

NO. 69219-4-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.

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR & INDUSTRIES**

ROBERT W. FERGUSON
Attorney General

PAUL M. WEIDEMAN
Assistant Attorney General
WSBA No. 42254
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 389-3820

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ISSUES.....	2
III.	STATEMENT OF THE CASE.....	2
	A. Potelco Received The Citation On December 21, 2010, And Placed It In The Inbox Of Bryan Sabari, the Safety Director Who Was Solely Responsible For Handling WISHA Citations And Who Knew About The 15-Day Appeal Period.....	2
	B. Mr. Sabari Was Out of Town For At Least Part Of The 15-Day Appeal Period And Did Not Have Anyone Review His Mail During His Extended Absence	4
	C. Although Mr. Sabari Returned To The Office On Or About January 10, He Did Not Discover The Citation In His Inbox For Several More Days	5
	D. The Board And Superior Court Dismissed Potelco’s Appeal As Untimely And Declined to Excuse the Late Filing On The Basis Of Equitable Tolling.....	6
IV.	STANDARD OF REVIEW.....	7
V.	ARGUMENT	7
	A. Because Potelco Failed To Appeal The Citation Within The 15-Day Period In RCW 49.17.140(1), The Citation Became A Final Order Not Subject To Review.....	7
	B. The Doctrine of Equitable Tolling Does Not Apply Here Because Potelco’s Failure To Appeal Timely Was Caused By Its Own Lack Of Diligence And Not By The Department’s Actions	9
	C. This Court Should Decline Potelco’s Invitation To Expand The Doctrine Of Equitable Tolling To Excuse	

Situations When A Party's Own Lack Of Diligence Results In The Party's Failure To Comply With A Statutory Deadline	12
VI. CONCLUSION	15

TABLE OF AUTHORITIES

Cases

<i>Benyaminov v. City of Bellevue</i> , 144 Wn. App. 755, 183 P.3d 1127 (2008).....	10, 13
<i>Capital City Excavating Co. v. Donovan</i> , 679 F.2d 105 (6th Cir. 1982)	12
<i>Danzer v. Dep't of Labor & Indus.</i> , 104 Wn. App. 307, 16 P.3d 35 (2000).....	8, 9, 11, 12
<i>Hill v. Dep't of Labor & Indus.</i> , 161 Wn. App. 286, 253 P.3d 430 (2011), <i>review denied</i> , 172 Wn.2d 1008, 259 P.3d 1108 (2011).....	7
<i>Irwin v. Dep't of Veterans Affairs</i> , 498 U.S. 89, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990).....	14
<i>Millay v. Cam</i> , 135 Wn.2d 193, 955 P.2d 791 (1998).....	9, 10, 13
<i>Morgan v. Johnson</i> , 137 Wn.2d 887, 976 P.2d 619 (1999).....	14
<i>Sec'y of Labor v. Barretto Granite Corp.</i> , 830 F.2d 396 (1st Cir. 1987).....	12
<i>State v. Duvall</i> , 86 Wn. App. 871, 940 P.2d 671 (1997).....	14
<i>State v. Robinson</i> , 104 Wn. App. 657, 17 P.3d 653 (2001).....	10
<i>West v. Thurston County</i> , 168 Wn. App. 162, 275 P.3d 1200 (2012).....	14

Statutes

29 U.S.C. § 659(a)	13
Laws of 2011, ch. 301, § 13.....	8
RCW 49.17.040	7
RCW 49.17.120	10
RCW 49.17.120(1).....	7
RCW 49.17.140(1).....	passim

Regulations

296-155 WAC.....	2
WAC 296-900-17005.....	8

Rules

CR 56(c).....	7
RAP 9.6(a)	6

I. INTRODUCTION

This is an appeal under the Washington Industrial Safety and Health Act (WISHA), Chapter 49.17 RCW. The Department of Labor and Industries cited Potelco, Inc. for violating several WISHA regulations. Under RCW 49.17.140(1), Potelco had 15 working days to appeal the citation. Potelco missed the deadline, appealing three days late.

Before the Board of Industrial Insurance Appeals, the Potelco employee solely responsible for WISHA citations testified that he was out of the office for at least part of the 15-day appeal period and that when he returned to the office, it was several more days before he discovered the citation at the bottom of his accumulated mail. Nobody reviewed his mail in his absence. The employee had significant experience with regard to WISHA appeals and knew about the 15-day appeal period.

The Board dismissed Potelco's appeal as untimely under RCW 49.17.140(1). The Skagit County Superior Court agreed, granting summary judgment in the Department's favor and rejecting Potelco's argument that the doctrine of equitable tolling excused its late appeal.

Potelco asks this Court to excuse its late appeal under the doctrine of equitable tolling despite its lack of diligence and the absence of any evidence that the Department acted in bad faith, with deception, or with false assurances. This Court should decline to do so.

II. ISSUES

1. Did the trial court properly grant the Department's motion for summary judgment to dismiss Potelco's untimely appeal of a WISHA citation where Potelco failed to appeal the citation within 15 days of receipt, as RCW 49.17.140(1) requires?
2. Did the trial court properly deny Potelco's request to apply the doctrine of equitable tolling where the Potelco employee who was solely responsible for addressing WISHA citations did not discover the citation in his inbox for nearly a month after it had been placed there because he did not have anybody review his mail during his extended absence and because he did not review his mail for time-sensitive documents when he returned to the office?

III. STATEMENT OF THE CASE

A. **Potelco Received The Citation On December 21, 2010, And Placed It In The Inbox Of Bryan Sabari, the Safety Director Who Was Solely Responsible For Handling WISHA Citations And Who Knew About The 15-Day Appeal Period**

On December 20, 2010,¹ the Department issued Citation and Notice of Assessment No. 314516261 to Potelco for multiple violations of WISHA's construction work safety regulations. CP 144-46; *see also* chapter 296-155 WAC. The citation included a statement of appeal rights that, under RCW 49.17.140(1), Potelco had 15 working days from the date of receipt to appeal the citation. CP 146. The Department mailed the citation to Potelco's local headquarters in Sumner by certified mail with return receipt requested. CP 112, 117-18, 122, 147-48.

¹ A calendar showing events relevant to this appeal appears at CP 152-53.

On Tuesday, December 21, 2010, Potelco receptionist Julia Miles signed the return receipt. CP 112-13, 117, 147-48. According to office protocol, she placed the citation in the inbox of Bryan Sabari, Potelco's Director of Safety. CP 118, 122, 126. Under RCW 49.17.140(1), Potelco had 15 working days—or until January 13, 2011—to appeal the citation. *See* CP 152-53.

As Director of Safety, Mr. Sabari was responsible for managing and enforcing Potelco's health and safety program. CP 123. He was aware of the August 17, 2010 inspection that led to the issuance of the citation. CP 131. He was present at the closing conference for the citation. CP 131. Although Mr. Sabari's work took him out of the office to meet with managers and customers on average three days a week, he usually "empt[ied]" his inbox at the Sumner office every day or every other day. CP 123-24, 135.

It was Mr. Sabari's sole responsibility to "handle[]" any citation that the Department issued to Potelco. CP 126, 131-32, 136. Generally, this meant that he reviewed any citation that Potelco received, scanned it, and sent copies to counsel and to corporate headquarters. CP 126. During Mr. Sabari's seven years as safety director, Potelco appealed every citation that the Department had issued to it, about 20 in total. CP 131. Mr. Sabari

was familiar with the language from the citations about when appeals had to be filed. CP 131, 136; *see also* CP 146.

B. Mr. Sabari Was Out of Town For At Least Part Of The 15-Day Appeal Period And Did Not Have Anyone Review His Mail During His Extended Absence

Mr. Sabari did not discover the citation in his inbox until approximately January 19, 2011, nearly one month after Ms. Miles deposited it there. CP 118, 133-34, 149-51. In his testimony before the Board, Mr. Sabari explained the reason for his late discovery. Before Christmas, he “had time off.” CP 127. It is not clear from this statement² whether Mr. Sabari was in the office on the weekdays of December 21, 22, or 23. *See* CP 127, 152. Friday, December 24 was a holiday. CP 152. From “sometime after Christmas Day” to January 3, 2011, he was skiing in Aspen. CP 127. On January 3, he flew from Aspen to Milwaukee on Potelco business. CP 127. He returned to Washington State on Thursday, January 6 or Friday, January 7. CP 127-28. He recalled returning to the Sumner office sometime around Monday, January 10 although he did not

² Mr. Sabari’s exact statement was “[i]n the days leading up to the holiday I had time off both before Christmas and I had - - I took the entire week off between Christmas and New Year’s.” CP 127. Potelco appears to rely on this statement to support its assertion the Mr. Sabari “was away from the office at the time Potelco received the Citation.” App. Br. 2. It is not clear from this statement, however, that Mr. Sabari was not in the office on December 21. Ms. Miles could not recall whether Mr. Sabari was in the office on December 21. CP 118-19.

specifically recall whether he returned to the office on January 10. CP 136; *see also* CP 128, 133.

During this extended absence, Mr. Sabari did not arrange for anyone else to review his mail. CP 136-37. He had two assistants. CP 125; *see also* 135-36. About 30 other employees worked in the Sumner office. CP 132.

C. Although Mr. Sabari Returned To The Office On Or About January 10, He Did Not Discover The Citation In His Inbox For Several More Days

After Mr. Sabari returned to the office during the week of January 10, he reviewed his accumulated mail. CP 133, 135-36. The mail that exceeded the capacity of his inbox had been left in piles on his desk. CP 135. It took Mr. Sabari “several days to go through” his mail. CP 135. The citation was at “the bottom of all the piles.” CP 135. When he saw the envelope from the Department, he “opened it immediately” and sent it to Potelco’s legal counsel. CP 132-33, 135. Mr. Sabari realized when he sent the citation to counsel that any appeal would be “close to the deadline.” CP 137. Potelco’s counsel filed an appeal with the Department that same day. CP 133-34. The Department received the appeal on January 19, 2011. CP 150.

D. The Board And Superior Court Dismissed Potelco's Appeal As Untimely And Declined to Excuse the Late Filing On The Basis Of Equitable Tolling

A timeliness hearing was held before the Board. CP 107-40. After considering Ms. Miles's and Mr. Sabari's testimony, the industrial appeals judge issued a proposed decision and order dismissing Potelco's appeal as untimely under RCW 49.17.140(1). CP 34. The judge rejected the argument that the time limit in RCW 49.17.140(1) was equitably tolled. CP 31-34.

Potelco petitioned for review of the proposed decision and order to the three-member Board. CP 17-22. The Board denied the petition and adopted the proposed decision and order as its final decision and order. CP 13.

Potelco appealed to superior court. *Potelco, Inc. v. Dep't of Labor & Indus.*, Skagit County Cause No. 12-2-00884-4, Notice of Appeal (filed 5/10/12).³ The Department filed a motion for summary judgment, arguing that the appeal was untimely. CP 154-162. Potelco filed a cross-motion for summary judgment, arguing that the superior court should apply the doctrine of equitable tolling. CP 1-7. The superior court granted the

³ Per RAP 9.6(a), the Department has supplemented the designation of clerk's papers with the notice of appeal to superior court and the Declaration of Charlotte Ennis Clark-Mahoney in Support of the Department's Motion for Summary Judgment.

Department's motion for summary judgment. CP 8-9. Potelco now appeals.

IV. STANDARD OF REVIEW

Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, affidavits, and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). This Court reviews a trial court's ruling on a motion for summary judgment de novo where no material facts are in dispute and the dispositive issue is a question of law. *Hill v. Dep't of Labor & Indus.*, 161 Wn. App. 286, 292, 253 P.3d 430 (2011), *review denied*, 172 Wn.2d 1008, 259 P.3d 1108 (2011).

V. ARGUMENT

A. Because Potelco Failed To Appeal The Citation Within The 15-Day Period In RCW 49.17.140(1), The Citation Became A Final Order Not Subject To Review

WISHA requires the Department to adopt rules and regulations to enforce safety and health standards in the workplace. RCW 49.17.040. When an investigation or inspection reveals that an employer has violated these standards, the Department must "with reasonable promptness" issue a citation to the employer. RCW 49.17.120(1). At the time relevant to

this appeal, the Department had to notify the employer of the citation by certified mail. RCW 49.17.140(1).⁴

An employer has 15 working days from communication of the notice of citation to inform the Department that the employer intends to appeal the citation or related penalty. RCW 49.17.140(1). The Department's notice must inform the employer of this 15-day deadline. RCW 49.17.140(1). An employer's failure to notify the Department within this 15-day timeframe means that the citation and assessment "shall be deemed a final order of the department and not subject to review by any court or agency." RCW 49.17.140(1); *see also* WAC 296-900-17005; *accord Danzer v. Dep't of Labor & Indus.*, 104 Wn. App. 307, 317, 16 P.3d 35 (2000) (a WISHA citation became final and the employer "lost all rights to appeal it to the Board" when the employer did not comply with the 15-day appeal period in RCW 49.17.140(1)).

Here, it is undisputed that the Department communicated the notice of citation to Potelco on December 21, 2010, by sending the citation to Potelco's local headquarters in Sumner. CP 117, 147-48; *see also* App. Br. 2, 7. And it is undisputed that Potelco did not notify the Department

⁴ In 2011, the legislature amended RCW 49.17.140(1) to allow the Department to notify the employer "using a method by which the mailing can be tracked or the delivery can be confirmed." Laws of 2011, ch. 301, § 13. This amendment did not affect the 15-day appeal deadline. Accordingly, the Department cites the current version of RCW 49.17.140(1) throughout this brief.

that it intended to appeal the citation until January 19, 2011, more than 15 working days after communication of the notice. CP 133-34, 150; *see also* App. Br. 3. Accordingly, under the plain language of RCW 49.17.140(1), the citation and assessment became the Department's final order and is not subject to review by any court or agency. RCW 49.17.140(1). Potelco "lost all rights" to appeal the citation to the Board. *See Danzer*, 104 Wn. App. at 317. Because the Department was entitled to judgment as a matter of law, the trial court correctly granted the Department's summary judgment motion.

B. The Doctrine of Equitable Tolling Does Not Apply Here Because Potelco's Failure To Appeal Timely Was Caused By Its Own Lack Of Diligence And Not By The Department's Actions

Potelco argues that the trial court improperly granted summary judgment to the Department because the Board should have equitably tolled the 15-day timeframe to appeal. *See* App. Br. 5. This argument lacks merit.

As our Supreme Court has recognized, the doctrine of equitable tolling applies in limited circumstances "when justice requires." *See Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998). The "predicates" for equitable tolling are "bad faith, deception, or false assurances by the defendant" *and* "the exercise of diligence by the

plaintiff.” *Millay*, 135 Wn. 2d at 206. Equitable tolling is appropriate when consistent with both the purpose of the statute providing the cause of action and the purpose of the statute of limitations. *Millay*, 135 Wn.2d at 206. Courts typically permit equitable tolling to occur only sparingly, and “should not extend it to a garden variety claim of excusable neglect.” *Benyaminov v. City of Bellevue*, 144 Wn. App. 755, 761, 183 P.3d 1127 (2008) (internal quotation marks omitted) (quoting *State v. Robinson*, 104 Wn. App. 657, 667, 17 P.3d 653 (2001)).

Here, neither predicate for equitable tolling has been met. The Department did not engage in bad faith, deception, or false assurances when it issued and communicated the citation to Potelco. Rather, the Department complied with the legislature’s mandate to issue the citation “with reasonable promptness,” to send the citation by certified mail, and to include appeal rights language in the citation. RCW 49.17.120; RCW 49.17.140(1). Because *Millay*’s first predicate has not been met, equitable tolling is not appropriate.

Moreover, Potelco did not exercise diligence in this case. Mr. Sabari, who was solely responsible for handling WISHA citations, had handled numerous WISHA appeals and knew that appeals had to be filed within 15 working days. CP 126, 131-32, 136. Although he traveled out of the office on business multiple times a week, he checked his office

inbox every day or every other day, suggesting that he knew the importance of frequently reviewing his mail. CP 123-24, 135. Yet in this case, Mr. Sabari did not arrange for anyone else to review his mail during an extended absence from the office from around Christmas Day to the week of January 10. *See* CP 136-37. He allowed his mail to pile up, unattended. And when he returned to the Sumner office on or about January 10—which was still within the 15-day appeal period—he did not scan his accumulated mail for time-sensitive documents. *See* CP 135-36. This would have been especially prudent given that he knew that nobody had checked his mail for nearly three weeks. Instead, several days passed before Mr. Sabari uncovered the citation, delivered almost a month earlier, at the “bottom of all the piles.” CP 132-33, 135. These facts amount to neglect, not diligence.

Danzer is instructive. There, the employer also asked the court to apply the doctrine of equitable tolling to allow it to appeal a WISHA citation that had become final under RCW 49.17.140(1). *Danzer*, 104 Wn. App. at 312, 317. The court initially observed that no Washington cases had applied equitable tolling in the context of an appeal of a WISHA citation. *Danzer*, 104 Wn. App. at 318. But, relying on federal precedent interpreting the Occupational Health and Safety Act, WISHA’s federal analogue, the *Danzer* court suggested that equitable tolling might be

appropriate if the employer's delay in filing an appeal "was caused by the agency's deception, the agency's failure to follow proper procedures, or other agency actions that misled or confused the petitioner." *Danzer*, 104 Wn. App. at 318 (citing *Sec'y of Labor v. Barretto Granite Corp.*, 830 F.2d 396, 399 (1st Cir. 1987); *Capital City Excavating Co. v. Donovan*, 679 F.2d 105, 110 (6th Cir. 1982)). The *Danzer* court declined to apply equitable tolling in the case before it because the employer had not identified "any Department action that caused its failure to appeal" the citation. *Danzer*, 104 Wn. App. at 318.

The same is true here. Potelco points to no Department action that caused its failure to appeal the citation on time, and there is none. Instead, the failure occurred because of Mr. Sabari's neglect in arranging for someone to review his mail for time-sensitive documents in his absence and his neglect in reviewing his accumulated mail for time-sensitive documents upon his return. Equity cannot excuse this lack of diligence. Accordingly, the Board and superior court correctly declined to excuse Potelco's late appeal under the doctrine of equitable tolling. Summary judgment on the Department's behalf was proper.

C. This Court Should Decline Potelco's Invitation To Expand The Doctrine Of Equitable Tolling To Excuse Situations When A Party's Own Lack Of Diligence Results In The Party's Failure To Comply With A Statutory Deadline

Finally, Potelco invites this Court to expand the doctrine of equitable tolling “beyond its traditional scope” to encompass situations, such as this one, where a plaintiff fails to exercise diligence and where a defendant acts in good faith and without deceit or false assurances. *See* App. Br. 6-7. Specifically, Potelco proposes a rule that when a party files an appeal “shortly” after “an extremely short”⁵ appeal period has elapsed, equitable tolling should apply if the appeal will “serve the purposes of the underlying statute.” App. Br. 6-7.

This Court should decline Potelco’s invitation to reformulate this equitable doctrine from one that courts now apply sparingly when specific predicates are met and “when justice requires” to one that could be applied any time that a party’s own lack of diligence results in its failure to comply with a “short” statutory appeal deadline. *See Millay*, 135 Wn.2d at 206. Potelco cites no authority for this novel rule. *See* App. Br. 6-7. Its proposed rule disregards case law that equitable tolling should be applied sparingly and should not be extended to garden variety claims of excusable neglect. *See, e.g., Benyaminov*, 144 Wn. App. at 761; *State v.*

⁵ The 15-day deadline for filing an appeal of a WISHA citation is consistent with the industry standard under OSHA, which also allows an employer 15 working days to appeal a citation. *See* 29 U.S.C. § 659(a). As under WISHA, an employer’s failure to appeal an OSHA citation timely means that the citation becomes a final order “not subject to review by any court or agency.” *See* 29 U.S.C. § 659(a). It is also worth noting that although Potelco characterizes the 15-day period as “extremely short” in this appeal, it has repeatedly complied with the appeal period on previous occasions. *See* CP 131.

Duvall, 86 Wn. App. 871, 875, 940 P.2d 671 (1997) (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990)). Moreover, such a rule is unworkable in practice. It would encourage litigation to resolve issues like what constitutes a “short” appeal period and how soon after an elapsed deadline an appellant would need to appeal to invoke this new rule.

Potelco also suggests that courts should disregard the legislature’s 15-day deadline and should reach the merits on late appeals of WISHA citations so that the Department, employers, and employees will have an increased understanding about the application of WISHA regulations. App. Br. 7. By this logic, courts should *always* permit untimely appeals to proceed to the merits. Such logic is untenable. It ignores the legislature’s prerogative to establish appeal deadlines and appellate courts’ assumption that the legislature “means exactly what it says.” *West v. Thurston County*, 168 Wn. App. 162, 183, 275 P.3d 1200 (2012) (internal quotation marks omitted) (quoting *Morgan v. Johnson*, 137 Wn.2d 887, 892, 976 P.2d 619 (1999)).

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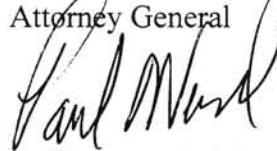
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VI. CONCLUSION

For the foregoing reasons, the Department requests that this Court affirm the superior court judgment.

RESPECTFULLY SUBMITTED this 30th day of January, 2013.

ROBERT W. FERGUSON
Attorney General



PAUL M. WEIDEMAN
Assistant Attorney General
WSBA No. 42254
800 Fifth Ave., Suite 2000
Seattle, WA 98104
(206) 389-3820

NO. 69219-4-I

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DECLARATION OF
MAILING

DATED at Seattle, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I sent the Brief of Respondent Department of Labor and Industries to all parties on the record via ABC Legal Messenger addressed as follows:

Richard D. Johnson, Court Administrator/Clerk (*original and copy*)
Court of Appeals, Division I
One Union Square
600 University Street
Seattle, WA 98101-1176

Gena M. Bomotti, Attorney
Riddell Williams, P.S.
1001 Fourth Ave, Suite 4500
Seattle, WA 98154-1192

Josias Flynn, Attorney
Riddell Williams, P.S.
1001 Fourth Ave, Suite 4500
Seattle, WA 98154-1192

Skylar Sherwood, Attorney
Riddell Williams, P.S.
1001 Fourth Ave, Suite 4500
Seattle, WA 98154-1192

DATED this 30th day of January, 2013.



SHARA WUSSTIG
Legal Assistant