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DIVISION II

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STATE OF WASHINGTON

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No. 50943-1-II

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

POTELCO, INC.,

Plaintiff/Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Defendant/Respondent.

APPELLANT POTELCO, INC.'S OPENING BRIEF

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I. INTRODUCTION

On February 14, 2014, a four-man Potelco crew was working in Olympia to remove old de-energized conductors. One of the crew members decided to cut part of the de-energized wire, which was blocking a residential driveway, but failed to notify the other crew members of the change in the agreed work procedure. A second crew member, who was unaware that the wire had been cut, grabbed it as it was suspended in the air, causing the tail that had been cut to come through the hot arm holding the energized conductor away from the power pole and tap a stirrup connected to the conductor, which briefly energized the piece of wire that he was holding. He felt a slight buzz in his hand but did not realize anything had gone wrong.

The Department issued a Citation and Notice of Assessment, alleging that Potelco committed four serious and one general violations of workplace health and safety standards. Following a hearing, Industrial Appeals Judge Tom Kalenius affirmed the citation, and the Board affirmed Judge Kalenius's decision. Potelco appealed the Board's decision to the Thurston County Superior Court and Judge James Dixon entered an order affirming the Board's decision.

Potelco timely appealed to this Court, and now asks the Court to (1) vacate alleged violation Items 1-1, 1-2, and 1-3 because substantial evidence does not support the Department's contention that Potelco had actual knowledge of those violations; (2) in addition and in the alternative,

vacate alleged violation Items 1-1, 1-2, and 1-3 because they were the result of unpreventable employee misconduct; (3) vacate alleged violation Item 1-4 because Potelco's accident prevention program is tailored to the needs of its workplace; (4) downgrade Item 2-1 from a general to *de minimis* violation because the violation is unrelated to employee health and safety; and (5) change Potelco's good faith rating from "poor" to "good" because the Department's inspector admits he did not consider most of the relevant factors in assigning the "poor" rating.

II. ASSIGNMENTS OF ERROR

Potelco respectfully asserts that the Superior Court erred in affirming the Board's findings of fact and adopting its conclusions of law because the facts were not supported by substantial evidence and therefore did not 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 Potelco failed to ensure that a protective grounding

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.

method was used to prevent an employee from exposure to hazardous differences in electrical potential?

Assignment of Error No. 2: The Superior Court erred in adopting Finding of Fact No. 4.

Statement of Issues Pertaining to Assignment of Error No. 2:
Did the Superior Court err in adopting Finding of Fact No. 4 when the Board's finding that Potelco failed to ensure another qualified worker was present positionally was not supported by substantial evidence?

Assignment of Error No. 3: The Superior Court erred in adopting Finding of Fact No. 7.

Statement of Issues Pertaining to Assignment of Error No. 3:
Did the Superior Court err in adopting Finding of Fact No. 7 when the Board's finding that Potelco committed four serious violations (Items 1-1, 1-2, 1-3, and 1-4) and one general violation (Item 2-1) was not supported by substantial evidence?

Assignment of Error No. 4: The Superior Court erred in adopting Finding of Fact No. 12.

Statement of Issues Pertaining to Assignment of Error No. 4:
Did the Superior Court err in adopting Finding of Fact No. 12 when the Department's inspector admitted he did not consider most of the relevant factors in assigning Potelco a poor good faith rating?

Assignment of Error No. 5: The Superior Court erred in adopting Finding of Fact No. 15.

Statement of Issues Pertaining to Assignment of Error No. 5:

Did the Superior Court err in adopting Finding of Fact No. 15 when the Board's finding that the alleged violations were not isolated instances of unpreventable employee misconduct was not supported by substantial evidence?

Assignment of Error No. 6: The Superior Court erred in adopting Conclusion of Law No. 2.

Statement of Issues Pertaining to Assignment of Error No. 6:

Did the Superior Court err in adopting Conclusion of Law No. 2 when alleged violation Items 1-1, 1-2, 1-3, 1-4, and 2-1 were not supported by substantial evidence?

Assignment of Error No. 7: The Superior Court erred in adopting Conclusion of Law No. 3.

Statement of Issues Pertaining to Assignment of Error No. 7:

Did the Superior Court err in adopting Conclusion of Law No. 3 when substantial evidence showed alleged violation Items 1-1, 1-2, and 1-3 occurred due to unpreventable employee misconduct?

III. STATEMENT OF THE CASE

A. Statement of Facts

Potelco is a utility contractor that focuses primarily on high voltage electrical lines. (Hearing Testimony of Bryan Sabari ("Sabari") at 124:19-

21)². In addition to energized line work, Potelco also performs non-energized work such as repair, maintenance and installation. (*Id.* at 125:16-22). It also works on energy generation facilities, such as wind and hydro facilities. (*Id.*). Potelco works all over the State of Washington, Oregon and in various other states. (*Id.* at 124:23 – 125:2). It employs approximately 800 employees who collectively complete around 1.5 million hours of work per year. (*Id.* at 125:4-8).

On February 14, 2014, a four-man Potelco crew was working in Olympia to remove old de-energized conductors. The crew consisted of Ben Laufenberg (foreman), Roger Jobb, Eli Price, and Brent Murphy. (Hearing Testimony of Ben Laufenberg (“Laufenberg”) at 45:6). Laufenberg, Jobb, and Price were all journeymen linemen. Murphy was a seventh step apprentice. (Hearing Testimony of Brent Murphy (“Murphy”) at 6:6). The crew installed and energized a three phase conductor (line or wire), which allowed them to de-energize the old single-phase line. (*Id.* at 10:8-15). In preparing to remove the old line, the crew first safely and successfully de-energized the old line. (*Id.*). The crew’s plan was then to ground the old line on both ends, work on getting it to the ground, roll it up and dispose of it. (*Id.*). In order to get it to the ground safely, the crew

² All citations to “Hearing Testimony” (and thereafter, the name of the witness—e.g. Sabari, Maxwell, etc.) refer to the transcript of testimony from the Board of Industrial Insurance Appeals hearing held in Tacoma, Washington, on October 6, 2015.

planned to cut it and drop each side to the ground so it remained under positive control³. (*Id.* at 11:2-6).

Instead of following the day's work plan, Laufenberg decided to cut part of the de-energized wire, which was blocking a residential driveway. (Laufenberg at 49:16-23). Laufenberg failed to notify the other crew members of the change in the established procedure. (*Id.*).

Unfortunately, Murphy, who was unaware that the wire had been cut, grabbed it as it was suspended in the air, causing the tail that had been cut to come through the hot arm and tap a stirrup, which briefly energized the piece of wire that Murphy was holding. (Murphy at 12:12-22). Laufenberg also failed to ensure that he was working closer to Murphy and Price, as required by Potelco policy, therefore, he was unable to see Murphy, or prevent him from, reaching for the wire. (*See* Laufenberg at 50:6-12).

Murphy did not realize that anything had gone wrong until the system operator called to inform them that there had been an outage. Murphy, who was not wearing gloves at the time, had felt a slight buzz when the line became energized, but "other than a slight tingle in [his] hand, [he] was completely fine." (Murphy at 30:15-20). Murphy suffered no injury and no long lasting damage. (*Id.* at 30:17). However, company policy required him to be taken to the hospital and observed for twelve hours. (*Id.* at 30:23 – 31:1).

³ A conductor is kept under positive control when it is kept clear of the earth and other obstacles that could cause damage.

After the incident, the crew was disciplined for violating Potelco safety policies. (Murphy at 42:12-15; Laufenberg at 52:18-20). Each of the crew members received three days off without pay, and each of them was retrained as part of the discipline. (Murphy 42:19-25; Laufenberg at 52:17-24).

B. Procedural Background

Department Compliance Safety and Health Officer George Richard Maxwell (“Maxwell”) opened an inspection of the Olympia Worksite, in response to Murphy’s minor injury. After the job had been completed, Maxwell visited and inspected the worksite and interviewed the crew. Following Maxwell’s inspection, the Department issued Potelco Citation No. 317228013 (“Citation”), comprised of the following alleged violations:

1. Violation 1, Item 1 alleges a serious violation of WAC 296-45-385(2)(b) for allegedly failing to ensure that the conductor being removed was under positive control.
2. Violation 1, Item 2 alleges a serious violation of WAC-296-45-345(3) for allegedly failing to ensure that a protective grounding method was used to prevent the employee from exposure to hazardous differences in electrical potential.
3. Violation 1, Item 3 alleges a serious violation of WAC 296-45-325(2)(b) for allegedly failing to ensure that another qualified worker was present positionally.
4. Violation 1, Item 4 alleges a serious violation of WAC 296-800-14004 for allegedly failing to develop a formal accident prevention program that is outlined in writing.
5. Violation 2, Item 1 alleges a general violation of WAC 296-27-02105(2)(b) for allegedly failing to enter the number of employees and hours worked onto the 2013 OSHA 300A for the Olympia H.Q.

(Hearing Ex. 20; Maxwell at 93:13-15).

Potelco timely appealed the Citation to the Board of Industrial Insurance Appeals (the “Board”). The Board held a hearing on October 6, 2015 in Tacoma, Washington. On January 7, 2016, Judge Tom Kalenius issued a Proposed Decision and Order (“D&O”), affirming the Citation. The Board affirmed Judge Kalenius’s decision on February 18, 2016. Potelco appealed the Board’s decision to the Thurston County Superior Court. Following a hearing on June 16, 2017, Judge James Dixon entered an order affirming the D&O. Potelco timely appealed to this Court, and now urges the Court to review and vacate alleged Violations 1-1, 1-2, 1-3, and 1-4, and classify alleged Violation 2-1 as *de minimis*.

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 (2008); *J.E. Dunn Nw., Inc., v. Dep’t of Labor & Indus.*, 139 Wn. App. 35, 42 (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. Potelco Did Not Have Knowledge of Violations 1-1, 1-2, or 1-3

Before the Board, the Department had the burden of showing that Potelco “knew, or through the exercise of reasonable diligence, could have known of the violative condition.” RCW 49.17.180(6); *Erection Co., Inc. v. Dept. of Labor & Industries*, 160 Wn. App. 194, 204-05 (2011). The Department could have done so by (1) proving Potelco had knowledge of similar past violations and did nothing to address the problem, or (2) proving Potelco lacked reasonable diligence by showing that it does have no adequate work rules and training programs, fails to supervise and discipline employees, or fails to inspect work areas and take measures to prevent safety violations. *J.E. Dunn Nw.*, 139 Wn. App. at 45–46; *In re Longview Fibre*, 2003 WL 23269365, *2, BIIA Dckt. No. W0321 (2003). Substantial evidence does not support the Board’s finding that Potelco had constructive knowledge of the violations.

The Board’s conclusion regarding Potelco’s knowledge of Violation 1-1 rested in part on the fact that the job at issue was several months long along a residential road and three past citations had been issued to Potelco. First, it is nonsensical to find that the length of a job provided Potelco with constructive knowledge of the violative condition. By the Board’s logic, Potelco would have had constructive knowledge of

any and all violations of any of the hundreds of regulations to which Potelco is subject, as long as the job on which they occurred was long enough. This would prevent Potelco from ever being able to challenge any serious violation citation issued on a job of some length, although Potelco is unable to determine exactly how long is long enough to impute such knowledge. It is an absurd result, and certainly not one intended by the legislature in crafting WISHA.

Next, the Board summarily stated: “The Department presented the employer’s history of prior violations and specific violations The preponderance of evidence was persuasive that the employer knew, or through the exercise of reasonable diligence, could have known of the violative conditions.” The citations even in the aggregate cannot support any finding that Potelco had constructive knowledge of any of the violations at issue. More than a scant record of three citations issued years ago is required to support such a finding. *See, e.g., J.E. Dunn Nw., 139 Wn. App. at 46* (using past similar violations to support a finding of constructive knowledge when a WISHA officer sent the employer a letter relating to the same regulations at issue *a few months before the accident*, and the employer’s safety manager issued a number of safety notices regarding the same violations *in the months leading up to the cited incidents*”) (emphasis added).

Here, three years separate the citations relied upon by the Board to support its finding and the citation at issue in this case. Again, this produces an absurd result when taken to its logical extreme. According to

the Board, an employer has constructive knowledge of any current incident similar to any citation issued in at least the past three years. This too prevents Potelco from challenging citations for any violation for which Potelco has been cited in the past several years, as Potelco will automatically be assumed to have constructive knowledge of current or future violations. None of the Board's findings support the conclusion that Potelco had constructive knowledge of the violative conditions.

The Board determined, without elaboration, that Potelco knew or could have known of the violative condition cited in Violation 1-2 because the scope of the work involved the grounding of lines. Yet again, this determination creates the ludicrous rule that an employer will always be deemed to have constructive knowledge of any violation simply because it is possible to violate a regulation within that scope of work. The evidence in the record is wholly insufficient to support this finding, even under the substantial evidence standard.

The Department argued before the Superior Court that the fact that Potelco received two violations related to EPZ set-up in 2011 is enough to provide substantial evidence of Potelco's knowledge. The Department, and in turn the Superior Court, dismissed the testimony of Potelco witnesses explaining the lengths to which Potelco has gone to address EPZ and grounding issues. Potelco has taken extensive measures to address any past issues that its employees have had with grounding and EPZs. In response to prior incidents, Potelco has developed extensive training programs over the past four years. (*See Sabari* at 131:23 – 133:11).

Specifically, Potelco has implemented several training programs to address EPZ and grounding practices. (*Id.*).

In addition, EPZ and grounding practices are covered in the OSHA ten-hour transmission and distribution course, which is a required two-day course. (Sabari at 131:23 – 133:11). EPZs and grounding are also covered in monthly safety meetings, as well as local safety meetings. (*Id.*). Further, the Safety Department identifies projects that will have EPZ and grounding hazards and send a safety person to the pre-job safety meeting to cover these topics specifically with the employees. (*Id.*). This way, Potelco ensures that the employees are aware of the hazards involved in each job and how to mitigate those hazards, as well as the personal protective equipment required. (*Id.*). Potelco is entitled to believe that its extensive safety training is effective and put into practice by its employees. The fact that Potelco received two similar citations three years prior to this incident cannot forevermore impute constructive knowledge about EPZ and grounding procedure violations.

C. **Violations 1-1, 1-2, and 1-3 Resulted from Unpreventable Employee Misconduct**

Even if there was substantial evidence to support the board's decisions regarding Potelco's failure to meet the relevant standards and Potelco's knowledge of the violative conditions, Violations 1-1, 1-2, and 1-3 should be vacated because they resulted from unpreventable employee misconduct. The Department may not issue a citation if unpreventable

employee misconduct (“UEM”) caused the violation. RCW 49.17.120(5)(a). UEM “addresses situations in which employees disobey safety rules despite the employer's diligent communication and enforcement,” and “defeats the Department's claim, even when the Department has proven all the elements of a violation....” *Asplundh Tree Expert Co. v. Wash. State Dept. of Labor and Indus.*, 145 Wn. App. 52, 62 (2008). The defense applies “when an unsafe action or practice of an employee results in a violation.” *In re Jeld-Wen of Everett*, BIIA Dec., 88 W144 at 11 (1990).

To establish the affirmative defense of UEM, an employer must show:

- (i) A thorough safety program, including work rules, training, and equipment designed to prevent the violation;
- (ii) Adequate communication of these rules to employees;
- (iii) Steps to discover and correct violations of its safety rules; and
- (iv) Effective enforcement of its safety program as written in practice and not just in theory.

RCW 49.17.120(5)(a).

1. Potelco Provides Extensive, Effective Safety Training

The Board's D&O on this point is not supported by substantial evidence because it largely disregards extensive testimony about Potelco's safety program and the significant efforts Potelco has undertaken to specifically address EPZ safety and compliance. EPZ and grounding practices are covered in the OSHA ten-hour transmission and distribution course, which is a required two-day course. (Sabari at 131:23 – 133:11). EPZs and grounding are also covered in monthly safety meetings, as well as local safety meetings. (*Id.*). Further, the Safety Department identifies projects that will have EPZ and grounding hazards and send a safety person to the pre-job safety meeting to cover these topics specifically with the employees. (*Id.*). This way, Potelco ensures that the employees are aware of the hazards involved in each job and how to mitigate those hazards, as well as the personal protective equipment required. (*Id.*).

Given the amount of training Potelco provides on grounding and EPZs and the extensive measures in place to address any past issues, Potelco expects its employees to implement the methods they have learned in training; training which builds upon what these employees have learned as part of their apprenticeships. (Sabari at 133:12-15).

With respect to Violation 1-1, Laufenberg admitted that company safety rules require both ends of a conductor to remain under positive control if there could be exposure to energized parts. (Laufenberg at 57:20-24). When Laufenberg cut the conductor, he did not anticipate that

Murphy would pull it, and therefore, he did not anticipate that the conductor would be coming into contact with anything. However, because Laufenberg admittedly failed to communicate to Murphy that he had changed the day's work plan and cut the conductor, (Laufenberg at 49:13-23), Murphy pulled the conductor, which then made brief contact with the stirrup.

With respect to Violation 1-2, Potelco has taken extensive measures to ensure that its employees are trained on the importance of EPZs. Each employee is required to attend new hire orientation, which always includes thorough grounding and EPZ training. (Sabari at 132:23 – 133:11). In fact, the orientation requires each of the employees to physically go out into the training yard and install grounds to ensure that each employee is familiar with the policies and safe work procedures necessary to install grounds properly on the job site. (*Id.*). Employees are not allowed to leave orientation until a safety individual has been ensured that they can do it correctly. (*Id.*). Additionally, although Potelco has been cited in the past for alleged violations of related to EPZ, it has since taken various steps to address these issues. As explained above in Section IV.A.2.a, Potelco has implemented various training initiatives to ensure that its employees understand and implement safe grounding methods.

Lastly, with respect to Violation 1-3, Laufenberg admitted that company policy required him to be present while Murphy was removing the conductor. (*See* Laufenberg at 49:24 – 50:7). This would have allowed him to serve as the standby person, and he would have been able to supervise

the safety of Murphy and Price. Therefore, it is clear that Potelco has adequately communicated the requirement for two qualified employees to be present when removing conductors.

2. **The Unpreventable Employee Misconduct Defense Applies to a Foreman's Actions**

Instead, the Board focused on the fact that Laufenberg was the foreman, and its conclusion that his actions were foreseeable in part because of his position. Laufenberg's unrefuted testimony at the hearing supports the opposite conclusion. Instead of following the agreed-upon plan, which was clearly communicated to and understood by the crew, Laufenberg decided to cut part of the de-energized wire that was blocking a residential driveway. (Laufenberg 49:16-23.) Laufenberg's unilateral decision to deviate from the work plan could not have been anticipated by Potelco, regardless of his position in the crew. Additionally, the UEM defense applies to a foreman's actions. In the absence of state decisions on the issue of whether the defense of unpreventable employee misconduct applies to foremen, Washington courts will interpret WISHA regulations by looking to OSHA regulations and consistent federal decisions.

Washington Cedar & Supply Co., Inc. v. Dept. of Labor and Indus., 137 Wn. App. 592, 604 (2007) (citing *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 147 (1998)).

When drafting OSHA "Congress 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 Com’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)) (emphasis added). The basis for this reasoning is contained in the Act itself, which states that its purpose is to ensure worker safety only “so far as possible.” 29 U.S.C. § 651(b); *see also W.G. Yates*, 459 F.3d at 606 (citing *Penn. Power & Light Co. v. Occupational Safety and Health Review Com’n*, 737 F.2d 350, 354 (3rd Cir. 1984)).

Likewise, WISHA’s purpose is to promote safe working conditions “*insofar as may reasonably be possible.*” RCW 49.17.010 (emphasis added). Accordingly, WISHA is designed to eliminate *preventable* hazards, and is not intended to impose strict liability upon employers.

Federal decisions hold that employers are not strictly liable for their employee’s actions, even if the employee is a supervisor. In other words, the UEM defense applies to actions taken by supervisors. *See Secretary of Labor v. Asplundh Tree Expert Co.*, 7 OSHC 2074 (1979) (vacating citation when foreman violated safety rule because the foreman’s action was UEM); *see also Danis-Shook Joint Venture XXV v. Secretary of Labor*, 319 F.3d 805 (6th Cir. 2003) (assessing the UEM defense when employer’s foreman was involved in the violation); *P. Gioioso, Inc. v. Occupational Safety and Health Review Com’n*, 115 F.3d 100 (1st Cir. 1997) (same).

“A supervisor’s participation in the violation does not by itself establish that a safety program is inadequate.” *Butch Thompson Enterprises*, 22 BNA OSHC 1985, 1991 (No. 08-1273, 2009). It is merely evidence that a court may weigh to determine whether an employer has met its burden of establishing the UEM defense. *See Id.* Laufenberg’s participation in this incident does not necessitate the conclusion that his actions were foreseeable.

3. Potelco Has Adequately Addressed Similar Past Violations

The Board incorrectly concluded that Laufenberg’s actions were foreseeable because Potelco has been cited for issues involving grounding and EPZs three years in the past. In response to those citations, Potelco implemented extensive additional training and re-training, and implemented safety measures to address these violations, including programs specifically aimed at grounding and EPZ practices. (Sabari 131:23–133:11.) These programs are mandated in addition to the ten-hour OSHA training covering grounding and EPZs, monthly safety and local safety meetings covering grounding and EPZs, and special training at pre-job safety meetings to provide additional support and emphasize grounding and EPZs before jobs involving these actions. (*Id.*) Potelco cannot fairly be said to have failed to address past similar violations given the training and resources it provides to its employees on this subject, nor could Potelco have been expected to

foresee another incident after implementing such extensive grounding and EPZ training.

D. Violation 1-4 Should Be Vacated Because Potelco's APP Is Tailored To The Needs Of Its Workplace

The Department cited Potelco for allegedly violating WAC 296-800-14005, which provides:

Develop a formal accident prevention program that is outlined in writing. The program must be tailored to the needs of your particular workplace or operation and to the types of hazards involved.

(Ex. 20). Specifically, the Department alleges that Potelco's accident prevention program (APP) is not as effective as WAC 296-45-325(2)(b). (*Id.*).

The Department has failed to show that Potelco's APP is not as effective as WAC 296-45-325(2)(b). Although Potelco's APP does not include Note 1, which follows this provision of the WAC, (*id.*), Potelco's APP contains the same language as WAC 296-45-325(2)(b). Therefore, it adequately addresses the needs of Potelco's workplace.

E. Violation 2-1 Should be Classified as *De Minimis*

The Department cited Potelco for violating WAC 296-27-02105(2)(b), which provides:

Enter the calendar year covered, the company's name, establishment name, establishment address, annual average number of employees covered by the OSHA

300 Log, and the total hours worked by all employees covered by the OSHA 300 Log.

(Ex. 21).

Potelco does not dispute that the number of employees and hours worked were not timely entered into the 2013 OSHA 300A form. However, the Department erroneously categorized this as a “general violation” because it is not related to employee health or safety.

A general violation is a violation that has a direct relationship to employee health and safety but cannot be reasonably predicted to result in death or serious physical harm. *See* RCW 49.17.180(3); (6). Maxwell admitted that Potelco’s failure to properly fill out the OSHA 300A form posed no danger to employee health or safety. (Maxwell 117:15-20).

The “basic purpose” of the OSHA Form 300A is to “accurately document the injuries and illnesses suffered by employees during a given year.” *Jewell Painting, Inc.*, 16 O.S.H.C. 2110, 1994 WL 518087, at *10 (O.S.H. Rev. Comm’n. Sept. 12, 1994).⁴ Omitting the number of employees and the number of hours worked does not defeat this purpose. The federal Occupational Safety and Health Review Commission (“OSHRC”) and a federal administrative judge came to this conclusion in at least two very similar circumstances. In the first case, the defendant employer did not always record its employees’ job title and regular departments on its OSHA Form 200 injury and illness log. *Anoplate*

⁴ *Jewell Painting* addressed the OSHA 200 Form, the predecessor of the 300 Form series. The 300 Forms replaced the 200 Form in 2002.

Corp., 12 O.S.H.C. 1678, 1986 WL 53487, at *10 (O.S.H. Rev. Comm'n. Mar. 4, 1986). The OSHRC concluded that the purpose of the form was nevertheless achieved and that the violation should be classified as *de minimis*. *Id.* In the second case, the defendant employer failed to total the numbers in the OSHA Form 200's columns at the bottom of the page as required by the form's instructions. *Jewell Painting*, 1994 WL 518087, at *10. The administrative judge found that employer's omissions were "minor deviation[s]" from the standard and that a *de minimis* classification was appropriate because the basic purpose of the logs was accomplished. *Id.* Violation 2-1 should be classified as *de minimis*.

F. **Potelco Should Have Received a Faith Rating of "Good"**

The monetary penalty for violating a WISHA rule is adjusted by the employer's "good faith effort" among other things. WAC 296-900-14015. The available ratings for good faith effort are Excellent, Good, Average, and Poor. *Id.* These ratings adjust the employers' penalty as follows: 35% reduction, 20% reduction, no adjustment, and 20% increase, respectively. *Id.* When deciding which rating to assign, the Department considers an employer's (1) awareness of WISHA, (2) effort before the inspection to provide a safe workplace, (3) effort to follow a requirement they have violated, and (4) cooperation during an inspection, measured by a desire to follow the cited requirement immediately correct identified hazard. *Id.* Here, the Department's rating of "poor" is unfounded.

In determining the faith code, Maxwell admitted that he failed to consider most of the relevant factors. At the hearing, Maxwell admitted that the crew cooperated with him by meeting with him and providing him with statements about the incident. (Maxwell 118:2-5). He also admitted that the hazards from the incident were abated. (*Id.* at 118:6-7). Maxwell admitted that Potelco is very aware of and familiar with WISHA. (*Id.* 118:8-9). He further admitted that he is familiar with Potelco's APP and acknowledged that Potelco makes an effort to maintain a safe workplace and follow WISHA requirements. (*Id.* at 118:11-15). Maxwell even admitted that he received an e-mail from Potelco's legal counsel confirming that he had received all of the documents he had requested. (Ex. 21). Although Maxwell now claims that he responded to this e-mail by calling Potelco's counsel and leaving a voicemail, the Department has not presented any evidence to support this assertion and Maxwell testified that he does not know whether his voicemail even included a request for additional information. (Maxwell 119:1-5; 122:16). Maxwell also claims that he requested an interview with an additional Potelco manager and Potelco never set up the interview for him. (Maxwell 120:24-121:6). However, there is no evidence to corroborate that Maxwell actually requested such an interview. Further, even accepting Maxwell's assertions as true (which Potelco does not), these two factors alone do not justify a "poor" faith code rating.

Because of Potelco's familiarity with WISHA, its commitment to maintaining a safe workplace, and its overall cooperation with Maxwell's inspection, it should have received a faith code of no lower than "Good."

V. CONCLUSION

For the reasons stated herein, Potelco respectfully requests that the Court (1) vacate Violations 1-1, 1-2, 1-3, and 1-4; (2) downgrade Violation 2-1 from general to *de minimis*; and (3) change Potelco's faith code from poor to good.

DATED this 14th day of December, 2017.

FOX ROTHSCHILD LLP

By 
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CERTIFICATE OF SERVICE STATE OF WASHINGTON

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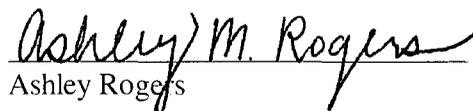
I, Ashley Rogers, certify that:

1. I am an employee of Fox Rothschild LLP, attorneys for 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 December 18, 2017, I served a true and correct copy of the foregoing document on the following party, attorney for Respondent, via email, and addressed as follows:

James P. Mills
Assistant Attorney General
Washington Attorney General's Office - Tacoma
1250 Pacific Ave., Ste 105
PO Box 2317
Tacoma, WA 98401-2317

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 18th day of December, 2017.


Ashley Rogers