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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY: 
LEWIS

No. 50824-9-II

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

POTELCO, INC.,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

APPELLANT POTELCO, INC.'S OPENING BRIEF

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I. INTRODUCTION

An experienced crew of Potelco line and ground workers set a distribution pole – one of over a thousand that they have set in the past – at a worksite in Olalla, Washington, when the groundman slipped and received a minor shock. Potelco reported this accident to the Department, who inspected and issued a citation and then a Corrective Notice of Redetermination (“CNR”), alleging that Potelco committed one general and five serious violations of workplace health and safety standards for, among other things, allegedly entering the minimum approach distance with a conductive object that made contact with an energized line.

Following a hearing, Industrial Appeals Judge Torem affirmed in part and vacated in part the CNR. Both parties petitioned for review, after which the Board of Industrial Insurance Appeals (the “Board”) issued a Decision and Order (“D&O”) vacating one out of the five alleged serious violations, affirming the other four serious violations, and affirming Judge Torem’s decision that the record keeping violation should be a de minimis rather than a general violation.

Now Potelco appeals to this Court, urging the Court to vacate some remaining portions of the Department’s CNR. Because substantial evidence does not support the Department’s contention that the transmission pole entered the MAD or made contact with the energized line, alleged violations 1-1(a) and 1-1(c) should be vacated.

II. ASSIGNMENTS OF ERROR

Potelco respectfully asserts that the Superior Court erred in affirming Findings of Fact Nos. 3 and 6, and in adopting Conclusions of Law Nos. 2 and 4, as set forth in the Board's D&O, because those facts were not supported by substantial evidence and did not in turn support the conclusions of law. Potelco also respectfully asserts that the Superior Court erred in granting statutory attorneys' fees to the Department as the prevailing party.¹ Specifically:

Assignment of Error No. 1: The Superior Court erred in adopting Finding of Fact No. 3.

Statement of Issues Pertaining to Assignment of Error No. 1:
Did the Superior Court err in adopting Finding of Fact No. 3 when the Board's finding that the pole entered the minimum approach distance (the "MAD") and that employees were exposed to the hazard of electrocution was not supported by substantial evidence?

Assignment of Error No. 2: The Superior Court erred in adopting Finding of Fact No. 6.

Statement of Issues Pertaining to Assignment of Error No. 2:
Did the Superior Court err in adopting Finding of Fact No. 6 when the Board's finding that Potelco employees were exposed to the hazard of

¹ Because the Superior Court erred in ruling in favor of the Department, the Department should not be considering the prevailing party entitled to attorney's fees and costs.

electrocution was not supported by substantial evidence where the Department failed to provide any evidence that the pole or the employees actually entered the MAD?

Assignment of Error No. 3: The Superior Court erred in adopting Conclusion of Law No. 2.

Statement of Issues Pertaining to Assignment of Error No. 3:
Did the Superior Court err in adopting Conclusion of Law No. 2 when alleged violation Item No. 1(a) was not supported by substantial evidence?

Statement of Issues Pertaining to Assignment of Error No. 4:
The Superior Court erred in adopting Conclusion of Law No. 4.

Assignment of Error No. 4: Did the Superior Court err in adopting Conclusion of Law No. 4 when alleged violation Item No. 1(c) was not supported by substantial evidence?

III. 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).² Each of the crew

² 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

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. 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).

2. The Inspection

Department of Safety and Health (DOSH) Inspector George 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,

part of the record on appeal.

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).

B. The Citation and Procedural History

Based on Maxwell's inspection, the Department issued Potelco the Citation and CNR, which includes the following alleged violations:

- 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 (b) alleges 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.
- 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.
- Item 1-2(a) alleges a serious violation of WAC 296-45-

105(1), which states that a lead worker cannot properly supervise the work and look out for the safety of employees under their direction if required to work as a lead worker and a line worker at the same time.

- Item 1-2(b) alleges a serious violation of WAC 296-45-385(11), which requires that raising poles, towers or fixtures in the close proximity of high voltage conductors be done under the supervision of a qualified employee.

- Item 2-1 alleges 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.

Potelco appealed the Corrective Notice of Redetermination (“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. Specifically, Judge Torem affirmed Violations 1-1 and 1-2, but decided that the Department had improperly calculated the penalties because the faith code should have been at least average, but likely even higher than that. He also found that Violation 2-1 was mischaracterized and should have been a de minimis violation.

Both Potelco and the Department petitioned for review of the PD&O. On January 26, 2016, the Board issued a Decision and Order (“D&O”) affirming in part and modifying in part the Department’s CNR.

Specifically, the D&O:

- Affirmed Item 1-1(a), 1-1(c), 1-2(a), and 1-2(b);
- Vacated Item 1-1(b);
- Upgraded the faith code from “poor” to “average” and recalculated the penalty accordingly; and
- Affirmed 2-1 as a de minimis, rather than a general violation.

Both Potelco and the Department 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. Potelco timely appealed to this Court,³ and now urges the Court to review and vacate alleged violations Items 1.1(a) and 1.1(c).

IV. ARGUMENT

A. Standard of Review

When reviewing Board rulings, this Court sits in the same position as the Superior Court and reviews the Board’s decision directly. *Dep’t of Labor & Indust. V. Tyson Foods, Inc.*, 143 Wn. App. 576, 581, 178 P.3d 1070 (2008); *J.E. Dunn NW., Inc., v. Dep’t of Labor & Indus.*, 139 Wn.

³ The Department initially appealed the D&O, but decided not to pursue the cross-appeal, and its appeal was dismissed with prejudice. As such, neither party challenges the D&O as it applies to Item 1-1(b) or 2-1, or with regards to the upgraded faith code. See Dkt. No. 12.

App. 35, 42, 156 P.3d 250 (2007). The Board's findings must be supported by substantial evidence when considering the record as a whole. RCW 49.17.150(1). Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true. Conclusions of law must be appropriate based on the factual findings. *Danzer v. Dep't of Labor and Indus.*, 104 Wn. App. 307, 319 (2000). Courts review questions of law de novo. *Monroe v. Soliz*, 132 Wn.2d 414, 418 (1997).

B. Alleged Violation 1-1(a) Should Be Vacated Because the Pole Did Not Enter the MAD

The Department cited Potelco for allegedly violating WAC 296-45-325(4), which provides:

The employer shall ensure that no employee approaches or takes any conductive object closer to exposed energized parts than set forth in Table 1 through Table 4, 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.

Hearing Ex. 37.

The Department alleges that the pole entered the MAD, but at the hearing it failed to provide any evidence beyond Maxwell's speculation in support of this allegation.

At the hearing, all of the crew members testified that they did not see the pole enter the MAD. (Morrison at 87:13; Street 103:23; Chase 1 17:11-15; Circulado 125:2). Further, Maxwell admitted that he does not actually know if the pole entered the MAD. (Maxwell at 64:25).

Therefore, because the Department has failed to show that the pole entered the MAD, it has not met its burden to establish that cited standard was violated, and the Board's finding to the contrary is not supported by substantial evidence, so this Court should vacate Item 1-1(a).

C. Alleged Violation 1-1(a) Should Be Vacated Because the Potelco Crew Was Not Working In the MAD

The Department cited Potelco for allegedly violating WAC 296-45-385(1)(c), which provides:

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 his or her body.

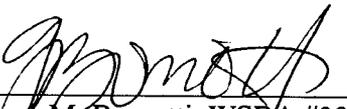
Specifically, the Department alleged that Potelco did not ensure that Potelco employees wore appropriate protective equipment when the pole was raised into the MAD. Hearing Ex. 3. However, as explained in above, the Department has failed to provide any evidence that the pole, let alone the Potelco employees, actually entered the MAD. Further, it is undisputed that the pole did not make contact with the energized line, as Item 1-1(b) which alleged such contact was vacated, and has not been challenged by the Department on appeal. Because there is not substantial evidence to show that Potelco employees were working in the MAD, and as such, would be required to wear additional protective equipment, this Court should vacate Item 1-1(c).

V. CONCLUSION

For the reasons stated herein, Potelco respectfully requests that the Court: vacate Item 1-1 (a) and (c) along with the associated penalties because the Department failed to show that the transmission pole encroached on the minimum approach distance or that Potelco employees were performing work in areas within the MAD and would thus require additional protective equipment in order to safely perform their work.

DATED this 20th day of November, 2017.

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CERTIFICATE OF SERVICE

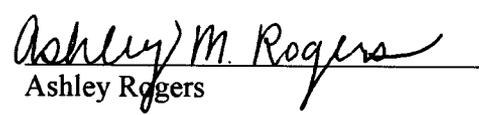
I, Ashley Rogers, certify that:

1. I am an employee of Fox Rothschild LLP, attorneys for Respondent/Cross-Appellant 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 November 20, 2017, I served a true and correct copy of the foregoing document on the following party, attorney for Respondent, via mail, and addressed as follows:

James P. Mills
Office of the Attorney General - Tacoma
1250 Pacific Ave Ste 105
PO Box 2317
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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 20th day of November, 2017.


Ashley Rogers

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