

FILED
Court of Appeals
Division II
State of Washington
3/19/2018 2:54 PM

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 REPLY BRIEF

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I. INTRODUCTION

For the reasons stated in Potelco's Opening Brief and explained below, substantial evidence does not support the alleged violations, and Potelco's good faith rating should be changed from "poor" to "good." Potelco respectfully requests that the Court vacate the alleged violations and change Potelco's good faith rating.

II. ARGUMENT

A. Potelco Did Not Have Knowledge of Violations 1-1, 1-2, or 1-3

The Department argues that Potelco had constructive knowledge of Violations 1-1, 1-2, and 1-3 because a foreman, Benjamin Laufenberg, was involved in the incident; the incident happened along a public road; and Potelco has been cited for similar violations in the past. None of these factors logically impute knowledge to Potelco.

Testimony at the hearing showed that the crew had an agreed-upon plan, which was discussed at the morning safety meeting, and which every member of the crew understood. Laufenberg admitted that instead of following this agreed-upon plan, he unilaterally decided to cut part of the de-energized wire that was blocking a residential driveway. (Laufenberg 49:16-23.) Potelco could not have anticipated that Laufenberg would deviate from the clearly communicated plan and Laufenberg's rogue action cannot impute knowledge to Potelco.

Next, the Department urges the Court to apply a bright-line rule that whenever a violation is visible to any bystander, the employer has constructive knowledge of that violation. RB at 11–12. The Department ignores the fact that visibility to bystanders or location along a public road has nothing whatsoever to do with Potelco’s knowledge of what is happening on a work site.

The Department finally argues that past citations impute knowledge of these alleged violations to Potelco. RB at 14. The Department believes Potelco’s extensive EPZ safety training is irrelevant, but the Department again asks the Court to apply a bright-line rule that an employer will automatically have knowledge of any violation for which it had been cited in the past. The extensive steps Potelco has taken to address past EPZ citations is certainly relevant to Potelco’s knowledge of the instant alleged violations, because Potelco is entitled to believe that its extensive training efforts have been effective in practice. Aside from the safety programs, three citations issued years ago cannot impute knowledge of this incident. As explained in Potelco’s Opening Brief, 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., Inc. v. Dept. of Labor & Indus.*, 139 Wn. App. 35, 46, 156 P.3d 250 (2007) (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).

None of the Board's findings support the conclusion that Potelco had constructive knowledge of the violative conditions.

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

The Department asserts, without elaboration, that Potelco failed to establish an unpreventable employee misconduct defense because "the violation was not an isolated occurrence and [it was not] foreseeable." RB at 18. The unpreventable employee misconduct defense was designed to protect employers in precisely this scenario: it "addresses situations in which employees disobey safety rules despite the employer's diligent communication and enforcement." *Asplundh Tree Expert Co. v. Wash. State Dept. of Labor and Indus.*, 145 Wn. App. 52, 62, 185 P.3d 646 (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).

Potelco's Opening Brief describes its comprehensive safety programs and the lengths to which Potelco has gone 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.*). Given this extensive training and the resources with which Potelco provides its crews to identify and avoid EPZ hazards, Potelco expects its employees to implement the methods they have learned in training. (Sabari at 133:12-15). The Department fails to explain how this incident was foreseeable and was not isolated in light of these comprehensive safety measures.

The Department also argues that Laufenberg's involvement defeats the unpreventable employee misconduct defense, but as explained above and in Potelco's Opening Brief, Laufenberg readily admitted that he unilaterally deviated from the day's work plan. This is the essence of unpreventable employee misconduct.

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

The Department has been inconsistent in its litigation of citations issued for Potelco's inadvertent failure to timely enter the number of employee hours and hours worked into the OSHA Form 300A. In *Potelco v. Dept. of Labor & Indus.*, Case No. 50824-9-II (Wash. Ct. App. Div. II, 2017), the Department declined to appeal the Industrial Appeals Judge, the Board, and the Superior Court's ruling that this exact violation should be reclassified as *de minimis* because it is not related to health and safety.

Nevertheless, in this case the Department reiterates arguments that were consistently rejected in the previous case.

The Department argues that an employer cannot receive *de minimis* status for a violation if the employer needs to abate the violation. RB at 27. This is not the standard under RCW 49.17.120. The Department's formulation of the inquiry ("Does this violation require abatement?") allows it to argue that Potelco's failure to complete the form must be abated because the forms are meant to improve worker safety. It conveniently skips over the question of whether this particular alleged violation had a relationship to health and safety. As explained in Potelco's Opening Brief, it did not. The Department argues that Potelco would never have to comply with the regulation if this violation were classified as *de minimis*, and appears to have an unfounded belief that Potelco would choose to routinely commit this violation if the classification is not changed. As the Department is well aware, this violation was the result of mere inadvertent oversight and Potelco does not, as the Department alleges, have a "practice" of failing to enter all of the required information.

The Department's argument was rejected at every level of the appeal process in *Potelco v. Dept. of Labor & Indus.*, Case No. 50824-9-II, and it should be rejected here as well.

D. Potelco Should Have Received a Faith Rating of “Good”

The four factors the Department considers in assigning a faith rating are 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 and immediately correct identified hazard. WAC 296-900-14015. With respect to the first factor, Department inspector George Maxwell admitted that Potelco is very aware of and familiar with WISHA. (Maxwell 118:8-9). Regarding the second and third factors, 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).

Finally, regarding the fourth factor, Maxwell admitted the crew cooperated with him by meeting with him and providing him with statements about the incident. (*Id.* at 118:2-5). He also admitted that the hazards from the incident were abated. (*Id.* at 118:6-7). The Department alleges that Potelco failed to cooperate with the Department’s investigation based on Maxwell leaving a voicemail with Potelco’s counsel regarding records, but Maxwell admitted he does not even know if he asked for additional information in that voicemail. (*Id.* at 122:15–16.)

There was no basis for Maxwell to assign a “poor” faith code. 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."

III. CONCLUSION

For the reasons stated in its Opening Brief and explained below, substantial evidence does not support alleged violation Items 1-1, 1-2, 1-3 and 1-4, alleged violation Item 2-1 should be downgraded from a general to *de minimis* violation, and Potelco's good faith rating should be changed from "poor" to "good." Potelco respectfully requests that the Court vacate the alleged violations.

DATED this 19th day of March, 2018.

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March 19, 2018 - 2:54 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50943-1
Appellate Court Case Title: Potelco, Inc., Appellant v. Department of Labor and Industries, Respondent
Superior Court Case Number: 16-2-01237-7

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