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**SUPREME COURT OF THE STATE OF WASHINGTON**

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POTELCO, INC.,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

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**ANSWER TO PETITION FOR REVIEW**

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## **I. INTRODUCTION**

A routine review of a safety and health citation for substantial evidence does not involve an issue of substantial public interest, contrary to Potelco, Inc.'s claims. Washington safety rules require employers to take proper precautions when working around high-voltage wires. Potelco failed to take these protections and a worker sustained shock injuries when the 45-foot power pole came too close to a live power line. The Board of Industrial Insurance Appeals found that Potelco did not ensure that workers used safety precautions sufficient to protect themselves from electrical shock. Substantial evidence supports this decision, and there is no issue of substantial public interest meriting review.

## **II. COUNTERSTATEMENT OF THE ISSUES**

Review is not warranted, but if review were granted, these issues would be presented:

1. WAC 296-45-325(4) requires employers to ensure that employees do not take an object that may conduct electricity within a specified distance of a live power line. Entering this minimum approach distance may cause an electrical arc. Potelco employees saw an electrical arc and the arc electrocuted one worker. Does substantial evidence support that Potelco employees broached the minimum approach distance?
2. WAC 296-45-385(1)(c) requires employers to ensure employees use insulated devices and personal protection when handling a pole near an energized overhead wire. Two employees used uninsulated devices when handling the pole near an energized wire and one employee used gloves that provided insufficient insulation for the

voltage being handled. Does substantial evidence support that Potelco employees did not use the required insulated devices?

### **III. COUNTER STATEMENT OF THE CASE**

#### **A. A Potelco Power Line Crew Member Was Injured When Potelco Failed To Follow Washington Safety Rules**

In February 2014, a Potelco crew was working on a power line replacement project in Olalla, Washington. AR Morrison 77-80.<sup>1</sup> The crew was setting replacement poles near an existing high-voltage overhead line. *See* AR Morrison 78. The accident occurred while the crew was setting a 45-foot pole with a 13-foot cross-arm. AR Morrison 78; AR Chase 110, 112. As the crewmember moved the pole up for placement, he slipped and the pole rotated, causing the pole's cross-arm to rotate towards the 115-kilovolt live wire. *See* AR Circulado 121. The resulting electrical current threw the worker into a ditch, caused him to lose consciousness briefly, and burned him. AR Street 96; AR Morrison 82.

Three employees heard the resulting electrical arc, and two employees saw "fire" exiting the butt of the pole. AR Morrison 81; AR Street 94; AR Chase 111-12; AR Circulado 121-22.

In the resulting investigation, the Department found that Potelco failed to maintain the minimum approach distance when working near

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<sup>1</sup> "AR" refers to the administrative record in the certified appeal board record. The record is not consecutively numbered, so this brief references witness testimony by "AR" followed by the witness's last name.

energized wires as required by WAC 295-45-325(4). Ex 37 at 3. That regulation requires employers to ensure no employee approaches or takes a conductive object near energized wires unless equipment insulates the employee from the energized wires—here, the pole should have been no closer than 4' 3" from the live wires. AR Maxwell 50. The inspector concluded that this violation occurred because the electrical arc showed that Potelco employees brought conductive objects—the pole and the uninsulated Peavey hooks directing the pole—within the minimum approach distance. *See* AR Maxwell 40, 50-51, 53.

The Department also found that Potelco failed to ensure that each employee wore electrical protective equipment and failed to ensure that employees used insulated devices when handling the pole, as required by WAC 296-45-385(1)(c). AR Maxwell 53-54; Ex 37 at 4. The inspector testified that Morrison's protective equipment consisted only of a hardhat and class 2 rubber gloves limited to 17 kilovolts. AR Maxwell 41. And the employees were working on a 115-kilovolt transmission line, which posed a serious risk of death by electrocution. AR Maxwell 41, 55.

**B. The Board Affirmed the Department's Citation with Modifications, and Trial Court and Court of Appeals Affirmed**

In affirming the citation resulting from the violations, the Board reasoned that the "circumstantial evidence strongly indicates that the

transmission pole intruded into the minimum approach distance and became a conductor causing an electrical arc.” AR 5. Potelco appealed to superior court, which affirmed the Board. CP 65-67.

At the Court of Appeals, Potelco argued that substantial evidence did not support the Board’s finding (FF 3) that the pole encroached within the minimum approach distance of the live line and the Board’s finding that employees were not using sufficient electrical protective equipment or using insulated devices when handling the pole (FF 6). *Potelco, Inc. v. Dep’t of Labor & Indus.*, No. 50824-9-II, slip op. (Aug. 14, 2018).<sup>2</sup>

The Court of Appeals rejected Potelco’s claims in an unpublished decision. First, the Court found that substantial evidence showed that the pole encroached within the minimum approach distance of the live line. Slip op. at 8-9. The Court reasoned that the evidence showed that when a pole enters the minimum approach distance of an energized line it causes an electrical arc, which the testimony showed had occurred here. Slip op. at 8-9. Second, it concluded that the evidence showed that pole encroached the minimum approach distance because workers testified that the uncovered pole tipped and rotated and then cross-arm came around and employees saw and heard the arc. Slip op. at 9-10. Applying the

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<sup>2</sup> Potelco did not challenge the Board’s finding that the employees did not have protective equipment or cover rated for the 115 kV line. Slip op. at 12.

findings of fact to the conclusions of law, the Court of Appeals concluded that Potelco committed a serious violation of the minimum approach distance rule (WAC 296-45-325(4)) and a serious violation of the rule requiring that employers ensure employees use proper protective equipment to avoid electrocution (WAC 296-45-385(1)(c)) because the violations could result in serious injury or death as shown by the electrocution injuries Morrison received. Slip op. at 11-15.

#### **IV. ARGUMENT**

This routine appeal does not involve issues of substantial public interest, contrary to Potelco's claims. Pet. 6. The Court of Appeals correctly reviewed the Board's findings for substantial evidence and applied well-established principles of law. This Court should decline review.

##### **A. Review is Not Warranted in This Substantial Evidence Case**

Washington employee safety rules require employers (1) to ensure employees do not take a conductive object within the minimum approach distance of a live power line and that each employee wears electrical protective equipment when they do, and (2) to ensure employees use insulated devices when handling a pole near an energized overhead wire and that no employee contacts the pole with an uninsulated body part.



WAC 296-45-325(4); WAC 296-45-385(1)(c). Here, substantial evidence shows that Potelco failed to do both.

Ample evidence supports the Board's determination that Potelco violated the minimum approach distance rule (WAC 296-45-325(4)). The inspector concluded that the electrical arc showed that Potelco employees brought the pole and the uninsulated Peavey hooks directing the pole within the minimum approach distance. *See* AR Maxwell 40, 50-51, 53. The employees testified that they heard and saw the arc. AR Morrison 81; AR Street 94; AR Chase 111-12; AR Circulado 121-22. The fact-finder was entitled to consider this evidence, and Potelco's arguments about its expert's opinion to the contrary is an improper attempt to reweigh the evidence. *See Frank Coluccio Constr. Co. v. Dep't of Labor & Indus.*, 181 Wn. App. 25, 35, 329 P.3d 91 (2014).<sup>3</sup>

Likewise, substantial evidence supports the Board's conclusion that Potelco failed to ensure Potelco employees used proper precautions when installing the pole near an overhead line—a violation of WAC 296-45-385(1)(c). The shocked crewmember wore insufficient personal

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<sup>3</sup> Potelco renews its claim here that its hired expert "provided an alternate explanation for how the crewmember could have received an electrical shock without the pole ever making contact with the line or even entering the MAD." Pet. 4. But Potelco's expert merely described how electrical fields are created and discussed static charges and did not testify that happened here. AR Hagan 138. In any case, appellate courts do not reweigh the evidence in WISHA appeals. *See Frank Coluccio.*, 181 Wn. App. at 35.

protective equipment because his class 2 rubber gloves were rated only for 17 kilovolts. AR Maxwell 41. And the Peavey hooks the crewmembers were using were not insulated. AR Circulado 121; AR Maxwell 36, 51. So the employer failed to ensure the employees used proper equipment rated for 115 kilovolts when the pole broached the minimum approach distance of the live power line. Because substantial evidence supported the Board's conclusions, this case raises no novel legal issues.

**B. This Case Does Not Involve an Issue of Substantial Public Interest**

Potelco fails to articulate why this substantial evidence case raises issues of substantial public interest, but instead vaguely alludes to reasons it believes this Court should grant review.

Without any citation to the record, Potelco suggests that the Board applied strict liability. Pet. 6. It did not. Rather, it applied the facts to each of the required elements of WAC 296-45-325(4) and -385(1)(c). AR 3-10. Further, on appeal, Potelco challenged only whether the Department showed it failed to meet the cited standards and whether its employees were exposed to the violative condition. *See* Appellant's Brief 2-3, 9. The Court of Appeals considered both these claims and rejected them. Slip op. at 8-15. This is not strict liability.

Potelco suggests that because RCW 49.17.010 finds it is “in the public interest for the welfare of the people of the state of Washington” “to assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington” that this matter is one of significant public interest. *See* Pet. 6-7. By this reasoning, any of the thousands of citations issued by the Department must be reviewed by this Court. That cannot be the standard for meeting RAP 13(b)(4).

Contrary to Potelco’s claims, employers do not require this Court to weigh in to receive “guidance on when the Department may issue citations related to encroachment into the [minimum approach distance].” Pet. 7. The Department already provides detailed high-voltage regulations and policy guidance providing the requirements for high voltage work. WAC 296-45; *see, e.g.*, DOSH Directive 18.55.<sup>4</sup> The Department also has a consultation program that allows employers to ask for guidance from the Department without the risk of being cited for any violations identified during the consultation. *See* RCW 49.17.250.<sup>5</sup> None of reasons stated by Potelco here merit consideration by this Court.

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<sup>4</sup> <https://www.lni.wa.gov/safety/rules/policies/pdfs/dd1855.pdf>.

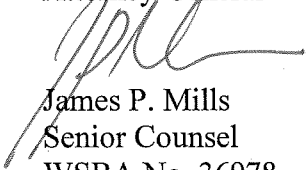
<sup>5</sup> *See* About Workplace Safety & Health Consultation, <https://lni.wa.gov/Safety/Consultation/About.asp>.

## V. CONCLUSION

Potelco failed to take safety precautions to prevent an electrical shock injury when its employees were performing a power pole installation around a live high-voltage power line. The result was an electrical arc and a serious shock injury requiring hospitalization. Substantial evidence supports the Board's findings that Potelco employees breached the minimum approach distance and failed to wear sufficient electrical protective equipment or use insulated devices when handling the pole. Because Potelco fails to show how this substantial evidence case raises issues of substantial public interest, this Court should deny review.

RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of November, 2018.

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