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SUPREME COURT
STATE OF WASHINGTON
9/13/2018 3:28 PM
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CLERK

Supreme Court No. 96302-9

Court of Appeals, Division II, No. 50824-9-II

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

Petitioner Potelco, Inc. is a Washington corporation that performs utility construction services. Potelco requests that this Court accept review of the Court of Appeals' decision, which affirmed the Board of Industrial Insurance Appeals' ("Board") decision upholding citations issued by the Washington State Department of Labor and Industries ("Department").

II. THE COURT OF APPEALS' DECISION

The Court of Appeals filed an unpublished decision in this matter on August 14, 2018. A copy of the decision is attached hereto as Exhibit A.

III. ISSUE PRESENTED FOR REVIEW

1. In the absence of physical evidence, may the Department issue citations to employers related to alleged encroachment into the minimum approach distance ("MAD") employees must maintain from exposed energized parts?

IV. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

1. The Worksite

On February 26, 2014, Potelco employees Stan Street (foreman), Bryan Chase (lineman), Jerry Circulado (lineman), and Zach Morrison (groundman) were setting a distribution pole in Olalla, Washington.

(Hearing Testimony of Zach Morrison at 78:8-10).¹ Each of the crew members had extensive experience setting poles, including Morrison, who had set at least a couple of thousand poles prior to that day. (Morrison 86:15; Hearing Testimony of Stan Street at 103:5; Hearing Testimony of Bryan Chase at 117:2; Hearing Testimony of Jerry Circulado at 124:16). None of the crew members had ever had any accidents setting poles in the past. (Morrison 86:17; Street 103:7; Chase 117:4; Circulado 124:18). In fact, they had already successfully set one pole earlier that day and were properly equipped and ready to set another. (Morrison 86:21 - 87:1). Unfortunately, while the ground man (Mr. Morrison) was setting the pole, he slipped and the pole neared a 115 kv energized line. At the hearing before the Board of Industrial Insurance Appeals, each of the crew members confirmed they did not see the pole make contact with the line or enter the MAD. (Morrison at 87:13; Street 103:23; Chase 117:11-13; Circulado 125:2). Further, Department of Safety and Health (“DOSH”) Inspector George Maxwell admitted that he does not actually know if the pole entered the MAD. (Maxwell at 64:25).

Although there is no evidence that the pole made contact with the line, Mr. Morrison did receive a minor shock. (Morrison 87:4-6; 87:9-13; Street 103:23; Chase 117:11-15; Circulado 125:1).

¹ All citations to “Hearing Testimony of...” followed by the name and citation to the record refer to the transcript of the hearing held at the Board of Industrial Insurance Appeals office, in Tacoma on July 27, 2015, in front of Administrative Law Judge Torem, and as part of the record on appeal.

2. The Inspection

Maxwell first arrived at the work site on the night of the incident, after work hours when no Potelco representatives remained at the site. (Hearing Testimony of George Maxwell 63:24 -64:12). Maxwell took photos that night and then returned to the site to take measurements and additional photos on another day. (Maxwell 19:4-7; 24: 13 - 25:2).

Maxwell met with Potelco employees Mr. Circulado, Mr. Chase, Mr. Street, and Potelco management at Potelco's Sumner office to perform an opening conference, to officially begin the Department's inspection. (Maxwell 34:21 - 35: 13). He then interviewed the crew members who were present that day and set up a subsequent interview with Mr. Morrison. *Id.*

Larry Rupe, Potelco's Director of Safety, also investigated the scene of the incident. (Hearing Testimony of Larry Rupe at 141:11). He noted that the incident pole did not have any burn marks on it and there was no physical indication of an arc. (Rupe 141:9-18). He further noted that there were no burn marks on the cross arm, the ground wire, or the brace. (Rupe 141:19-24). At the hearing, Mr. Rupe explained that in his two years of experience as Director of Safety, he has inspected sites in which a pole had made contact with an energized line and, in those instances, the contact left a burn mark on the pole. (Rupe 142:5-11). For example, in one instance, a pole came into contact with a 69 kv line, a line with significantly less voltage than the line subject to this inspection, and the contact left a burn mark on the pole. (Rupe 142:15-19).

Further, Mr. Wayne Hagan, an electrical engineering expert, provided an alternate explanation for how Mr. Morrison could have received an electrical shock without the pole ever making contact with the line or even entering the MAD. Mr. Hagan explained that an electrical field exists when there is a voltage difference across conductors. (Hearing Testimony of Wayne Hagan at 137:22-24). He further explained that when a conductive object comes within an electrical field, it will acquire a charge on it if it does not have a path where it can be discharged. (Hagan 135:5-7). The charge will stay on the object until it can be discharged to a lower voltage; often times, it seeks a path to the ground, which in this case could have been Mr. Morrison. (Hagan 138:11-14).

Based on Maxwell's inspection, the Department issued Potelco a citation and, subsequently, a Corrective Notice of Redetermination (“CNR”), which includes the following alleged violations relevant to this Petition:

- Item 1-1 (a) alleges a serious violation of WAC 296-45-325(4), which requires the employer to ensure that no employee approaches the Minimum Approach Distance (MAD) with a conductive object unless the employee is insulated from the energized part or the energized part is insulated from the employee and from any other conductive object at a different potential.
- Item 1-1 (c) alleges a serious violation of WAC 296-45-385(1)(c), which requires that an employer ensure that employees who are setting, moving or removing a pole near an exposed energized

overhead conductor wear electrical protective equipment or use insulated devices when handling the pole and that no employee contacts the pole with uninsulated parts of his or her body.

B. PROCEDURAL BACKGROUND

Potelco appealed the CNR and a hearing was held in Tacoma at the Board of Industrial Insurance Appeals (the “Board”) before Administrative Law Judge Torem on July 27, 2015. Following the hearing, both Potelco and the Department submitted post-hearing briefs to Judge Torem, who entered the Proposed Decision and Order (“PD&O”) affirming in part and vacating in part the CNR. Judge Torem affirmed Items 1-1(a) and 1-1(c) relevant to this Petition. Potelco petitioned for review of the PD&O and on January 26, 2016, the Board issued a Decision and Order (“D&O”) affirming Items 1-1(a) and 1-1(c).²

Potelco appealed the Board’s D&O to the Kitsap County Superior Court. Following a hearing on July 31, 2017, Judge Kevin Hull entered an order affirming the Board’s D&O and awarding statutory attorney’s fees to the Department as the prevailing party. On September 5, 2017, Potelco timely appealed to the Washington State Court of Appeals, Division II,

² The D&O also vacated Item 1-1(b) of the CNR (alleging a serious violation of WAC 296-45-385(1)(b), which prohibits poles being set, moved, or removed near exposed energized overhead conductors from making contact with the conductors); upgraded Potelco’s faith code and reduced the penalties accordingly; and found that Item 2-1 (alleging a general violation of WAC 296-27-021 05(2)(b), which requires that the employer enter the number of employees and hours worked into the 2013 OSHA 300A form) should have been classified as a less serious “de minimis” violation. The Department appealed this ruling to the Superior Court, which affirmed the D&O. The Department filed a notice of appeal with the Court of Appeals, but later withdrew its cross-appeal and its appeal was dismissed with prejudice.

asking the Court of Appeals to review and vacate Items 1-1(a) and 1-1(c). *Potelco, Inc. v. Dep't of Labor and Indus.*, Kitsap County Cause No. 16-2-00370-4, Notice of Appeal to Washington State Court of Appeals, Division II, Dkt. # 2. The Court of Appeals filed an unpublished decision in this matter on August 14, 2018. *See* Exhibit A.

V. ARGUMENT

Under RAP 13.4(b)(4), a petition for review will be granted if the petition involves an issue of substantial public interest that the Supreme Court should consider. This petition for review involves such issues.

WISHA, an Act created for the “public interest,” strives “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. To interpret WISHA regulations, Washington courts may look to the Occupational Safety and Health Act (OSHA) standards and consistent federal decisions. *Wash. Cedar & Supply Co., Inc. v. Dept. of Labor and Indus.*, 137 Wn. App. 592, 604, 154 P.3d 287 (2007) (citing *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 147, 750 P.2d 1257 (1998)). Similar to WISHA, OSHA has a stated purpose to assure worker safety “so far as possible.” 29 U.S.C. § 651(b). When Congress drafted OSHA it “quite clearly did not intend to impose strict liability: The duty was to be an achievable one...Congress intended to require the elimination only of preventable hazards.” *W.G. Yates & Sons Const. Co. Inc. v. Occupational Safety and Health Review Comm'n*, 459 F.3d 604, 606 (5th Cir. 2006) (quoting *Horne Plumbing & Heating*

Co. v. Occupational Safety and Health Review Com'n, 528 F.2d 564, 568 (5th Cir. 1976)).

This review will provide employers guidance on when the Department may issue citations related to alleged encroachment into the MAD. This will impact how employers create work plans and train employees. Because the WISHA standards are specifically designed to promote the “public interest,” clarification on these issues related to WISHA compliance involves issues of substantial public interest that the Supreme Court should determine. RCW 49.17.010.

VI. CONCLUSION

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

DATED this 13th day of September, 2018.

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FILED
SUPREME COURT
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9/13/2018 3:28 PM
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CLERK

EXHIBIT A

August 14, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

POTELCO, INC.,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF
LABOR AND INDUSTRIES,

Respondent.

No. 50824-9-II

UNPUBLISHED OPINION

LEE, A.C.J. — Potelco, Inc. appeals the Decision and Order issued by the Board of Industrial Insurance Appeals (Board), finding that Potelco, Inc. had violated several safety regulations. Potelco argues that (1) substantial evidence does not support the Board’s findings of fact No. 3 and No. 6, and (2) the Board erred in adopting conclusions of law No. 2 and No. 4. We hold that Potelco’s claims fail. Accordingly, we affirm the Board’s order.¹

FACTS

A. THE INCIDENT

On February 26, 2014, four employees of Potelco were tasked with setting electric transmission poles under a live 115 kilovolt (kV) high voltage transmission line in Kitsap County. One of the employees, Stan Street, operated the boom equipment from a truck. The other three

¹ The superior court also affirmed the Board’s order, so by our affirming the Board’s order, we also affirm the superior court’s order.

employees guided the poles: Brian Chase and Jerry Circulado guided the poles with uninsulated peaveys² while Zach Morrison guided the butt end of the poles by hand wearing Class 2 rubber gloves rated for 17 kVs.

While setting one of the poles, Morrison slipped and fell, causing the pole to swing and rotate. The pole became a conductor, causing an electrical arc, and resulted in Morrison receiving an electrical shock. Morrison was rendered temporarily unconscious and received burns to his body.

B. INVESTIGATION, CITATION, AND CORRECTIVE NOTICE

A Washington State Department of Safety and Health compliance inspector, George Maxwell, investigated the incident. Maxwell visited the incident site and interviewed the Potelco employees involved. Larry Rupe, Potelco's Director of Safety, also investigated the incident.

After Maxwell completed his investigation, the Washington Department of Labor and Industries (Department) cited Potelco for six violations. The cited violations relevant to this appeal are:

Violation 1 Item 1a
WAC 296-45-325(4)

Violation Type: Serious

For this instance the employer did not ensure that the pole was being set in a manner to avoid making contact with a one hundred and fifteen thousand volt line phase to phase. Three employees were exposed to the hazard on the PSE 115kv line approximately 4 spans east of the Puget Sound Energy owned[.] ... Contact with a pole brushing against a high voltage line can cause death, serious disfiguring burns, loss of limbs, possible mental retardation.

....

² A peavey is a tool with a jointed hook and point on one end. The hook is stuck into a log or pole and provides leverage.

Violation 1 Item 1c
WAC 296-45-385(1)(c)

Violation Type: Serious

The employer did not ensure that protective equipment rated for the 115 kv phase to phase was used when the pole with the attached 13 foot cross arm was raised into the minimum approach distance of 4'3". Three employees were exposed to the hazard on the PSE 115kv line approximately 4 spans east of the Puget Sound Energy owned ... substation[.] ... Un-insulated physical contact with a wood pole brushing against a high voltage line can cause death, serious disfiguring burns, loss of limbs, possible mental retardation.

Administrative Record (AR) at 85-86.

Potelco appealed the citation. The Department held an informal conference and issued a corrective notice of redetermination. The Department affirmed the violations contained in the original citation.

C. APPEAL TO IAJ AND EVIDENTIARY HEARING

Potelco appealed to the Board. An industrial appeals judge (IAJ) held an evidentiary hearing.

Maxwell testified at the hearing to his understanding of what happened based on his investigation and interviews. He stated that Potelco's employees were in the process of setting the pole during the incident. The cross-arm was on the pole, and the pole was hanging off the winch line of the truck. Chase and Circulado were controlling the pole with peaveys. Morrison was pushing the pole into the pole claws of the truck, but slipped and caused the cross-arm to twist. The employees heard the cross-arm hit the 115 kV line, heard an arc, saw a flash at the ground, and saw Morrison get shocked. Maxwell believed that the cross-arm had swung and touched the

115 kV line or broke the minimum approach distance³ and created an electrical arc. The employees did not have protective equipment or cover rated for 115 kV. Morrison was wearing Class 2 gloves, which were not rated to address the live 115 kV line, and the peaveys were not insulated.

Rupe testified that he inspected the scene and the pole. He did not see any burn marks on the pole or the arm. During his two years as Director of Safety, Rupe had inspected other sites where a pole made contact with a live line, and in those instances, there were burn marks.

Morrison testified that when he was pushing the pole into the claws of the truck, the pole missed and he lost control. He slipped and was shocked. He was wearing Class 2 gloves rated for 17 kV. Morrison heard arcing, but he did not see the pole make contact with the 115 kV line or enter the minimum approach distance. He told Maxwell that he assumed the pole made contact with the 115 kV line based on the circumstances.

Street testified that the plan was to get the pole and arm through the distribution lines and then drop the pole into the hole. When Morrison lost his footing, the pole tipped and swung, and the cross-arm came around. Street saw Morrison get shocked, saw an arc at the bottom of the pole, and heard the arcing. He vaguely saw the top of the pole; he did not see the pole make contact with the 115 kV line but could not say it did not. Street may have told Maxwell that the pole made contact with the 115 kV line because he assumed it did as it made sense.

Chase testified that he and Circulado were moving the pole forward with peaveys while Morrison had his hands on the pole with gloves. He then heard Morrison yell, heard an arc, and

³ The minimum approach distance is designed to keep people from getting electrocuted. When a conductive object enters the minimum approach distance, it could contact the conductor or create an arc. The minimum approach distance here was 4 feet 3 inches.

saw Morrison fall to the ground. Chase was looking at the peavey when Morrison was shocked. When they were initially moving the pole, the cross-arm was parallel to the 115 kV line. There was no cover on the 115 kV line. When Morrison fell, the pole rotated. From the noise Chase heard, he assumed that the pole made contact with the 115 kV line, but he did not see the pole make contact with the 115 kV line or enter the minimum approach distance.

Circulado testified that he was looking up and down when the shock occurred. The pole was tilted when the shock occurred. He did not see the pole make contact with the 115 kV line and did not think that the pole entered the minimum approach distance. Circulado believed that the minimum approach distance was 2 feet 2 inches but did not think that the pole came within 4 feet 3 inches of the line. Circulado did see the pole arcing through the 115 kV line and an arc go from the cross-arm through the butt plate.

Wayne Hagan, an electrical engineer, testified that when a conductive object enters an electrical field, it will acquire a charge if it does not have a path to be discharged to. The charge will stay on the object until it has a place to go, which is normally the ground.

After the hearing, the IAJ issued a Proposed Decision and Order. The Proposed Decision and Order affirmed the violations at issue in this appeal.

D. APPEAL TO BOARD AND SUPERIOR COURT

Potelco and the Department both petitioned for review of the IAJ's Proposed Decision and Order to the Board. The Board reviewed the record and found that

2. On February 26, 2014, four employees of Potelco, Inc., were tasked with setting electric transmission poles under a 115 kV high voltage transmission line . . . This crew consisted of Stan Street, foreman; Brian Chase, lineman; Jerry Circulado, lineman; and Zach Morrison, groundman. Mr. Street, the crew's

foreman operated the boom equipment from the truck while Mr. Chase and Mr. Circulado guided the transmission pole with uninsulated peavey hooks and Mr. Morrison guided the butt end of the pole by hand, wearing only Class 2 gloves. All four members of the crew actively worked to set the transmission pole, leaving no one person to actively supervise the work. While in the process of setting the second pole of the day, Mr. Morrison slipped and fell on the uneven terrain causing the transmission pole that the men were holding to swing and rotate. The transmission pole intruded into the minimum approach distance and became a conductor causing an electrical arc. As a consequence, Mr. Morrison received an electrical shock rendering him temporarily unconscious and causing burns to his body.

3. Under Citation Item 1-1(a), on February 26, 2014, employees of Potelco, Inc., setting a transmission pole allowed the pole to encroach within the minimum approach distance of an overhead energized 115 kV transmission line. As a result, the employees were exposed to the hazard of electrocution.

4. A substantial probability existed that if the Potelco employees exposed to the hazard described in Finding of Fact No. 3 were injured, the injury would result in serious physical harm, including death or permanent disability.

....

6. Under Item 1-1(c), on February 26, 2014, employees of Potelco setting a transmission pole near an exposed energized overhead conductor were not wearing sufficient electrical protective equipment or using insulated devices when handling the pole. As a result, the employees were exposed to the hazard of electrocution.

7. A substantial probability existed that if the Potelco employees exposed to the hazard described in Finding of Fact No. 6 were injured, the injury would result in serious physical harm, including death or permanent disability.

....

9. The severity of the hazard in Items 1-1(a) and 1-1(c) was a 6 on a scale of 1 to 6.

10. The probability of an injury occurring due to the hazard in Items 1-1(a) and 1-1(c) was a 5 on a scale of 1 to 6.

AR at 7-8.

The Board concluded that

2. Item 1-1(a) of Corrective Notice of Redetermination No. 316977933 issued by the Department of Labor and Industries on November 10, 2014, is a serious violation of WAC 296-45-325(4), within the meaning of RCW 49.17.180(6).

....

4. Item 1-1(c) of Corrective Notice of Redetermination No. 316977933 issued by the Department of Labor and Industries on November 10, 2014, is a serious violation of WAC 296-45-385(1)(c), within the meaning of RCW 49.17.180(6).

AR at 9-10.

Potelco appealed the Board's order to the superior court. The superior court affirmed the Board's decision. Potelco appeals.

ANALYSIS

A. FINDINGS OF FACT NO. 3 AND NO. 6

Potelco argues that substantial evidence does not support the Board's findings of fact No. 3 and No. 6. We disagree.

In a Washington Industrial Safety and Health Act (WISHA) appeal, we review the Board's decision based on the record before the Board. *Mowat Constr. Co. v. Dep't of Labor & Indus.*, 148 Wn. App. 920, 925, 201 P.3d 407 (2009). The Board's findings of fact are conclusive if supported by substantial evidence when viewed in light of the record as a whole. *Id.* "Substantial evidence" is evidence sufficient to persuade a fair-minded person of the truth of the declared premise. *Id.* We view the evidence in the light most favorable to the prevailing party and all

reasonable inferences are drawn in favor of the same. *Frank Coluccio Constr. Co. v. Dep't of Labor & Indus.*, 181 Wn. App. 25, 35, 329 P.3d 91 (2014).

1. Finding of Fact No. 3 – Minimum Approach Distance

Potelco argues that substantial evidence does not support finding of fact No. 3—that the pole encroached within the minimum approach distance of the live 115 kV line. We disagree.

The minimum approach distance is the “closest distance an employee is permitted to approach an energized or a grounded object.” WAC 296-45-035. Under WAC 296-45-325(4), “[t]he employer shall ensure that no employee approaches or takes any conductive object closer to exposed energized parts” than the minimum approach distance, unless the employee is insulated or the energized part is insulated.

Here, substantial evidence supports the Board’s finding. First, evidence was presented to show that when a pole enters the minimum approach distance of an energized line, an electrical arc can be created. Hagan testified that when a conductive object enters an electrical field, it will acquire a charge if it does not have a path to be discharged to, and the charge will stay on the object until it has a place to go, which is normally the ground. Maxwell testified that when a conductive object enters the minimum approach distance, it could contact the conductor or create an arc.

Second, evidence was presented to show that the pole actually encroached the minimum approach distance of the live 115 kV line. Chase testified that when they were initially moving the pole, the cross-arm was parallel to the 115 kV line, which was not covered. When Morrison slipped, the pole tipped and rotated, and the cross-arm came around. Maxwell testified that the employees heard the arm hit the 115 kV line. Three of the employees heard an arc. Circuladoro

testified that he saw the pole arcing through the 115 kV line and an arc go from the arm through the butt plate. Street also saw an arc at the bottom of the pole and saw Morrison get shocked.

Viewing this evidence in the light most favorable to the Department and drawing all reasonable inferences in favor of the Department, sufficient evidence was presented to persuade a fair-minded person that the employees setting the pole allowed the pole to encroach within the minimum approach distance of the live 115 kV line, creating an arc between the 115 kV line and the pole, which travelled down the pole and shocked Morrison. *Mowat*, 148 Wn. App. at 925; *Frank*, 181 Wn. App. at 35.

Potelco argues that the employees testified that they did not see the pole enter the minimum approach distance. However, during the incident, Street only vaguely saw the top of the pole, Chase was looking at the peavey, and Circulado saw the pole arcing through the 115 kV live line and an arc go from the cross-arm through the butt plate. Also, Morrison, Street, and Chase assumed that the pole made contact with the 115 kV line. Therefore, we hold that substantial evidence was presented to support the Board's finding of fact No. 3.

2. Finding of Fact No. 6 – Protective Equipment

Potelco argues that substantial evidence does not support finding of fact No. 6—that Potelco did not ensure its employees wore appropriate protective equipment when setting the pole near a live line—because the Department failed to provide any evidence that the pole or the employees entered the minimum approach distance. We disagree.

WAC 296-45-385(1)(c) states,

When a pole is set, moved, or removed near an exposed energized overhead conductor, the employer shall ensure that each employee wears electrical protective

equipment or uses insulated devices when handling the pole and that no employee contacts the pole with uninsulated parts of their body.

Insulated is defined as “[s]eparated from other conducting surfaces by a dielectric (including air space) offering a high resistance to the passage of current.” WAC 296-45-035. “When any object is said to be insulated, it is understood to be insulated for the conditions to which it normally is subjected.” WAC 296-45-902.

Here, substantial evidence supports the Board’s finding. At the hearing, substantial evidence was presented to show that the pole encroached within the minimum approach distance of the live 115 kV line and that the 115 kV line was not covered, as discussed above. *See supra*, Section A.1. Thus, substantial evidence was presented to show that the employees were working near an exposed energized overhead conductor.

Substantial evidence was also presented to show that the employees did not use protective equipment or cover rated for 115 kV when handling the transmission pole. Maxwell testified that the employees did not have protective equipment or cover rated for 115 kV. Morrison was wearing Class 2 gloves, which were not rated to address the 115 kV line, and Chase and Circulado were controlling the pole with peaveys, which were not insulated at all. Morrison confirmed in his testimony that he was pushing the pole while wearing Class 2 gloves rated for 17 kV. And Chase testified that he and Circulado were moving the pole forward with peaveys while Morrison had his hands on the pole with gloves.

Viewing this evidence in the light most favorable to the Department and drawing all reasonable inferences in favor of the Department, sufficient evidence was presented to persuade a fair-minded person that the employees setting the pole near an exposed energized overhead

conductor were not wearing sufficient electrical protective equipment or using insulated devices when handling the pole. *Mowat*, 148 Wn. App. at 925; *Frank*, 181 Wn. App. at 35.

Potelco argues that substantial evidence does not support the Board’s finding of fact No. 6 because substantial evidence does not support finding that the employees entered the minimum approach distance. However, the Board’s finding of fact No. 6 does not mention the minimum approach distance. The Board’s particular finding only found that “employees of Potelco [set] a transmission pole near an exposed energized overhead conductor.” AR at 8. Nonetheless, substantial evidence was presented to show that the pole encroached within the minimum approach distance of the live 115 kV line. *See supra*, Section A.1. Therefore, we hold that substantial evidence supported the Board’s finding of fact No. 6.

B. CONCLUSIONS OF LAW NO. 2 AND NO. 4

Potelco argues that the Board erred when it adopted conclusions of law No. 2 and No. 4. We review a Board’s conclusions of law de novo to determine whether the findings of fact support the conclusions. *Mt. Baker Roofing, Inc. v. Dep’t of Labor & Indus.*, 146 Wn. App. 429, 433, 191 P.3d 65 (2008). Unchallenged findings are verities on appeal. *Frank*, 181 Wn. App. at 35.

1. Conclusion of Law No. 2 – WAC 296-45-325(4)

Potelco argues that the Board erred when it adopted conclusion of law No. 2—that Potelco committed a serious violation of WAC 296-45-325(4). We disagree.

Under WAC 296-45-325(4), “The employer shall ensure that no employee approaches or takes any conductive object closer to exposed energized parts” than the minimum approach distance, unless the employee is insulated or the energized part is insulated. The minimum

approach distance is the “closest distance an employee is permitted to approach an energized or a grounded object.” WAC 296-45-035.

RCW 49.17.180(6) defines serious violation:

For the purposes of this section, a serious violation shall be deemed to exist in a workplace if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use in such workplace, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

Here, the Board’s findings support the conclusion that Potelco committed a violation of WAC 296-45-325(4). The Board’s finding that the pole encroached within the minimum approach distance of the live 115 kV line is supported by substantial evidence. *See supra*, Section A.1. Furthermore, Potelco does not challenge the Board’s finding that the employees did not have protective equipment or cover rated for the 115 kV line as “Mr. Chase and Mr. Circulado guided the transmission pole with uninsulated peavey hooks and Mr. Morrison guided the butt end of the pole by hand, wearing only Class 2 gloves.” AR at 7. Therefore, this finding is a verity on appeal. *Frank*, 181 Wn. App. at 35. Taken together, these findings support the conclusion that Potelco violated WAC 296-45-325(4) by allowing the pole to enter the minimum approach distance without employees being insulated for the live 115 kV line.

The Board’s findings also support the conclusion that the violation was serious. The Board found that as a consequence of the pole entering the minimum approach distance, “Mr. Morrison received an electrical shock rendering him temporarily unconscious and causing burns to his body.” AR at 7-8. The Board also found that “[a] substantial probability existed that if the Potelco employees exposed to the hazard [of electrocution] were injured, the injury would result in serious

physical harm, including death or permanent disability.” AR at 8. The Board further found that the severity of the hazard from the violation “was a 6 on a scale of 1 to 6” and that the probability of an injury occurring due to the hazard from the violation “was a 5 on a scale of 1 to 6.” AR at 8. These unchallenged findings are verities on appeal and support the conclusion that the violation of WAC 296-45-325(4) was a serious violation. Therefore, we hold that the Board did not err when it adopted conclusion of law No. 2.

2. Conclusion of Law No. 4 – WAC 296-45-385(1)(c)

Potelco argues that the Board erred when it adopted conclusion of law No. 4—that Potelco committed a serious violation of WAC 296-45-385(1)(c). We disagree.

WAC 296-45-385(1)(c) states,

When a pole is set, moved, or removed near an exposed energized overhead conductor, the employer shall ensure that each employee wears electrical protective equipment or uses insulated devices when handling the pole and that no employee contacts the pole with uninsulated parts of their body.

Insulated is defined as “[s]eparated from other conducting surfaces by a dielectric (including air space) offering a high resistance to the passage of current.” WAC 296-45-035. “When any object is said to be insulated, it is understood to be insulated for the conditions to which it normally is subjected.” WAC 296-45-902

RCW 49.17.180(6) defines serious violation:

For the purposes of this section, a serious violation shall be deemed to exist in a workplace if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use in such workplace, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

Here, the Board's findings support the conclusion that Potelco committed a violation of WAC 296-45-385(1)(c). The Board's finding that the pole encroached within the minimum approach distance of the live 115 kV line is supported by substantial evidence. *See supra*, Section A.1. Furthermore, Potelco does not challenge the Board's finding that the employees were setting a pole "under a 115 kV high voltage transmission line" and handled and contacted the pole without protective equipment or cover rated for the 115 kV line as "Mr. Chase and Mr. Circulado guided the transmission pole with uninsulated peavey hooks and Mr. Morrison guided the butt end of the pole by hand, wearing only Class 2 gloves." AR at 7. Thus, this finding is a verity on appeal. *Frank*, 181 Wn. App. at 35. Taken together, these findings support the conclusion that Potelco violated WAC 296-45-385(1)(c) by failing to ensure that its employees had protective equipment or used insulated devices when setting a pole near the live 115 kV line and allowing an employee to contact the pole with uninsulated parts of his body.

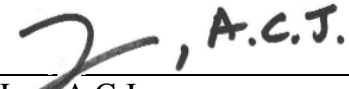
The Board's findings also support the conclusion that the violation was serious. The Board found that as a consequence of the pole entering the minimum approach distance, "Mr. Morrison received an electrical shock rendering him temporarily unconscious and causing burns to his body." AR at 7-8. The Board also found that "[a] substantial probability existed that if the Potelco employees exposed to the hazard [of electrocution] were injured, the injury would result in serious physical harm, including death or permanent disability." AR at 8. The Board further found that the severity of the hazard from the violation "was a 6 on a scale of 1 to 6" and that the probability of an injury occurring due to the hazard from the violation "was a 5 on a scale of 1 to 6." AR at 8. These unchallenged findings are verities on appeal and support the conclusion that the violation

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of WAC 296-45-385(1)(c) was a serious violation. Therefore, we hold that the Board did not err when it adopted conclusion of law No. 4.

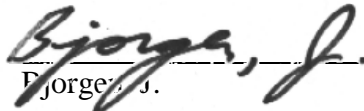
We affirm.

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

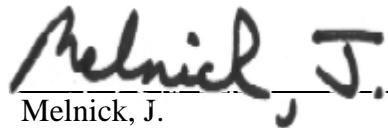


L., A.C.J.

We concur:



Bjorge, J.



Melnick, J.

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September 13, 2018 - 3:28 PM

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CERTIFICATE OF SERVICE

I, Monica Dawson, certify that:

1. I am an employee of Fox Rothschild LLP, attorneys for Petitioner 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 September 13, 2018, I served a true and correct copy of the foregoing document on the following party, attorney for Respondent, via e-mail and legal messenger, and addressed as follows:

James P. Mills
Office of the Attorney General - Tacoma
1250 Pacific Ave Ste 105
PO Box 2317
Tacoma, WA 98401-2317
jamesm7@atg.wa.gov

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 13th day of September, 2018.



Monica Dawson

FOX ROTHSCHILD LLP

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