No. 72845-8-I (Wash. Ct. App. filed Dec. 15, 2014).

For the same reasons, Potelco did not effectively enforce its written accident prevention program. As the Board found, the advance warning for safety inspections and lack of discipline created an environment in which Potelco employees readily ignored safety rules in order to work faster. Substantial evidence likewise supports the Board's finding that Potelco knew or could have known of the violations because they occurred in plain view and in the presence of a foreperson. This Court should affirm.

A. Potelco Did Not Meet Its Burden of Proving All Elements of the Unpreventable Employee Misconduct Defense

Potelco did not show its failure to create an EPZ resulted from unpreventable employee misconduct. This is an affirmative defense that the employer must prove. *Wash. Cedar & Supply Co. v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 911-12, 83 P.3d 1012 (2003). Under RCW 49.17.120(5), the employer must show the existence of:

> (i) A thorough safety program, including work rules, training, and equipment designed to prevent the violation;
>
> (ii) Adequate communication of these rules to employees;
>
> (iii) Steps to discover and correct violations of its safety rules; and
>
> (iv) Effective enforcement of its safety program as written in practice and not just in theory.

An employer asserting an unpreventable employee misconduct defense must prove each element of the test. RCW 49.17.120(5); *Wash. Cedar*, 119 Wn. App. at 911. To prove that a safety program is effective in practice, "evidence must support the employer's assertion that the employees' misconduct was an isolated occurrence and was not foreseeable." *BD Roofing, Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 98, 111, 161 P.3d 387 (2007).

Here, special rules apply because a supervisor was involved in the violation. In such circumstances, "the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his or her supervision." *Sec'y of Labor v. Archer-W. Contractors, Ltd.*, 15 BNA OSHC 1013, 1991 WL 81020, at *5 (No. 87-1067 1991). "[I]n cases involving negligent behavior by a supervisor or foreman which results in dangerous risks to employees under his or her supervision, such fact raises an inference of lax enforcement and/or communication of the employer's safety policy." *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1277 (6th Cir. 1987).[4]

[4] For help in deciding cases where there is an absence of state law on point, Washington looks to the Occupational Safety and Health Administration (OSHA) laws and consistent federal decisions. *See Wash. Cedar*, 119 Wn. App. at 911-12; *Elder Demolition, Inc. v. Dep't of Labor & Indus.*, 149 Wn. App. 799, 806, 207 P.3d 453

Potelco did not prove unpreventable employee misconduct. As the Board found, the company failed take adequate steps to discover and correct safety violations and did not enforce its safety program in a manner that was effective in practice.[5] Because substantial evidence supports these findings, and the findings support the conclusions of law, this Court should affirm.

1. Substantial Evidence Shows That Potelco Did Not Take Adequate Steps to Discover and Correct Safety Violations Where Employees Were Warned in Advance of Potelco's Safety Inspections

Potelco's own employees testified that the company did not take adequate steps to discover and correct safety violations. An employer's steps are inadequate where unannounced inspections are infrequent and workers caught violating the rules are not consistently disciplined. *Legacy Roofing, Inc. v. Dep't of Labor & Indus.*, 129 Wn. App. 356, 365-66, 119 P.3d 366 (2005). Such steps are inadequate because they are not sufficient to deter future violations. *See Legacy Roofing*, 129 Wn. App. at 365.

(2009). Standards adopted under WISHA must be at least as effective as those adopted or recognized under OSHA. RCW 49.17.050(2); *Aviation W. Corp. v. Dep't of Labor & Indus.*, 138 Wn.2d 413, 423-424, 980 P.2d 701 (1999).

[5] The Board found that Potelco's safety program was adequate "in theory," satisfying the first element of the unpreventable employee misconduct defense. CP 11. The Board made no finding regarding whether Potelco adequately communicated its safety rules to employees. As the party that carries the burden of proof, the absence of a finding is the equivalent of a finding against the party on that issue. *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 524, 22 P.3d 795 (2001). Nevertheless, as the Board's explicit findings are sufficient to support its legal conclusions, this brief focuses on the substantial evidence that supports those findings.

Here, Potelco employees were warned in advance of the company's upcoming inspections. Robb Schwilke observed no unannounced safety inspections in the entire time that he worked for Potelco. CP 288. He explained that employees were told when Potelco safety inspectors were coming to a jobsite. CP 290. These warnings usually came from the general foreperson during morning safety meetings. CP 290-91.

Kathryn Evans also testified that Potelco's forepersons would warn employees of upcoming safety inspections. CP 316. Only 20 percent of Potelco safety coordinator Rupe's jobsite visits were unannounced. CP 317. Most of the time, Evans's crew was told in advance of Rupe's upcoming inspections, and would take special care to comply with safety rules on those days. CP 311, 316-17.

Potelco safety coordinator Bellos acknowledged that workers received advance warning of Potelco's inspections: "It's a common courtesy to call your fellow lineman and say, 'Hey, George, the safety guy's here. Make sure, you got, you know, your jobsite set up properly, you know. He's going to be checking you.'" CP 409.

This advance notice resulted in ineffective inspections in which Potelco discovered few safety violations. In the two years preceding the March 2011 incident, Potelco conducted over a thousand safety audits, yet

there was no evidence that a single audit resulted in employee discipline. CP 439, 500-05. During this two year period, discipline was given on only five occasions. CP 500-05. In at least three instances, the discipline was the result of an accident investigation and not a safety inspection. CP 500-05. Potelco provided no documentation that any safety inspection resulted in employee discipline. CP 500-05.

Potelco attempts to shift blame to its employees for its failure to provide unannounced visits, ignoring that it was the general foreperson who on many occasions warned employees of upcoming inspections. There is no merit to Potelco's argument that it cannot control its employees from informing their coworkers about unannounced inspections "[i]n an age where mobile phones are ubiquitous." App's Br. 15. It was Potelco's own forepersons, including the general foreperson, that warned workers of inspections, and the company cannot reasonably assert that it lacks all power to control its management personnel. CP 290-91. As noted by the industrial appeals judge, Potelco could easily implement a rule to address this issue. CP 113. Potelco could discipline employees who warned other crews about upcoming inspections and adopt a policy of zero toleration for violations. CP 113. Potelco's employees would be far less likely to tell their coworkers about inspections if the company was to implement such a rule.

In any event, there is no question that Potelco's chosen methods for correcting safety violations were ineffective. Schwilke saw Potelco employees routinely breaking safety rules. CP 256, 283. Even when a foreperson or general foreperson was present, he never saw an employee disciplined. CP 256-57. Evans observed workers violating safety rules at many Potelco worksites, including times where a foreperson knew about the violations. CP 309-11. Yet, like Schwilke, Evans did not recall ever seeing an employee disciplined. CP 315. Such inconsistent disciplinary practices are not sufficient to deter future safety violations. *See Legacy Roofing*, 129 Wn. App. at 365-66. Substantial evidence shows that Potelco did not take adequate steps to discover and correct safety violations.

Potelco had the burden to prove every element of its unpreventable employee misconduct defense. *Wash. Cedar*, 119 Wn. App. at 911-12. That defense fails because Potelco did not take adequate steps to discover and correct safety violations at its worksites.

2. Substantial Evidence Supports the Board's Finding That Potelco Did Not Effectively Enforce Its Safety Program Where a Potelco Foreman Participated in the Violation

The same evidence showing that Potelco failed to discover and correct safety violations also supports the Board's finding that the company's enforcement of its safety program was not effective in practice. It is not enough for an employer to show the existence of "a good paper

program." *BD Roofing*, 139 Wn. App. at 113 (citing *Brock*, 818 F.2d at 1277). Rather, the employer must prove the "'effective enforcement of its safety program . . . *in practice* and not *just in theory*.'" *BD Roofing*, 139 Wn. App. at 113 (quoting RCW 49.17.120(5)) (alterations and emphasis in original). Potelco did not effectively enforce its safety program where its forepersons warned employees of upcoming safety inspections, those inspections resulted in the discovery of few safety violations, and Potelco workers routinely violated safety rules without receiving discipline. This alone is substantial evidence that Potelco failed to effectively enforce its safety program in practice.

But Potelco's safety program also falls short for other reasons. Potelco's own foreman broke its safety rules, its management failed to implement or enforce its disciplinary policies, and the company's safety culture made violations predictable. This is additional substantial evidence that Potelco did not adequately enforce its safety program.

Where a supervisor or foreperson participates in a safety violation, "such circumstance raises an inference of lax enforcement and/or communication of the employer's safety policy." *Brock*, 818 F.2d at 1277. Here, Potelco foreman Williams was involved in two safety violations at the Sedro-Woolley jobsite. Williams and the lineman, Bill Sword, fuzzed the transmission line to test it for voltage, a violation of Potelco's own

safety regulations. CP 188, 308-09, 322-23, 582. Williams also failed to ensure that his crew established an EPZ through proper grounding. CP 188-89. Williams's involvement in these violations raises a strong inference that Potelco's safety program was not effective in practice.[6]

Potelco's own management personnel acknowledged that the company often failed to follow its written disciplinary policies. Safety coordinator Rupe admitted that Potelco rarely documented verbal warnings to employees. CP 516. At the time of the incident, the company's disciplinary policy consisted of four progressive steps: (1) verbal warning, (2) written warning, (3) suspension without pay, (4) termination. CP 774. The policy required that all discipline, including verbal warnings, be documented in written form. CP 774. Potelco's failure to document verbal warnings was in direct contradiction of this policy. CP 9, 522-23, 774.

The failure to document verbal warnings shows that Potelco's safety program was not effective in practice. Potelco now contends its failure to document verbal warnings does not render its program

[6] Potelco asserts that the Board, in its Finding of Fact No. 12, "found that Potelco's safety program was ineffective because a violation occurred in this case." App's Br. 18. It argues that such reasoning is improper because it would render the unpreventable employee misconduct defense "moot" in every case in which a violation is proved. *Id.* Potelco misapprehends the Board's finding. The Board determined that Potelco's safety program was ineffective, not because a violation occurred, but because a Potelco foreman was involved in the violation. CP 11. Such an inference is clearly permissible. *Brock*, 818 F.2d at 1277.

ineffective, noting that its disciplinary practices should be judged solely by whether they achieve the goal of promoting a safe workplace. App's Br. 17. However, besides rearguing the facts, which it cannot do under the substantial evidence standard of review, Potelco ignores the practical effects of neglecting to document all disciplinary actions.

Here, the failure to document verbal warnings prevented Potelco from effectively enforcing its safety program. Without written documentation, the company's safety personnel had no way of knowing whether employees had received prior verbal warnings. *See* CP 463-64, 516, 522-23. The Board found that "[t]he net effect was that a Potelco worker could get a number of verbal warnings and receive no progressive discipline for repeating the same safety violation. That fact created an environment where Potelco's employees readily ignored some safety rules to perform work faster." CP 11-12.

A safety program is not effective in such circumstances. *See In re Erection Co., Inc.,* No. 07 W0080, 2008 WL 2479898 at *4 (Wash. Bd. Indus. Ins. App. March 10, 2008) (finding progressive disciplinary policy ineffective where failure to document verbal warnings prevented supervisors from tracking previous safety violations).[7] Potelco's failure to

[7] This Court considers the Board's significant and non-significant decisions as persuasive authority. *See Dep't of Labor & Indus. v. Shirley*, 171 Wn. App. 870, 887-91,

document verbal warnings is additional substantial evidence that the company did not effectively enforce its safety program.

Finally, contrary to Potelco's assertions, which again reargue the facts, the crew's decision not to establish an EPZ was a predictable one. *See* App's Br. at 18-19. To prove unpreventable employee misconduct, the "evidence must support the employer's assertion that the employees' misconduct was an isolated occurrence and was not foreseeable." *BD Roofing*, 139 Wn. App. at 111. The evidence here shows the opposite. Williams felt pressure to work quickly in order to impress his superiors. CP 324. Evans understood that Potelco wanted its employees to work quickly: "They will get on you if you take too long to do things and, you know, it's like you are costing Potelco money if you take too long." CP 310, 323-24. The mentality at the worksite was "production, production, production." CP 305-06. The crew did not set up an EPZ in part because Williams wanted to "get moving." CP 324.

The crew's failure to follow safety rules was especially predictable in light of Potelco's safety culture at the time of the incident. While Potelco again reargues the facts by asserting that it "puts a strong emphasis on safety" (App's Br. 16), many employees viewed the company's statements about safety with skepticism. *See* CP 323-24. As

288 P.3d 390 (2012) (discussing two non-significant Board decisions in support of legal analysis).

explained above, Potelco's unannounced safety inspections were infrequent, noncompliance rarely discovered, and safety violations usually unpunished. In the absence of such enforcement measures, most Potelco workers believed production and not safety to be of primary importance. CP 323-24. Given this environment, substantial evidence shows that the crew's decision to ignore safety rules to complete the project more quickly was foreseeable.

The Board correctly found that Potelco failed to prove unpreventable employee misconduct. Substantial evidence shows that Potelco did not take adequate steps to discover and correct safety violations and that the company's enforcement of its safety program was not effective in practice. These findings support the conclusion that the failure to establish an EPZ at the Sedro-Woolley jobsite was not the result of unpreventable employee misconduct. This Court should reject Potelco's affirmative defense.

B. Substantial Evidence Supports the Board's Finding That Potelco Did Not Effectively Enforce Its Written Accident Prevention Program

Potelco failed to effectively enforce its written accident prevention program. Under WAC 296-800-14025, an employer must establish, supervise, and enforce its written safety program in a manner that is effective in practice. Potelco does not dispute that its workers violated the

company's accident prevention program. CP 188-89. Instead, Potelco simply repeats its arguments regarding unpreventable employee misconduct, contending that the evidence shows that it effectively enforces its written safety rules. App's Br. 19.

However, as discussed above, substantial evidence shows that Potelco's enforcement of its safety program was inadequate. Such evidence includes testimony about advance notice of inspections; frequent rule violations, including the "fuzzing" of the line and the failure to set up an EPZ; and ineffective disciplinary policies. This Court does not reweigh the evidence on appeal. *Zavala*, 185 Wn. App. at 867. The Board correctly determined that Potelco did not enforce its written accident prevention program in a manner that was effective in practice. This Court should affirm.

C. The Violations Were Serious Where They Were in Plain View and a Potelco Supervisor Knew about the Violations

Potelco's failures to create an EPZ and enforce its written safety program were serious violations. To establish a serious violation of a WISHA safety regulation, the Department must prove that: (1) the cited standard 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. *Wash. Cedar*, 119 Wn. App. at 914.

Potelco does not dispute that it violated the applicable standards, that its employees were exposed, or that there was substantial probability of serious physical harm. Instead, the company asserts that the violations were not serious because it did not and could not have known of them even with the exercise of reasonable diligence. App's Br. 19-20. Potelco's argument, which the Board and the superior court properly rejected, fails for two reasons.

First, Potelco had constructive knowledge of the violations. Constructive knowledge may be proved through evidence that a violation was in "plain view." *BD Roofing*, 139 Wn. App. at 109-10. As this Court has explained, knowledge is established where the violation was "readily observable or in a conspicuous location in the area of the employer's crews." *Erection Co.*, 160 Wn. App. at 207.

Here, the entire worksite was in plain view. Potelco stipulated that "[t]he work performed by Gavin Williams' [sic] crew on March 28, 2011 was done out in the open." CP 189. A knowledgeable observer could readily have determined that the crew did not place temporary protective grounds before beginning work on the transmission lines. *See* CP 304-07.

Potelco's argument that it could not have discovered the crew's failure to create an EPZ is unavailing.

Second, a Potelco foreman directly observed the violative conduct. Where a supervisor has actual or constructive knowledge of a safety violation, such knowledge is imputed to the employer. *See Danis-Shook Joint Venture XXV v. Sec'y of Labor*, 319 F.3d 805, 812 (6th Cir. 2003); *N.Y. State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98, 105 (2d Cir. 1996); *Ga. Elec. Co. v. Marshall*, 595 F.2d 309, 321 (5th Cir. 1979). Potelco does not dispute that Williams, the foreman at the worksite, had actual knowledge of the EPZ violation. CP 10. Nor does it dispute that Williams had ultimate responsibility for the safety of his crew. CP 11, 466. Williams had the authority to stop work at a worksite, discipline other employees, and even terminate crew members. CP 11, 459-60, 466, 510-12. Potelco vested Williams with management powers, so his knowledge of the violations is imputed to Potelco. *See Ga. Elec.*, 595 F.2d at 321.

Neither the record nor the law supports Potelco's argument that it could not have known of the violations because the crew's failure to set up an EPZ was not foreseeable. *See* App's Br. 20. Potelco cites to no legal authority for this proposition; nor does it attempt to explain how the foreseeability of an employee's conduct relates to an employer's

knowledge of a violation.[8] Certainly, even idiosyncratic and unanticipated behavior can be observed. The question of foreseeability pertains to Potelco's unpreventable employee misconduct defense and not to the question of the employer's knowledge. *See BD Roofing*, 139 Wn. App. at 111 (holding employee's conduct must be unforeseeable to prove unpreventable employee misconduct defense).

Potelco's argument also fails on its own terms, as the crew's actions were foreseeable. As discussed above, Potelco's lack of safety enforcement resulted in a culture where employees routinely violated safety rules in order to work more quickly. The crew's failure to create an EPZ was entirely predictable in such an environment.

The citations against Potelco were serious violations. Because there is substantial evidence that Potelco knew or could have known of these violations, this Court should affirm.

VI. CONCLUSION

The Department correctly cited Potelco for two serious safety and health violations for failing to create an EPZ and failing to effectively

[8] Potelco cannot rehabilitate its failure to properly argue this issue by presenting it in its reply brief. A court need not consider "assertions that are given only passing treatment and are unsupported by reasoned argument." *Peters v. Vinatieri*, 102 Wn. App. 641, 655, 9 P.3d 909 (2000). And the court does not consider arguments argued for the first time in the reply brief. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *Joy v. Dep't of Labor & Indus.*, 170 Wn. App. 614, 629-30, 285 P.3d 187 (2012).

enforce its written accident prevention program. Substantial evidence supports the Board's finding that Potelco did not prove unpreventable employee misconduct. Potelco cannot evade responsibility where its own foreman participated in the violations, its management warned workers of upcoming inspections, and the company rarely disciplined employees for safety violations. For these same reasons, the Board correctly found that Potelco failed to effectively enforce its written safety program. Potelco's efforts to enforce its safety rules were inadequate where its employees routinely violated those rules without receiving discipline. Substantial evidence also shows that Potelco knew of the violations where they occurred in plain view and were observed by a Potelco foreman. The Board's findings support its conclusions of law. This Court should affirm.

RESPECTFULLY SUBMITTED this 2nd day of September, 2015.

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COURT OF APPEALS. DIVISION I
OF THE STATE OF WASHINGTON

POTELCO, INC, Appellant, v. WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	DECLARATION OF MAILING

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Department's Brief of Respondent and this Declaration of Mailing in the below described manner:

Via E-file to:

Richard D. Johnson, Clerk/Administrator
Court Of Appeals, Division I
One Union Square
600 University Street
Seattle, WA 98101-1176

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Via First Class United States Mail, Postage Prepaid to:

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DATED this 2nd day of September, 2015.

KRISTEN HARRIS
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