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STATE OF WASHINGTON
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NO. 92480-5

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SUPREME COURT OF THE STATE OF WASHINGTON

POTELCO, INC.,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

**DEPARTMENT OF LABOR & INDUSTRIES
ANSWER TO PETITION FOR REVIEW**

ROBERT W. FERGUSON
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I. INTRODUCTION

Potelco identifies no error committed by the Court of Appeals and none exists. This case involves the routine application of facts to undisputed law. At the administrative hearing level, Potelco asserted the affirmative defense of unpreventable employee misconduct to excuse its lack of compliance with the Washington Industrial Safety & Health Act (WISHA). But to establish this defense, it had to provide all necessary safety equipment to its workers and have a comprehensive safety program, with safety rules adequately communicated to its workers. RCW 49.17.120. Substantial evidence shows that Potelco did neither.

In its petition, Potelco asks for review on the ground that WISHA cases are a matter of public interest because of the remedial legislative policy embodied in the Act, and because the issue of unpreventable employee misconduct would present an issue of substantial public interest. Beyond these general statements, Potelco presents no specific reason for review and it identifies no disputed issue. This Court should deny review.

II. STATEMENT OF THE ISSUE

Review should not be granted, but if it were, the issue is:

Does substantial evidence support the Board's decision that Potelco did not prove unpreventable employee misconduct where Potelco did not provide necessary safety equipment, where the safety manual had incorrect information, and where key personnel did not know about the "equipotential zone" requirement?

III. STATEMENT OF THE CASE

A. **Potelco Set Up a Power Line Jobsite Without Setting Up an “Equipotential Zone”**

Potelco provides services related to power lines. BR Rupe 7-8.¹ On August 4, 2011, a Potelco crew responded to a report of a broken power pole along Tiger Mountain Road in Issaquah. BR Rupe 9-10. An automobile collision broke the pole, leaving high voltage power lines, as well as the damaged pole, either on or in close proximity to the ground. BR Rupe 10-12. These power lines could become energized while the crew was working in the vicinity, and those energized lines could cause death or serious bodily harm to anyone coming into contact with them. BR Rupe 20-22, 26; BR Maxwell 120, 134-35.

The responding Potelco crew consisted of foreman Bill Enger, linemen Jeff Richartz and James Waters, and apprentice Scott Hendrickson. BR Rupe 13.

After arriving, the crew held a safety meeting reviewing the work to be performed. BR Enger 24. WAC 296-45-345(3) requires a specific type of grounding for workers working with power lines:

Equipotential zone. Temporary protective grounds shall be placed at such locations and arranged in such a manner as

¹ The certified appeal board record is cited as “BR.” Testimony is cited as BR followed by the witness name.

to prevent each employee from being exposed to hazardous differences in electrical potential.

The foreman did not instruct the crew to use this type of grounding. BR Enger 24, 50. Waters and Hendrickson installed bracket grounds on the power line both north and south of the damaged pole. BR Enger 15. Known as “bracket grounding,” this process connects power lines to the ground for the purpose of directing any electrical current through the bracket grounds and into the ground so that any current would not make contact with members of the repair crew. Ex. 1 at 11-1. Bracket grounding is not “equipotential zone” grounding under WAC 296-45-345(3). BR Rupe 22, 24-25, 76.

The crew did not set up an “equipotential zone” (EPZ) or use an EPZ grounding mat. BR Rupe 18; BR Enger 24. Both the foreman Enger and lineman Richartz testified that they did not know that an EPZ was required. BR Enger 14, 45; BR Richartz 62.

Unrelated to the EPZ issue, a worker was killed by a motor vehicle at the job site, triggering an investigation. BR Rupe 13-14.

B. The Board Affirmed the Department’s Citation, Finding That Potelco Did Not Have a Thorough Safety Program or Adequate Communication of Safety Rules

The Department of Labor & Industries cited Potelco for failing to set up an EPZ. BR 1. At hearing, Potelco admitted that it violated the

regulation requiring an EPZ, but argued that its conduct should be excused by the defense of unpreventable employee misconduct. BR Maxwell 139. The defense of unpreventable employee misconduct requires the employer to prove it has a thorough safety program, including all necessary equipment, and that it has adequately communicated safety rules to its employees. RCW 49.17.120. The Board found that neither occurred here.

It found that Potelco did not have a thorough safety program and did not give safety equipment to the workers. BR 3 (FF 7). At hearing, there was evidence of lack of equipment. Although the safety director testified that the crew should have had an EPZ mat at the Tiger Mountain site, the foreman testified that Potelco did not provide EPZ mats to its employees. BR Rupe 20; BR Enger 19, 23, 51.

The Board further found that Potelco did not communicate its safety program to the workers. BR 3 (FF 8). At hearing, Potelco pointed to safety training it provided to its employees by way of its safety manual. BR Rupe 33. Potelco uses as its safety manual a publication from its parent company Quanta that also applies to other states, and includes information not applicable in Washington. BR Rupe 81-83. The manual directs that when dealing with downed power lines, “personal protective grounds must be installed on both sides of the work location, and all workers must wear approved rubber gloves or stand on a conductive mat.”

Ex. 1 at 11-14. Although the Potelco safety manual lists rubber gloves as a method to protect employees, Potelco's safety director admitted that Washington does not allow rubber gloves to be used as a primary method of temporary protective grounding for projects such as the Tiger Mountain site. Ex. 1 at 11-14; BR Rupe 82; WAC 296-45-325(9).²

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 v. Dep't of Labor & Indus.*, No. 72845-8-I, slip op. 1 (Oct. 5, 2015). The Court of Appeals noted that "at oral argument, counsel for Potelco conceded that a reasonable trier of fact could find, based on the record, that the training provided by Potelco was insufficient insofar as it concerned EPZ zones." Slip op. 6. The Court of Appeals pointed to two pieces of evidence that support finding that the safety program was not thorough. Slip op. 7. First, rubber gloves may only be used "on 5,000 volts or less between phases," WAC 296-45-325(9), and the voltage at the Tiger Mountain worksite was 12,470 volts phase to phase. *Id.* Yet the manual directed the unrestricted use of rubber gloves. *Id.* at 6-7. Second, the safety director testified that the Tiger Mountain

² WISHA's electrical worker protection regulations prohibit the use of rubber gloves as primary protection unless the voltage is 5,000 volts or less phase to phase. WAC 296-45-325(9). At the Tiger Mountain worksite, the voltage was 12,470 volts phase to phase. BR Richartz 56.

crew should have had a mat, but the foreman testified that mats were not made available to employees. Slip op. 7.

The Court held that the evidence supporting the finding of inadequate communication of safety rules was that the foreman and a long-time lineman both believed that bracket grounding was sufficient. Slip op. 7.

IV. ARGUMENT

A. Potelco Points To No Error by the Court of Appeals

Potelco does not point to any error committed by the Court of Appeals. Instead it cites to the statute that provides the unpreventable employee misconduct defense and asserts that “This petition raises an issue that will clarify the circumstances under which an employer has taken all reasonable steps to comply with WISHA.” Pet. 6-7. Potelco provides no argument or explanation of what will be clarified. Review should not be granted where the Court and the opposing party need to speculate as to why the petitioner seeks this Court’s extraordinary review.

B. Potelco Points to No Issue of Substantial Public Interest

Potelco argues that review should be accepted because WISHA is a statute “specifically enacted for the ‘public interest.’” Pet. at 7. It is true the Legislature enacted WISHA to provide work place safety protection to workers. RCW 49.17.010. This does not mean, however, that all WISHA

cases must be accepted for review—such a rule flies in the face of RAP 13.4(b). In any event, Potelco fails to explain how an employer who has admitted to violating WISHA presents a substantial issue of public interest when it is undisputed that it did not provide the work place safety requirements mandated by RCW 49.17. Given that undisputed point alone, it is unremarkable that the Board and two lower courts have rejected Potelco's defense.


At the Court of Appeals, this case consisted of a party disputing whether substantial evidence supports the findings of the fact-finder. Such a case presents no issue that warrants review, especially where Potelco conceded matters such that a reasonable fact finder could, and did, find against it.

V. CONCLUSION

The petition lacks merit. This Court should deny review.

RESPECTFULLY SUBMITTED this 23th day of November, 2015.

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v.

WASHINGTON STATE
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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, she caused to be served the Department's Answer to Petition for Review and this Certificate of Service in the below described manner:

Via E-mail Filing:

Ronald R. Carpenter
Supreme Court Clerk
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supreme@courts.wa.gov

Via First Class United States Mail, Postage Prepaid to:

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DATED this 23rd day of November, 2015.



SHANA PACARRO-MULLER
Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Pacarro-Muller, Shana (ATG)
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Case No. 92480-5
RE: Potelco, Inc. v. Department of Labor and Industries

Dear Mr. Carpenter:

Attached for filing is the Department's Answer to Petition for Review and Certificate of Service in the above referenced matter.

Thank you,

Shana Pacarro-Muller

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