

73735-0

73735-0

FILED
November 20, 2015
Court of Appeals
Division I
State of Washington

NO. 73735-0-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

POTELCO, INC.,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent.

**DEPARTMENT OF LABOR AND INDUSTRIES
BRIEF OF RESPONDENT**

ROBERT W. FERGUSON
Attorney General

William F. Henry
Assistant Attorney General
WSBA No. 45148
Office Id. No. 91018
800 Fifth Ave., Suite 2000
Seattle, WA 98104
(206) 464-7740

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	STATEMENT OF ISSUES.....	2
III.	STATEMENT OF FACTS.....	2
	A. Potelco Assigned Civil Workers Rather Than Journeyman Linemen To Assist a Helicopter in Unloading Materials at a Worksite Near an Energized High Voltage Transmission Line	2
	B. At a Meeting Before the Helicopter Operation Began, Potelco Did Not Inform Its Civil Workers of the Hazards Posed If the Helicopter Came Too Close to the Energized High Voltage Line.....	4
	C. The Worksite Near Structure 4/3 Was Much Closer to the Live Transmission Line Than Worksites at Other Structures	6
	D. Potelco Did Not Stop Work and Hold a Conference with Wheeler's Crew When the Helicopter Began Flying Closer to the Energized Line Than It Had at Any Other Jobsite	8
	E. A Potelco Employee Was Seriously Injured When the Helicopter Came Too Close to the Energized Transmission Line.....	8
	F. The Department Cited Potelco for Failing To Hold a Conference When the Hazards of the Helicopter Operation Changed and for Failing To Ensure That Only Properly Qualified Employees Worked On or Near the Unguarded High Voltage Line; the Board and the Superior Court Affirmed.....	9
IV.	STANDARD OF REVIEW.....	12

V. ARGUMENT13

A. Substantial Evidence Supports the Board’s Finding That Potelco Failed To Hold a Conference Following a Change In Hazards During the Helicopter Operation at Its Worksite.....14

B. Substantial Evidence Supports the Board’s Finding That Potelco Had Employees Working in Areas Containing Unguarded, Uninsulated High Voltage Power Lines Who Were Not Qualified To Work On or Near Such Lines18

C. Substantial Evidence Supports the Board’s Finding That Potelco Knew Or, with the Exercise of Reasonable Diligence, Could Have Known of the Violative Conditions25

VI. CONCLUSION29

TABLE OF AUTHORITIES

Cases

Erection Co., Inc v. Dep't of Labor & Indus.,
160 Wn. App. 194, 248 P.3d 1085 (2011)..... 13, 26

Frank Coluccio Constr. Co. v. Dep't of Labor & Indus.,
181 Wn. App. 25, 329 P.3d 91 (2014)..... 12, 13

J.E. Dunn Nw., Inc. v. Dep't of Labor & Indus.,
139 Wn. App. 35, 156 P.3d 250 (2007)..... 12, 13, 22, 25

Mowat Constr. Co. v. Dep't of Labor & Indus.,
148 Wn. App. 920, 201 P.3d 407 (2009)..... 12

Peters v. Vinatieri,
102 Wn. App. 641, 9 P.3d 909 (2000)..... 27

Pilchuck Contractors, Inc. v. Dep't of Labor & Indus.,
170 Wn. App. 514, 286 P.3d 383 (2012)..... 21

Zavala v. Twin City Foods,
185 Wn. App. 838, 343 P.3d 761 (2015)..... 12, 23

Statutes

RCW 49.17.010 13

RCW 49.17.150(1)..... 12

Regulations

WAC 296-45-035..... passim

WAC 296-45-065..... 19, 24

WAC 296-45-065(1)(a) 20

WAC 296-45-065(1)(b) 20

WAC 296-45-065(1)(c)	20
WAC 296-45-065(1)(d)	20
WAC 296-45-325.....	19
WAC 296-45-325(1).....	passim
WAC 296-45-675.....	15
WAC 296-45-67505(1).....	15
WAC 296-45-67507(2).....	9, 13, 14, 15

I. INTRODUCTION

Potelco failed to exercise reasonable diligence in identifying the hazards at its worksite. A Potelco employee was seriously injured when a helicopter came too close to a 115,000-volt transmission line while delivering concrete on the end of a long line. Electricity arced from the energized transmission line, down the helicopter's conductive long line, and electrocuted the worker on the ground.

The Department of Labor and Industries cited Potelco for serious violations of the Washington Industrial Safety and Health Act (WISHA). The helicopter operation brought Potelco's employees at the accident site much closer to the energized power line than at other project jobsites, and Potelco failed to hold a conference to discuss this change in hazards. It also failed to ensure that only workers with proper electrical training and skills worked with the helicopter near the unguarded, energized line. The Board of Industrial Insurance Appeals affirmed the citations, rejecting Potelco's theory that it could not have known of the violations because it incorrectly assumed that the helicopter's long line was nonconductive. Potelco knew that the jobsite was muddy and that Kevlar lines become conductive when dirty. Had the company exercised reasonable diligence, it would have known the long line was conductive. Because substantial evidence supports the Board's decision, this Court should affirm.

II. STATEMENT OF ISSUES

1. Does substantial evidence support the Board's finding that Potelco failed to hold a safety conference following a change in hazards at its worksite where a helicopter operation brought Potelco's employees much closer to an energized transmission line than at other jobsites on the project and it is undisputed that the company did not hold a conference to discuss this change in hazards?
2. Does substantial evidence support the Board's finding that Potelco allowed nonqualified employees to work in areas containing unguarded, uninsulated energized power lines where several Potelco employees with minimal training or understanding of electrical safety were working in close proximity to an energized 115,000-volt transmission line?
3. Does substantial evidence support the Board's finding that Potelco knew or, through the exercise of reasonable diligence, could have known of the violative working conditions where Potelco knew that its employees were working with a helicopter near an energized transmission line, knew that the worksite was muddy, and knew that the helicopter's long line could become conductive when dirty?

III. STATEMENT OF FACTS

A. Potelco Assigned Civil Workers Rather Than Journeyman Linemen To Assist a Helicopter in Unloading Materials at a Worksite Near an Energized High Voltage Transmission Line

Potelco is a service provider for Puget Sound Energy that installs electrical facilities, including high voltage transmission lines. CP 278. In June 2012, Potelco was replacing a transmission line near Concrete, Washington. CP 374. It was working on the Baker 2 transmission line, a high voltage line running from a generating plant at Baker dam to a substation in Sedro Woolley. CP 281, 282-83, 374. The Baker 2 line was

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

Potelco had two main classes of employees working on the project: linemen who were trained to work in close proximity to energized transmission lines, and civil workers who performed excavation and construction but who were not trained to work on or near energized lines. CP 166, 178-80, 193, 205-07, 280-81, 342-44. Potelco provided its civil workers with only limited training about energized electrical lines. CP 193. In general, Potelco taught its civil workers to simply stay away from live wires. CP 193.

The project required Potelco to rebuild the structures supporting the Baker 2 line. CP 281-82. There were several structures that could not be reached by car or truck. CP 194, 284. Potelco contracted with Salmon River Helicopters to fly gravel, concrete, and other materials to these locations. CP 288. Potelco's line crew manager Al Whiteacker and line crew foreman Gordon Anchetta coordinated the helicopter operation and laid out the plan for each structure. CP 286, 302. Anchetta was also the lead general foreman for the entire project. CP 308.

Whiteacker and Anchetta decided to use Potelco's civil workers

rather than linemen to assist the helicopter in unloading materials. CP 302. They determined how the helicopter would be used and where the civil crews would be working. CP 301, 302. Potelco directed the helicopter where to bring materials. CP 303. It had authority to call off the helicopter. CP 303. Anchetta oversaw the day-to-day operations of the civil crews. CP 308.

B. At a Meeting Before the Helicopter Operation Began, Potelco Did Not Inform Its Civil Workers of the Hazards Posed If the Helicopter Came Too Close to the Energized High Voltage Line

On the first day that Potelco used the helicopter to deliver materials to the jobsite, it held a short meeting with its civil workers and helicopter personnel. CP 197-98. The pilot explained the fly-in operation. CP 289. The helicopter would deliver materials to the structures using a long line. CP 290. At the end of the long line was a funnel-shaped aluminum box called a hopper. CP 290. The helicopter would pick up concrete in the hopper at a central loading zone and then fly to jobsites along the transmission line. CP 289-90. The helicopter would lower the hopper from overhead on the end of the long line. CP 173-74. A Potelco employee would grab the hopper and release the concrete. CP 174.

The meeting lasted for approximately 10 to 15 minutes. CP 197. The discussion centered on what to do if the helicopter had an

emergency, such as its engine dying. CP 198. Potelco's employees were told to wear rubber gloves and boots because the helicopter's rotor could create static electricity on the line and on the helicopter. CP 198.

There was no discussion at the meeting of the minimum approach distance for the energized Baker 1 line or the hazards posed if the helicopter came too close to the line.¹ CP 197-99, 341-42. Potelco did not identify electrocution as a potential hazard of the helicopter operation. CP 341. It did not discuss how close to the Baker 1 line the crew would be working at different jobsites on the project. CP 197-99.

Potelco general foreman Eric Holmgren attended the safety meeting. CP 280, 289. Holmgren had received no training as a lineman and was not part of planning how the helicopters would be used. CP 301. He heard the pilot say that the long line was made of nonconductive Kevlar. CP 292, 308. Holmgren knew that there are numerous factors that determine the conductivity of Kevlar and that this material can become conductive when dirty. CP 304.

The long line was not in fact made of Kevlar. CP 229. A Kevlar covering encased the line, but there was also an electrical cord within the casing. CP 229. The electrical cord allowed the helicopter to jettison the hopper in an emergency. CP 229-30. The electrical cord was conductive,

¹ The "minimum approach distance" is the closest distance an employee is permitted to approach an energized or a grounded object. WAC 296-45-035.

increasing the electrical hazard when working near live transmission lines. CP 229-31.

C. The Worksite Near Structure 4/3 Was Much Closer to the Live Transmission Line Than Worksites at Other Structures

Shane Wheeler was the foreman of a crew that included underground technician Alan Jesmer and equipment operator Randy Chapple. CP 191, 195, 322. All three were Potelco civil workers. CP 187, 191, 321-22. They had received some training in basic electrical safety during a one-and-a-half day OSHA 10 training. CP 183, 209, 293, 332, 379. Electrical safety was one of nine topics covered during this training, which also included trenching and excavation, lifting and rigging, confined and enclosed spaces, and falls and struck-by hazards. CP 381. The majority of the OSHA 10 training did not pertain to electrical safety. CP 214, 381. Potelco did not train Wheeler, Jesmer, and Chapple to work on or near energized electrical lines. CP 166, 178-80, 193, 205-07, 342-44.

The day after the meeting with helicopter personnel, Wheeler's crew was installing anchors for the Baker 2 line's new supporting structures. CP 194-95, 324-27. The crew had dug the anchor holes and was now filling them with gravel and concrete. CP 194, 283, 324. The helicopter was flying in the concrete on the long line. CP 326. A

helicopter company employee accompanied the crew. CP 173. Potelco did not assign a lineman to supervise them.² CP 376.

Wheeler's crew worked on several different jobsites that day. CP 177, 194, 326, 345. The last jobsite was near a power pole designated structure 4/3.³ CP 283, 327. It was windy and raining, and the ground was covered in several inches of mud. CP 178, 202. Structure 4/3 was located at a point where the Baker 1 line and the Baker 2 line turned at an angle. CP 285. There were three anchors supporting the structure. CP 328. The last anchor hole—anchor hole A—was nearly directly under the energized Baker 1 line, just over five feet from the area beneath the fully energized line. CP 225-26, 330. This was much closer to the live transmission line than any of the other structures on which the crew had worked. CP 201-02, 205, 346. The location of the anchor hole resulted in the helicopter coming much closer to the Baker 1 line than it had at previous jobsites. CP 344-45.

² Potelco's collective bargaining agreement with the union that supplied the company's workforce required that a lineman supervise a helicopter's delivery of materials near an energized transmission line. CP 239-40.

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

D. Potelco Did Not Stop Work and Hold a Conference with Wheeler's Crew When the Helicopter Began Flying Closer to the Energized Line Than It Had at Any Other Jobsite

Chapple, the equipment operator on Wheeler's crew, noticed that the helicopter was flying closer to the Baker 1 line at structure 4/3 than it had at other structures. CP 344-45. He estimated that at that time the long line was as close as ten feet to the energized transmission line. CP 344. At the other worksites, the helicopter's long line was at least 50 feet away from the energized line. CP 345.

Potelco did not stop work and hold a conference with Wheeler's crew to discuss the hazards created by the helicopter flying so much closer to the energized transmission line. CP 341-42. There was no discussion about anchor hole A's proximity to the Baker 1 line as compared to other worksites on the project. CP 202. Wheeler, Jesmer, and Chapple were not aware of the hazards posed by the helicopter's long line coming too close to the energized transmission line. CP 181, 205, 331.

E. A Potelco Employee Was Seriously Injured When the Helicopter Came Too Close to the Energized Transmission Line

On the last delivery of the day, the pilot brought the helicopter over anchor hole A, hovering above Wheeler and Jesmer, who were positioned on either side of the hole. CP 176, 202-03, 330. The hopper swung back and forth between them in the wind. CP 186-87, 203. As it

neared the ground, the hopper swung toward Wheeler. CP 203. Jesmer began to move toward him, trying not to fall down in the muddy conditions. CP 202, 203.

As Wheeler reached toward the hopper to release the concrete, there was a large flash. CP 176, 203-04. Electricity from the energized Baker 1 line arced from the hopper to the ground. CP 203, 300. The electricity traveled through Wheeler's body, throwing him back several feet. CP 203, 299.

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

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

The Department cited Potelco for safety and health violations under WISHA. It cited the company for a serious violation of WAC 296-45-67507(2) for failing to hold a conference when there was a change in hazards relating to the helicopter operation. CP 79-81. It cited Potelco for a serious violation of WAC 296-45-325(1) for failing to ensure that only

employees who were qualified to assess the hazards of the jobsite worked on or near the unguarded high voltage line.⁴ CP 79-81. Potelco appealed to the Board. CP 83-85. It asserted that there was no change of hazards during the helicopter operation and maintained that all its employees were qualified for their assigned tasks. CP 16-20. Potelco further argued that it had no knowledge of the violative working conditions, contending that it relied on assurances by Salmon River that the long line was made of nonconductive Kevlar. CP 20-22.

The Board rejected Potelco's arguments and affirmed the citations. It found that the proximity of anchor hole A to the energized Baker 1 line presented a new hazard at structure 4/3, given that the helicopter—which was dragging a conductive long line—was required to fly closer to the Baker 1 line at this jobsite than it had at any other site:

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

CP 72 (FOF 9). The Board explained that "there should have been a conference before work began at structure 4/3 to make sure all workers

⁴ This brief focuses only on these two violations. Two additional violations were vacated by the Board, which concluded that they were essentially identical to Potelco's violation of WAC 296-45-325(1). CP 63. The Department did not appeal this determination, and these violations are not at issue in this appeal.

understood the hazard they would face, and the protections that needed to be taken.” CP 72 (FOF 10).

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

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

CP 71-72 (FOF 8).

Finally, the Board found that Potelco had knowledge of the violative working conditions, noting specifically that Potelco knew or, through the exercise of reasonable diligence, could have known that the helicopter’s long line was conductive. CP 71 (FOF 6). The Board noted that Kevlar becomes conductive when dirty and that Potelco either knew, or should have known, “there was a good chance that after two days of

work delivering gravel and concrete in a muddy location, that the long Kevlar line could have become contaminated, even if it was not conducive to begin with.” CP 64-65.

Potelco appealed to superior court. CP 534. The superior court affirmed, finding that substantial evidence supported the Board’s findings and decision. CP 534-35. Potelco appeals.

IV. STANDARD OF REVIEW

In a WISHA appeal, a 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.

A reviewing court does not reweigh conflicting evidence or substitute its judgment for that of the finder of fact. *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. *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*, 181 Wn. App. at 36; RCW 49.17.010. The court gives substantial weight to the Department's interpretation of WISHA. *Frank Coluccio*, 181 Wn. App. at 36.

V. ARGUMENT

The Board correctly determined that Potelco committed serious violations of WAC 296-45-67507(2) and WAC 296-45-325(1). Substantial evidence supports the Board's findings. To prove a serious violation, the Department must show:

(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 from the violative condition.

J.E. Dunn Nw., 139 Wn. App. at 44-45 (internal quotation omitted).

Potelco does not dispute that its employees were exposed to hazards or that this exposure could lead to serious harm or death. CP 374-75. Rather, it argues that the requirements of the cited standards were met and that it

could not have known of the violative conditions. App's Br. 13, 14, 16.

Substantial evidence supports the Board's findings to the contrary. As the Board correctly found, there was a change in the hazards requiring a conference where the helicopter operation at structure 4/3 brought Potelco's workers into far closer proximity to the energized Baker 1 line than at previous worksites on the project. *See* WAC 296-45-67507(2). These workers were not "qualified employees" where they were not trained and competent to identify the live parts of electric equipment, determine nominal voltage and minimum approach distances, or properly use specialized electrical materials and tools. *See* WAC 296-45-325(1). Finally, the Board properly found that Potelco had knowledge of the violations. Potelco's own general foreman testified that Kevlar becomes conductive when dirty, the helicopter had been delivering gravel and concrete to a muddy worksite, and the long line could be readily tested for conductivity. If Potelco had exercised reasonable diligence, it would have known that the long line was conductive.

A. Substantial Evidence Supports the Board's Finding That Potelco Failed To Hold a Conference Following a Change In Hazards During the Helicopter Operation at Its Worksite

The Board correctly found that the hazards of the helicopter operation changed, thus necessitating Potelco to stop work and hold a conference. Specific safety standards apply when a helicopter is used to

construct, alter, or repair transmission lines. WAC 296-45-675. Before work involving helicopters begins, an employer must hold a discussion with all affected employees that covers the particular hazards of the job. WAC 296-45-67505(1). The employees must understand the hazards in detail. *Id.* When there is a change in the hazards during the course of a job, the employer must immediately hold a conference and advise all affected employees of the new hazards. WAC 296-45-67507(2).

Substantial evidence supports the Board's finding that there was a change in hazards requiring a conference at structure 4/3. This worksite was much closer to the energized Baker 1 line than other jobsites on the project and, as a consequence, the helicopter's conductive long line came much closer to the energized transmission line at this location. CP 344-45, 346. Anchor hole A at structure 4/3 was considerably closer to the energized line than any other jobsite at which Wheeler's crew had previously worked. CP 201-02, 346. The distance from the accident site to the area directly beneath the Baker 1 line was approximately 64 inches. CP 225-26. In order to deliver concrete, the helicopter lowered the hopper from directly above where the crew was working. CP 330. Because the helicopter's long line was conductive, the crew working with the long line on the ground was placed in close proximity to the 115,000-volt transmission line. CP 229. These features distinguish the jobsite at

structure 4/3 from any of the other jobsites where Wheeler and his crew had worked.

George Maxwell, a Department compliance inspector who specializes in high voltage jobsites, testified that there was a change in hazards when the helicopter began flying closer to the transmission line than it had at other worksites on the project. CP 250. He explained that the change in hazards required a conference with affected employees:

When they started flying the long line with the hopper in the proximity of the high voltage line, they should have stopped and reassessed before they got to that point and examined . . . the hazards and the methods they were going to use to fly in there.

CP 249. Substantial evidence supports the Board's finding that there was a change in hazards at structure 4/3 that necessitated a conference to notify Wheeler and his crew of the new dangers posed at this location.

Potelco does not dispute that there was no conference to discuss these hazards. *See* App's Br. 13-14. Underground technician Jesmer testified that there was no discussion about structure 4/3's proximity to the energized line. CP 202. This issue was not discussed on the day of the accident or at the previous day's meeting with helicopter personnel. CP 202. There was no discussion about minimum approach distances or the hazards posed by using long lines near an energized transmission line. CP 179, 197-99. Chapple, the equipment operator on Wheeler's crew,

confirmed that Potelco did not inform the crew of any hazards associated with the helicopter long line. CP 341-42. Potelco offered no evidence to the contrary.

As explained above, substantial evidence supports the Board's finding that the structure 4/3 jobsite was closer to the energized Baker 1 transmission line than any other jobsite on the project. CP 201-02, 344-46. Nevertheless, on appeal, Potelco improperly asks this Court to reweigh the evidence, arguing that the helicopter did not fly any closer to the energized line at structure 4/3 than it did at other worksites. App's Br. at 13-14. Potelco asserts that the helicopter had previously delivered materials to other "angled" structures and appears to argue that the worksites at these structures were equally close to the energized line. App's Br. at 13-14. Potelco is incorrect.⁵

Contrary to the company's assertion, there was explicit testimony that the worksite at structure 4/3 was closer to the energized Baker 1 line than any other worksite, including worksites at other angled structures.

Jesmer testified that the accident site was much closer to the energized line

⁵ Notably, Potelco's argument presupposes that it briefed its employees about the hazards of the helicopter operation prior to beginning the project. However, it is undisputed that Potelco never informed its employees of the hazards posed by the helicopter's conductive line at any point during the helicopter operation. Regardless of whether these hazards first arose at structure 4/3 or at a different worksite earlier in the project, Potelco was required to hold a conference to inform affected employees of this new danger. Even assuming that Potelco is right that there was no change in hazards at structure 4/3 because the hazard was also present at other jobsites on the project, this would not excuse Potelco's actions here.

than other locations where the crew had worked:

It was considerably closer. Most of the locations we had been prior had very little turn. . . . All these structures pretty much have an angle to them. They'll come in and they'll go off in another way. This one had a very sharp corner. . . . The energized line was on the outside. The de-energized line was on the inside. So along that corner it just ended up being much, much closer than all the other ones.

CP 201-02. Chapple likewise testified that anchor hole A was the closest spot to the energized line that the crew worked on either day of the helicopter operation. CP 346. He reported that the helicopter's long line came closer to the energized Baker 1 transmission line at structure 4/3 than it had at any other structure. CP 344-45. Indeed, general foreman Holmgren, the witness on whom Potelco relies for its contention about other angled structures, testified that he had no idea how close these various sites were to the energized line. CP 315. This Court should reject Potelco's improper attempt to reargue the facts.

Substantial evidence supports the Board's finding that Potelco failed to hold a conference when the hazards of the helicopter operation changed. This Court should affirm.

B. Substantial Evidence Supports the Board's Finding That Potelco Had Employees Working in Areas Containing Unguarded, Uninsulated High Voltage Power Lines Who Were Not Qualified To Work On or Near Such Lines

The Board properly found that Wheeler and his crew were not

qualified to work beneath the energized Baker 1 transmission line while the helicopter and its long line were overhead. Substantial evidence supports this finding. Under WAC 296-45-325(1), only “qualified employees” can work “in areas containing unguarded, uninsulated energized lines . . . operating at 50 volts or more.” Qualified employees must be trained and competent to recognize and protect themselves from the hazards posed by working on or near such lines. WAC 296-45-035, -065. These regulations apply whenever employees are working near enough to a live line that they are exposed to “any hazard [it] presents.” WAC 296-45-325.

Potelco does not dispute that Wheeler and Jesmer were working near an unguarded, uninsulated energized line. *See* App’s Br. 14-16. The energized Baker 1 line was uninsulated and unguarded when the helicopter and its long line were in the area. CP 252-53. Wheeler was nearly directly beneath the energized line at the time of the accident—as noted above, the distance between the accident site and the Baker 1 line was only 64 inches. CP 225-26. Maxwell testified that “[w]hen the helicopter brought that long line in, they were now in the proximity of that 115,000-volt line.” CP 229. He explained that, given the presence of the conductive long line, Wheeler and Jesmer were working close enough to the energized transmission line that they were exposed to the hazards it presented. CP 252. Substantial

evidence supports the Board's finding that Wheeler's crew was working in an area containing an unguarded, uninsulated, high voltage line.

Substantial evidence likewise supports the Board's finding that Wheeler and Jesmer were not qualified employees because they did not fully understand the hazards of the work they were performing. Under WAC 296-45-035, a worker is not a "qualified employee" unless he or she either is a journeyman lineman or is a person who is "familiar with the construction of, or operation of such lines and/or equipment that concerns his/her position and who is fully aware of the hazards connected therewith." Qualified employees must also be "trained and competent" to identify the exposed live parts of electric equipment and to determine the nominal voltage of the live parts.⁶ WAC 296-45-065(1)(a), (b). Such employees must be trained and competent in minimum approach distances and the "use of the special precautionary techniques, personal protective equipment, insulating and shielding materials, and insulated tools for working on or near exposed energized parts of electric equipment." WAC 296-45-065(1)(c), (d).

Neither Wheeler nor Jesmer was a journeyman lineman and, as civil workers, they had limited knowledge of electrical safety. CP 166,

⁶ The nominal voltage of a system or circuit is the value assigned to a system or circuit of a given voltage class for the purpose of convenient designation. The actual voltage may vary above or below this value. WAC 296-45-035.

195. Both testified that they were unaware of the hazards posed by the helicopter's long line coming near the energized transmission line. CP 181, 205. Neither knew how to distinguish live parts from other parts of electrical equipment. CP 178, 206. They did not know how to determine the nominal voltage of a live line; indeed, Wheeler testified that he did not understand this term. CP 178, 206. Neither employee knew the proper use of insulating and shielding materials or insulated tools for working on or near exposed energized parts. CP 180, 207. While both were familiar with the general concept of minimum approach distances, Jesmer testified that he did not know what that distance was for the Baker 1 line. CP 206. This is substantial evidence that Wheeler and Jesmer were not "qualified employees" within the meaning of WAC 296-45-035.

Because Wheeler was not qualified to work on or near energized electrical lines, Potelco's argument that he was "qualified" to work on a de-energized power line fails. Potelco asserts that it only assigned Wheeler to work near the de-energized Baker 2 line, a task for which he was qualified. App's Br. 15. Potelco's intentions, however, have no bearing on whether Wheeler and his crew were qualified to be working where they were at the time of the accident. Rather, it is the actual conditions at the worksite that inform whether a safety violation occurred. *See, e.g., Pilchuck Contractors, Inc. v. Dep't of Labor & Indus.*, 170 Wn. App. 514,

520, 286 P.3d 383 (2012). Regardless of what Potelco believed about the task it assigned to Wheeler's crew, substantial evidence shows that the helicopter operation brought Wheeler and Jesmer into close proximity to an energized 115,000-volt line, a situation for which neither worker was properly trained or qualified. Potelco's understanding of what it assigned these employees to do is not relevant to whether the requirements of the cited standard were met.⁷

The reasons for the accident are likewise irrelevant to whether a safety violation occurred. Contrary to Potelco's assertion, the Board did not find that Wheeler's crew was unqualified "simply because Wheeler was injured." App's Br. 15. Instead, as discussed above, the Board reached this determination based on testimony that neither Wheeler nor Jesmer was trained and competent to identify the live parts of electric equipment, determine nominal voltage and minimum approach distances, or properly use specialized electrical materials and tools. CP 71-72 (FOF 8).

Indeed, had these employees received such training, they would have understood the hazards posed by the helicopter's long line, and the

⁷ Potelco's beliefs about the hazards at the worksite are also immaterial to whether the requirements of WAC 296-45-325(1) were met. The company asserts that it reasonably relied on Salmon River's assurances that the helicopter's long line was nonconductive. App's Br. 15-16 n.7. Potelco makes no effort to explain why such a belief would have any bearing on whether a violation of the cited standard occurred. This issue relates instead to Potelco's knowledge of the violative conditions. *See J.E. Dunn Nw.*, 139 Wn. App. at 44-45. As discussed below, substantial evidence supports the Board's finding that Potelco knew or, through the exercise of reasonable diligence, could have known that the long line was conductive. *See Part V.C.*

accident could have been prevented. Potelco's assertion that "even a lineman in Mr. Wheeler's shoes would not have appreciated the hazard" is without merit. App's Br. at 16 n.8. Maxwell testified that a journeyman lineman would recognize that the use of a long line near an energized power line is potentially hazardous. CP 231. In fact, a crew of journeyman linemen drilling anchor holes on the other side of structure 4/3 would stop their work whenever the helicopter approached the structure. CP 217-18. If Wheeler and Jesmer were qualified employees, it is likely that they too would have stopped working when the helicopter began flying too close to the energized power line. Had these workers received proper training, it is likely that this accident would not have happened.

Nothing in the record suggests that the accident occurred because Wheeler and Jesmer believed the helicopter's long line to be nonconductive. Potelco's assertion to the contrary is pure conjecture. *See* App's Br. 15-16. Neither worker testified that he heard the helicopter pilot say the line was made of Kevlar. Indeed, both testified that they did not know of what material the line was made. CP 174, 188, 204. As noted above, the reason for the accident is not relevant to whether Wheeler and Jesmer were qualified employees. But even if it was, there is no evidence that either worker was misled about the conductivity of the line.

This Court does not reweigh the evidence. *See Zavala*, 185 Wn.

App. at 867. While Potelco argues that Wheeler understood the risks posed by the energized transmission line (App's Br. 15), it fails to explain how he and his crew could be deemed "qualified employees" in light of their testimony. Wheeler and Jesmer both testified that they were unaware of the hazards posed by the helicopter's long line, that they did not know how to distinguish live parts from other parts of electrical equipment, and that they did not know how to determine the nominal voltage of a live line. This is substantial evidence that neither Wheeler nor Jesmer was a qualified employee. In arguing to the contrary, Potelco is either ignoring this testimony or ignoring that, under WAC 296-45-035 and WAC 296-45-065, a worker must be trained and competent in these skills to be found qualified within the meaning of those regulations.

For similar reasons, the Board correctly determined that Potelco's training of its civil workers was insufficient to qualify them to work on or near energized electrical lines. This training was of limited duration and, in general, simply taught such workers to stay away from energized lines. CP 193, 214. While Potelco asserts that its civil workers participated in an OSHA 10 training course that "spans 10 hours" and covers numerous "electrical safety topics in detail" (App's Br. at 7), this assertion mischaracterizes the record. Electrical safety was only one of nine topics covered by the training, which also included trenching and excavation,

lifting and rigging, confined and enclosed spaces, and falls and struck-by hazards. CP 214, 381. Employees were not tested for competency in electrical safety following the training. CP 342, 363-64. Given the limited nature of the OSHA 10 training, Maxwell testified that it was insufficient to qualify Potelco's employees to work on or near high voltage lines. CP 247-48. Insofar as Potelco argues that its civil workers were qualified employees based on their training, this contention is without merit.

For all the reasons stated above, there is substantial evidence that Wheeler and Jesmer were not qualified to work on or near the unguarded, energized Baker 1 transmission line. Neither employee fully appreciated the hazards posed by working in close proximity to an active power line; nor did they have the training and skills to protect themselves from those hazards. Potelco offers no cogent reason to conclude otherwise. This Court should affirm.

C. Substantial Evidence Supports the Board's Finding That Potelco Knew Or, with the Exercise of Reasonable Diligence, Could Have Known of the Violative Conditions

The Board correctly found that Potelco had knowledge of the violations. Either actual or constructive knowledge is sufficient under WISHA—knowledge is established where an employer knew or, through the exercise of reasonable diligence, could have known of the violative condition. *J.E. Dunn Nw.*, 139 Wn. App. at 44-45; *Erection Co.*, 160 Wn.

App. at 206-07. “Reasonable diligence involves several factors, including an employer’s obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence.” *Erection Co.*, 160 Wn. App. at 206-07 (internal quotation omitted).

Substantial evidence supports the Board’s finding that Potelco had knowledge of the violative working conditions. Potelco does not dispute that it knew the various aspects of its helicopter operation, the location of its worksites, or the details of its employees’ training and experience. Rather, the company asserts that it “reasonably relied” on the helicopter pilot’s statement that the long line was made of nonconductive Kevlar. App’s Br. 2, 15, 16-17. Potelco posits that it reasonably believed that the line was nonconductive and, therefore, it could not have known it was assigning Wheeler’s crew to work in an area containing an unguarded energized line. App’s Br. 16-17. For this same reason, Potelco asserts that it could not have known of the change in hazards at structure 4/3 because it believed there would be no hazard regardless of how close the helicopter came to the Baker 1 transmission line. App’s Br. 16-17.

The Board properly rejected these arguments, finding that if Potelco had exercised reasonable diligence, it could have known that the helicopter’s long line was conductive. Substantial evidence supports this

finding. At hearing, Potelco's general foreman, Holmgren, admitted that the long line could be tested for conductivity. CP 304. He also admitted that he knew that Kevlar can become conductive when dirty. CP 304. The conditions at the worksite were muddy—Jesmer testified that the rain had saturated the ground and “turned it into a mud pit basically.” CP 216. Given the importance of the long line's conductivity, the conditions at the worksite, and the fact that Kevlar becomes conductive when dirty, at a bare minimum, any exercise of reasonable diligence would include testing the line for conductivity. Had Potelco exercised such diligence, it would have known that the helicopter's long line was conductive.⁸

Potelco's professed reliance on the helicopter pilot's “assurances” does not constitute reasonable diligence. As noted by the Board, “[t]here was no evidence that the pilot was journeyman lineman, had any special knowledge regarding electrical work, or knowledge of what materials were and were not conductive.” CP 54. Potelco does not explain how a helicopter pilot would have more accurate knowledge of a long line's

⁸ Potelco asserts that the Board's findings suggest that “it expected Potelco to disprove its knowledge of the alleged violation.” App's Br. 18 n.9. Potelco provides no citation to the record in support of this argument and the Court should not consider it. *Peters v. Vinatieri*, 102 Wn. App. 641, 655, 9 P.3d 909 (2000) (holding that a court need not consider “assertions that are given only passing treatment and are unsupported by reasoned argument”). In any event, there was ample affirmative evidence that Potelco could have known the long line was conductive with reasonable diligence. As noted above, Potelco admitted that the long line could be tested for conductivity and that Kevlar becomes conductive when dirty. Given the muddy conditions of the worksite, Potelco should have tested the line.

conductivity than a high voltage transmission line specialist like itself.⁹

Unquestioning reliance is not reasonable diligence. More importantly, because Kevlar becomes conductive when dirty, which Potelco admits it knew, the company could not reasonably assume that the line would remain nonconductive after two days of work delivering gravel and concrete to a muddy location. As the Board properly found, Potelco had no “valid reason to conclude that the long line used by Salmon River was nonconductive.”¹⁰ CP 64.

The Board correctly found that Potelco had knowledge of the violative conditions at its worksite. Substantial evidence supports the Board’s findings. This Court should affirm.

⁹ Potelco asserts that Salmon River “touted its extensive experience with delivering materials by helicopter” (App’s Br. 1) and “held themselves out as experts on the type of work being performed.” App’s Br. 18. This characterization is hardly reflected in the record. The only evidence regarding this issue came from Potelco general foreman Holmgren, who testified: “They stated that they were fully confident, they had no problems, they had no [sic] didn’t foresee any difficulties that were out of their ability to perform what we asked them to do.” CP 319-20. There is no evidence that Salmon River claimed any special expertise in high voltage safety.

¹⁰ Potelco complains that the Board improperly relied on the company’s contract with Salmon River to find that Potelco could have discovered that the helicopter’s long line was conductive. App’s Br. 17-18. Potelco misapprehends the Board’s point. If the contract had been introduced at hearing, it would have provided important evidence about the specifications of the helicopter long line. As the Board explained, Potelco had sole control of this evidence. CP 64. But the company chose not to provide it, limiting its witnesses to individuals with no personal dealings with the helicopter company. This litigation strategy by Potelco was among the reasons that the Board noted that it was nearly impossible to determine what Potelco actually knew about the conductivity of the long line, remarking that the company “was less than forthcoming at hearing.” CP 66.

VI. CONCLUSION

The Board correctly determined that Potelco committed two serious safety and health violations, finding that the company failed to hold a conference when the hazards of the helicopter operation changed and failed to ensure that only qualified employees worked on or near the energized Baker 1 transmission line. Substantial evidence supports these findings. There was a change in hazards where the helicopter operation at the accident site brought Potelco's employees much closer to the energized line than at other jobsites on the project. These workers were not qualified employees as defined by the regulations because they did not have the training or skills to understand and protect themselves from the dangers posed by working in such close proximity to the energized line. Potelco had either actual or constructive knowledge of the violative working conditions because the company knew that Kevlar becomes conductive when dirty and that the helicopter had been delivering gravel and concrete to a muddy location for two days. Had Potelco exercised reasonable diligence and tested the helicopter's long line, it would have known that the line was conductive.

//

//

//

The Board's findings are supported by substantial evidence, and the findings support the Board's conclusions of law. This Court should affirm.

RESPECTFULLY SUBMITTED this 20th day of November, 2015.

ROBERT W. FERGUSON
Attorney General



William F. Henry
Assistant Attorney General
WSBA No. 45148
Office Id. No. 91018
800 Fifth Ave., Suite 2000
Seattle, WA 98104
(206) 464-7740

NO.73735-0-I

**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

//

//

//

//

Via First Class United States Mail, Postage Prepaid to:

Josias Flynn
Skylar Sherwood
Riddell Williams P.S.
1001 Fourth Avenue, Suite 4500
Seattle, WA 98154

DATED this 20th day of November, 2015.



KRISTEN HARRIS
Legal Assistant