

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.

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APPELLANT'S DIVISION
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APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Potelco, Inc. filed an appeal of Citation No. 314516261 (the “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.

Potelco disputes that the cited conduct violated the Washington Industrial Safety and Health Act of 1973 (“WISHA”). If the Department of Labor and Industries (“Department”) considers the merits of Potelco’s appeal, both the Department and Potelco will gain a better understanding of WISHA’s provisions. This will lead to a safer workplace for Washington workers, which is WISHA’s primary objective. Under these circumstances, the Court should equitably toll the timeframe to appeal a citation, and permit Potelco’s appeal to proceed. For these reasons, discussed more fully herein, Potelco respectfully requests that the Court reverse the Board’s Decision and Order and remand this case to the Board for a full hearing on the merits.

II. ASSIGNMENT OF ERROR

Assignment of Error No. 1: Potelco respectfully asserts that the Superior Court erred in affirming Conclusion of Law No. 3, as set forth in the Board's Decision and Order.

Statement of Issues Pertaining to Assignment of Error No. 1:

Did the Board err in adopting Conclusion of Law No. 3, where the 15-day timeframe to appeal a citation as provided in RCW 49.17.140 should be equitably tolled under the circumstances of this case.

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

The Department issued the Citation to Potelco on December 20, 2010, for alleged WISHA violations. (CP 142-146). The next day, Potelco receptionist Julia Miles signed for delivery of the Citation, which was sent by certified mail to Potelco's Sumner office. (CP 147). Ms. Miles followed her usual procedure for distributing company mail, and placed the Citation in the mailbox of Bryan Sabari, Potelco's former Director of Safety. (CP 118).

At that time, Mr. Sabari was the only Potelco employee who handled citations from the Department. (CP 131-32). Unfortunately, he was away from the office at the time Potelco received the Citation. (CP

127). In fact, due to the nature of his position, Mr. Sabari frequently worked outside the office to train managers, meet with customers, attend legal proceedings, and to help restore energy service during severe weather emergencies or storm outages. (CP 123-25, 128-29).

That particular December, Mr. Sabari was away from the office from before Christmas until at least January 10, 2011, for personal and work-related reasons. (CP 127-28). During his absence, a substantial amount of mail accumulated on Mr. Sabari's desk. (CP 134-35). When Mr. Sabari returned and discovered the Citation, he immediately sent a copy to Riddell Williams P.S., counsel for Potelco. (CP 132-33). Riddell Williams filed an appeal on behalf of Potelco that same day, January 19, 2011, only three working days beyond the statutory timeframe allowed for an appeal. (CP 149-51).

B. PROCEDURAL BACKGROUND

Potelco appealed the Citation to the Department on January 19, 2011. (CP 149-51). The Department forwarded Potelco's appeal to the Board, and a hearing was held at the Board's Seattle office before Judge Metzger on February 16, 2012. (CP 107-140). The Board considered a single issue – whether Potelco's appeal should be dismissed because it was filed after the statutory timeframe allowed for an appeal. (CP 109). It did

not address the merits of the Citation. The Board issued its Proposed Decision and Order on March 16, 2012. (CP 27-35). Potelco filed a timely Petition for Review. (CP 17-22). On April 26, 2012, the Board denied Potelco's Petition for Review and issued its final Decision and Order dismissing Potelco's appeal. (CP 13-14). Potelco appealed the Board's Decision and Order to the Skagit County Superior Court (*Potelco, Inc. v Dep't of Labor and Indus.*, Skagit County Cause No. 12-2-00884-4, Notice of Appeal (filed 5/10/2012)). The Department then filed a motion for summary judgment, arguing that Potelco's appeal was time-barred. (CP 154-162). Potelco filed a cross-motion for summary judgment, arguing that under the circumstances of the case, the Board should have applied equitable tolling and considered the merits of Potelco's appeal. (CP 1-7). On August 6, 2012, Superior Court Judge Meyer heard the parties' oral arguments, and then affirmed the Board's Decision and Order. (CP 8-9). Potelco timely appealed to this Court on August 15, 2012. (*Potelco, Inc. v Dep't of Labor and Indus.*, Skagit County Cause No. 12-2-00884-4, Notice of Appeal to Washington State Court of Appeals, Division I (filed 8/15/2012)).

IV. ARGUMENT

A. STANDARD OF REVIEW

When reviewing Board rulings, this Court stands in the same position as the Superior Court. *Dep't of Labor and Indus. v. Tyson Foods, Inc.*, 143 Wn. App. 576, 581, 178 P.3d 1070 (2008). The Board's findings must be supported by substantial evidence when considering the record as a whole. RCW 49.17.150(1). Substantial evidence is sufficient evidence that would persuade a fair-minded, rational person that a finding is true. *Martinez Melgoza & Assoc., Inc. v. Dep't of Labor & Indus.*, 125 Wn. App. 843, 847-48, 106 P.3d 776 (2005), *review denied*, 155 Wn.2d 1015 (2005). Conclusions of law must be appropriate based on the factual findings. RCW 49.17.150; *Martinez Melgoza*, 125 Wn. App. at 847. Courts review questions of law, such as the Board's construction of a statute, *de novo*. *Stuckey v. Dep't of Labor and Indus.*, 129 Wn.2d 289, 295, 916 P.2d 399 (1996).

B. THE BOARD SHOULD HAVE EQUITABLY TOLLED THE TIMEFRAME TO APPEAL

RCW chapter 49.17 authorizes the Department to issue citations and assess penalties against 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. But the 15-day time period is not absolute.

Under the doctrine of equitable tolling, 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).

Appropriate circumstances explicitly recognized by Washington courts include bad faith, deception, or false assurances by the Department, and the exercise of diligence by the employer. *Id.* While courts should 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. Because these circumstances are met here, the Court should extend equitable tolling beyond its traditional scope.

For one, Potelco had a mere 15 days to appeal the Citation. Also, Potelco appealed the Citation only three days late. Furthermore, allowing Potelco to appeal the Citation on the merits will promote WISHA's main purpose – which is to provide safe working conditions for Washington workers. *Erection Co., Inc. v. Dep't of Labor and Indus.*, 160 Wn. App. 194, 202, 248 P.3d 1085, 1089 (2011). On appeal, the Department can address Potelco's belief that the cited conduct actually complied with WISHA. After a decision on the merits, both Potelco and the Department will better understand WISHA's requirements and the working conditions that were the subject of this Citation. This increased understanding will result in safer working conditions by educating the Department, employers, and employees about the application of the regulations at issue. Equitable tolling will accomplish the policies underlying the statute in this case. Accordingly, Potelco respectfully requests that the Court allow Potelco's appeal to proceed.

C. THE COURT SHOULD NOT RELY ON THE BOARD'S DECISION BECAUSE THE COURT HAS EQUITABLE POWERS THAT THE BOARD LACKS

The Board was reluctant to even consider Potelco's claim for equitable tolling, it stated that:

Equitable relief is usually outside of the Board's subject-matter jurisdiction. The Board is a creature of statute and its jurisdiction and powers are, as a consequence, limited... The Board has no inherent equitable powers.

(CP 33). The Board also stated that it could toll the relevant timeframe only if a Washington court had done so under similar facts. *Id.* The Board found only two qualifying situations: (1) when the person to whom the order is addressed is illiterate or unable to understand English, or (2) when the person is under a mental disability that incapacitates him or her from appealing. *Id.* Thus, under the facts here, the Board felt compelled to dismiss Potelco's appeal. *Id.* ("when an appeal is not filed within the time allowed by law, the Board's *only option* is to dismiss the appeal.") (emphasis added).

But the doctrine of equitable tolling is not so limited. As previously discussed, it is available in "appropriate circumstances." *See supra*, Section (B). This Court may apply the relevant legal standard to the facts presented before it, regardless of whether this precise situation

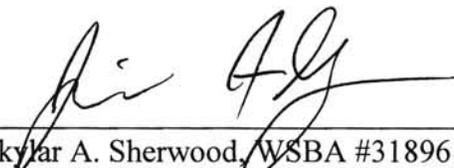
has previously been addressed by another Washington court. Therefore, the Court should not rely on the Board's equitable tolling analysis.

V. 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 29th day of November, 2012.

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