

69219-4

69219-4

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2013 MAR -1 PM 3:24

No. 69219-4-I

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

---

POTELCO, INC.,

*Plaintiff/Appellant,*

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

*Defendant/Respondent.*

---

**REPLY IN SUPPORT OF OPENING BRIEF OF  
APPELLANT POTELCO, INC.**

---

RIDDELL WILLIAMS P.S.

Skylar A. Sherwood, WSBA #31896

Gena M. Bomotti, WSBA #39330

Josias Flynn, WSBA #44130

Attorneys for Appellant Potelco, Inc.

1001 Fourth Avenue

Suite 4500

Seattle, WA 98154-1192

(206) 624-3600

Facsimile: (206) 389-1708

ORIGINAL

## **Table of Contents**

<b>I. INTRODUCTION</b> .....	1
<b>II. ARGUMENT</b> .....	1
A. Under the Doctrine of Equitable Tolling, the Citation is Subject to Review.....	1
B. The Court May Expand the Doctrine of Equitable Tolling in a Functional Manner .....	2
<b>III. CONCLUSION</b> .....	3

**TABLE OF AUTHORITIES**

**CASES**

*Benyaminov v. City of Bellevue*, 144 Wn. App. 755, 183 P.3d 1127 (2008).....2

*Danzer v. Dep't of Labor and Indus.*, 104 Wn. App. 307, 16 P.3d 35 (2000).....2

*Douchette v. Bethel School Dist. No. 403*, 117 Wn.2d 805, 818 P.2d 1362 (1991).....2

*Millay v. Cam*, 135 Wn.2d 193, 955 P.2d 791 (1998).....2

**STATUTES AND REGULATIONS**

RCW 49.17.120 .....1

RCW 49.17.130 .....1

RCW 49.17.140(1).....1

RCW 49.17.180 .....1

WAC 296-900-17005.....1

Washington Industrial Safety and Health Act of 1973  
("WISHA") .....1

## **I. INTRODUCTION**

Potelco, Inc. filed an appeal of Citation No. 314516261 (“Citation”) a mere three days after the brief 15-day timeframe to appeal had elapsed. Based on Potelco’s nominally late filing, the Board of Industrial Insurance Appeals (“Board”) dismissed Potelco’s appeal without addressing the merits of the Citation. The Skagit County Superior Court (“Superior Court”) upheld the Board’s decision.

This Court should equitably toll the 15-day limitations period and allow Potelco’s appeal to proceed in this case, because doing so will serve the purposes of the Washington Industrial Safety and Health Act of 1973 (“WISHA”). Potelco’s appeal will lead to a safer workplace for Washington workers by further educating both the Department and Potelco on WISHA’s requirements.

## **II. ARGUMENT**

### **A. Under the Doctrine of Equitable Tolling, the Citation is Subject to Review**

The Department may issue citations to employers for WISHA violations. RCW 49.17.120, 49.17.130, 49.17.180. An employer has the right to appeal a citation by submitting a written notice of appeal within 15 working days. RCW 49.17.140(1); WAC 296-900-17005. Under the doctrine of equitable tolling, however, the 15-day period to file an appeal

may be extended under appropriate circumstances. *Danzer v. Dep't of Labor and Indus.*, 104 Wn. App. 307, 318, 16 P.3d 35 (2000). So despite the Department's claim that the Citation is an unreviewable final order (Brief of Respondent at 9), if the Court applies equitable tolling here, Potelco may proceed with its appeal. *Id.*

**B. The Court May Expand the Doctrine of Equitable Tolling in a Functional Manner**

Appropriate circumstances for equitable tolling include bad faith, deception, or false assurances by the Department, and the exercise of diligence by the employer. *Id.* While courts do not apply equitable tolling to garden variety claims of excusable neglect, equitable tolling may be appropriate when it would accomplish the policies underlying the statute, and the purposes underlying the statute of limitations. *Millay v. Cam*, 135 Wn.2d 193, 206 955 P.2d 791 (1998); *Benyaminov v. City of Bellevue*, 144 Wn. App. 755, 761-62, 183 P.3d 1127 (2008). Before courts consider such policies and purposes, they require proof that the plaintiff was diligent and the defendant acted in bad faith. *See Millay*, 135 Wn.2d at 206; *Douchette v. Bethel School Dist. No. 403*, 117 Wn.2d 805, 812, 818 P.2d 1362 (1991). But courts should not so narrowly restrict the doctrine of equitable tolling.

When (1) a statute of limitations is an extremely short time period,

and (2) a party files an appeal shortly thereafter, and (3) allowing the appeal will serve the purposes of the underlying statute, a court should permit equitable tolling even without specific evidence of bad faith or diligence.<sup>1</sup>

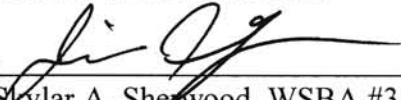
The Department argues that expanding the doctrine of equitable tolling would be “unworkable in practice” because it would encourage litigation to resolve the contours of the new rule. But to some extent, any new rule will encourage such litigation. Accordingly, the court should not hesitate to expand equitable tolling simply because parties may seek clarification regarding specific applications of the new rule.

### **III. CONCLUSION**

Potelco respectfully requests that the Court reverse the Board’s Decision and Order, and remand Potelco’s appeal to the Board for a full hearing on the merits of the Citation.

DATED this 1<sup>st</sup> day of March, 2013.

RIDDELL WILLIAMS P.S.

By   
Skylar A. Sherwood, WSBA #31896  
Gena M. Bomotti, WSBA #39330  
Josias Flynn, WSBA #44130  
Attorneys for Appellant Potelco, Inc.

---

<sup>1</sup> As fully described in Potelco’s opening brief, these circumstances are met here. (Opening Brief of Potelco at 7).

CERTIFICATE OF SERVICE

I, Jazmine Matautia, certify that:

1. I am an employee of Riddell Williams P.S., 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 Thursday, March 1, 2013, I served a true and correct copy of the foregoing document on the following party, attorney for Respondent, via hand delivery, and addressed as follows:

Paul Michael Weideman  
Washington Attorney General's Office  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104

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 1<sup>st</sup> day of March, 2013.



---

Jazmine Matautia