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No. 72845-8-I

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

POTELCO, INC.,

Plaintiff/Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Defendant/Respondent.

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. ASSIGNMENTS OF ERROR	1
III. STATEMENT OF THE CASE.....	3
A. STATEMENT OF FACTS	3
B. PROCEDURAL BACKGROUND.....	6
IV. ARGUMENT	7
A. STANDARD OF REVIEW	7
B. THE CITATION SHOULD BE VACATED BECAUSE THE VIOLATION WAS THE RESULT OF UNPREVENTABLE EMPLOYEE MISCONDUCT	8
V. CONCLUSION.....	14

TABLE OF AUTHORITIES

Page

CASES

<i>Asplundh Tree Expert Co. v. Wash. State Dept. of Labor and Indus.</i> , 145 Wn. App. 52, 185 P.3d 646 (2008)	8
<i>BD Roofing, Inc. v. Dept. of Labor and Indus.</i> , 139 Wn. App. 98, 161 P.3d 387 (2007)	13
<i>Dep't of Labor and Indus. v. Tyson Foods, Inc.</i> , 143 Wn. App. 576, 178 P.3d 1070 (2008)	7
<i>In re Exxel Pacific, Inc.</i> , BIIA Dec., 96 W182 at 17 (1998)	9, 13
<i>Potelco Inc. v. Dep't of Labor and Indus.</i> , King County Cause No. 13-2-38928-2, Notice of Appeal to Superior Court (filed November 14, 2013)	6, 7
<i>J.E. Dunn Nw., Inc. v. Dep't of Labor & Indus.</i> , 139 Wn. App. 35, 156 P.3d 250 (2007)	7
<i>In re Jeld-Wen of Everett</i> , BIIA Dec., 88 W144 at 11 (1990)	8
<i>Legacy Roofing Inc. v. Wash. State Dep't of Labor & Indus.</i> , 129 Wn. App. 356 (2005)	9, 11, 12
<i>Martinez Melgoza & Assoc., Inc. v. Dep't of Labor & Indus.</i> , 125 Wn. App. 843, 106 P.3d 776 (2005)	7
<i>Stuckey v. Dep't of Labor and Indus.</i> , 129 Wn.2d 289, 916 P.2d 399 (1996)	7

STATUTORY AUTHORITIES

RCW 49.17.120(5)(a)	8
RCW 49.17.120(5)(a)(i)	9
RCW 49.17.150	7
RCW 49.17.150(1)	7
WAC 296-45-345(3)	11

I. INTRODUCTION

Potelco, Inc. (“Potelco”) is an electrical contractor that performs work on high-voltage power lines. The Department of Labor and Industries (the “Department”) issued a citation against Potelco under the Washington Industrial Safety and Health Act (“WISHA”) for failure to set up an equipotential zone (“EPZ”) at a worksite in Issaquah, Washington.

Potelco respectfully requests the Court to vacate the citation because the failure to establish an EPZ was the result of the unpreventable employee misconduct (“UEM”) of certain Potelco crew members; each of whom had received intensive training relating to the cited conduct before the Department’s inspection.

II. ASSIGNMENTS OF ERROR

Potelco respectfully asserts that the Superior Court erred in affirming Findings of Fact Nos. 7-8 and in adopting Conclusion of Law No. 5 as set forth in the Board’s Decision and Order, because these Findings of Fact were not supported by substantial evidence and did not in turn 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. Specifically:

Assignment of Error No. 1: The Superior Court erred in adopting Finding of Fact No. 7.

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

Did the Superior Court err in adopting Finding of Fact No. 7 when substantial evidence shows that Potelco's safety program is thoroughly outlined?

Assignment of Error No. 2: The Superior Court erred in adopting Finding of Fact No. 8.

Statement of Issues Pertaining to Assignment of Error No. 2:

Did the Superior Court err by adopting Finding of Fact No. 8 when the substantial evidence shows that Potelco's safety program and rules are communicated to its employees?

Assignment of Error No. 3: The Superior Court erred in adopting Conclusion of Law No. 5.

Statement of Issues Pertaining to Assignment of Error No. 3:

Did the Superior Court err by adopting Conclusion of Law No. 12 when the substantial evidence shows that the violation of WAC 296-45-345(3) at Potelco's worksite was the result of unpreventable employee misconduct?

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

At approximately 10:00 pm on August 4, 2011, a drunk driver hit a utility pole near 14525 Tiger Mountain Road in Issaquah, Washington. (Certified Appeal Board Record (“CABR”) at 67.) The utility pole broke into two sections. *Id.* The top section fell onto the north lane of Tiger Mountain Road, with the overhead power lines still attached. *Id.* at 67-68. This caused a power outage for several customers of Puget Sound Energy (“PSE”). *Id.* at 67. PSE called Potelco to replace the damaged pole, and to move the wires from the broken pole to the new pole. *Id.* The responding Potelco crew consisted of foreman Bill Enger, linemen Jeff Richartz and James Waters, and 6th step apprentice Scott Hendrickson. *Id.* at 68.

The crew arrived on location and prepared to set up the new pole. *Id.* To allow the crew to safely set the pole and move the existing wire, PSE needed to isolate the section of line that the crew would be working with. *Id.* PSE did so by using a mechanical device called a cutout to create an opening in the power line on each side of Potelco’s worksite, which disconnected the section of the line Potelco would work with from the remaining live distribution line. *Id.* To further isolate that section of

line, PSE disconnected a “feeder” line, which ran underground to the overhead power line. *Id.* In combination, these steps that PSE took effectively de-energized the section of line Potelco needed to work with by isolating it from all sources of electricity. (Transcript of Larry Rupe’s Testimony, May 14, 2013 (“Rupe Tr.”) at 71.) This process is referred to as providing a “clearance.” (CABR at 69; Rupe Tr. at 12.)

While PSE was working to provide a clearance, the Potelco crew held a safety meeting (“tailboard”) during which they reviewed the work to be performed. (CABR at 68-69; Rupe Tr. at 73-74; Transcript of Bill Enger’s Testimony, May 15, 2013 (“Enger Tr.”) at 23.) Once PSE provided a clearance, Enger and Richartz placed tags on a pole to the south and on a pole to the north of Potelco’s worksite. (CABR at 69.) These tags indicated that the crew was working on the section of power line between the tagged poles. *Id.* Afterwards, Waters and Hendrickson installed bracket grounds on the power line, immediately to the north and to the south of the broken pole. (CABR at 69; Rupe Tr. at 22.) Bracket grounding is a process that connects power lines to the earth, which provides a path to ground for any electricity in those lines. (Enger Tr. at 15-17.) In other words, if the isolated section of line that the crew was working with had somehow accidentally connected to the live line, the

electricity would have flowed from the live distribution line through the bracket grounds and into the ground, almost certainly avoiding any contact with Potelco's employees. *Id.* at 17-18. Once the bracket grounds were installed, Waters and Richartz started untying the power line from the broken pole, which was lying on the ground. (CABR at 3.)

Enger and Hendrickson then went to get their trucks, which were parked near the broken pole. *Id.* Enger planned to drive his truck past the worksite and then turn around at a location where he could shine his lights on the broken pole, to improve visibility at the worksite. (Rupe Tr. at 75.) As Waters was untying the de-energized line, he lost his balance and fell backward into Tiger Mountain road, at the same time Enger was driving slowly by the worksite. (Rupe Tr. at 14.) Unfortunately, Enger's vehicle struck Waters, who suffered fatal injuries. *Id.* This fatality is not the subject of the Citation at issue here.

Department Compliance Safety and Health Officer George Richard Maxwell ("Inspector Maxwell") opened an inspection of the Tiger Mountain worksite, in response to Waters' fatality. Inspector Maxwell observed the worksite and interviewed the crew. Following Maxwell's inspection, the Department issued Potelco Citation No. 315093880, which

alleges a serious violation of WAC 296-45-345(3) because the crew failed to establish an equipotential zone (“EPZ”) at its worksite.

B. PROCEDURAL BACKGROUND

Potelco appealed the Citation to the Board on May 7, 2012 (CABR at 46-47). The Board conducted a hearing at its Seattle office before Judge Mychal Schwartz on May 14-15, 2013. (Transcript of Judge Mychal Schwartz’s Opening Statement, May 14, 2013 at 3, and May 15, 2013 at 2). Judge Steven Straume issued a Proposed Decision and Order on August 27, 2013, affirming the Citation. (CABR at 20-31.) Potelco filed a timely Petition for Review. (CABR at 8-15.) The Board granted Potelco’s Petition for Review, and on October 15, 2013, the Board issued a Final Decision and Order affirming the Citation. (CABR at 1-4.) On November 14, 2013, Potelco appealed the Board’s Decision and Order to the King County Superior Court. (*Potelco, Inc. v. Dep’t of Labor and Indus.*, King County Cause No. 13-2-38928-2, Notice of Appeal to Superior Court (filed November 14, 2013)). On November 14, 2014, Judge Bruce Heller entered an order affirming the Board’s Decision and Order. CP 31-33. Potelco timely appealed to this Court on December 15, 2014. (*Potelco, Inc. v. Dep’t of Labor and Indus.*, King County Cause

No. 13-2-38928-2, Notice of Appeal to Washington State Court of Appeals, Division I (filed December 15, 2014).)

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 and Indus. v. Tyson Foods, Inc.*, 143 Wn. App. 576, 581, 178 P.3d 1070 (2008); *J.E. Dunn Nw., Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 35, 42, 156 P.3d 250 (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 is evidence sufficient to 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). Conclusions of law must be appropriate based on the factual findings. RCW 49.17.150; *Martinez Melgoza*, 125 Wn. App. at 847-48. Courts review questions of law, such as the Board's interpretation 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 CITATION SHOULD BE VACATED BECAUSE THE VIOLATION WAS THE RESULT OF 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, 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). 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). Here, the Citation should be vacated because it was the result of the unforeseeable and unpreventable misconduct of Potelco's crew, who failed to establish an EPZ at the Tiger Mountain worksite, in violation of Potelco's work rules and the relevant regulation.

1. POTELCO HAS A THOROUGH SAFETY PROGRAM

A safety program is thorough for purposes of RCW 49.17.120(5)(a)(i) when it is "thoroughly outlined." *See Legacy Roofing Inc. v. Wash. State Dep't of Labor & Indus.*, 129 Wn. App. 356, 364 (2005). The program may be detailed in a manual covering the employer's rules, orientation and trainings, safety pre-planning, safety meetings, monitoring and discipline, and other safety rules and equipment. *See In re Exxel Pacific, Inc.*, BIIA Dec., 96 W182 at 17 (1998). Potelco's safety program meets all of these requirements.

Potelco has a detailed Company Policy and Safety Guide ("Safety Manual") that covers a wide range of topics, including EPZ. (Rupe Tr. at 16-18; Exhibit No. 1.) The Safety Manual directs employees to build an EPZ when working on or near electric lines, so Potelco has established a work rule designed to prevent the violation at issue. *Id.*

Potelco provides safety training to its employees in several ways. All Potelco employees attend new employee training when they are first

hired. (Rupe Tr. at 33-34.) That training covers the aspects of an employee's job, including the applicable safety rules. *Id.* Potelco also holds mandatory safety meetings every month, at which safety coordinators lead all crews through topics chosen by the National Electrical Contractors Association. *Id.* at 40. In addition, Potelco has mandatory weekly safety meetings that cover the various hazards employees face in their day-to-day work. *Id.* at 39-40. Furthermore, before beginning work each day on any job, foremen must conduct a specific job hazard assessment ("tailboard") with their crews, during which the crews identify the dangers associated with the work to be performed and discuss how they will mitigate those dangers. *Id.* at 73-74.

Potelco also holds a detailed 10-hour training course referred to as the OSHA-10 T&D, which includes training on an extensive list of safety topics related to the electrical construction industry. (Rupe Tr. at 40-41; Exhibit Nos. 5 and 30.) During the OSHA-10, Potelco leads its employees through an in-depth presentation on EPZs, including the purpose of EPZs, when to use an EPZ, and how to build one. (Rupe Tr. at 40-42; Exhibit No. 5.) Every member of Potelco's crew had completed the entire OSHA-10 T&D course, and therefore had received comprehensive training on

EPZs, prior to the Department's inspection in this case. (Enger Tr. at 10-11; Exhibit Nos. 5, 9-12.)

Thus, the substantial evidence established that Potelco has conducted safety trainings designed to prevent WISHA violations, including the violation of WAC 296-45-345(3) cited here.

2. POTELCO ADEQUATELY COMMUNICATES ITS SAFETY RULES TO EMPLOYEES

Washington courts have held that communicating safety rules to employees in a safety meeting held prior to the date of an alleged violation is evidence that an employer has adequately communicated its safety program to its employees. *See Legacy Roofing*, 129 Wn. App. at 364-65. Potelco did this when it communicated its safety procedures regarding EPZ during the extensive OSHA 10 T&D training course that every crew member attended before the Department's inspection in this case. (Enger Tr. at 10-11; Exhibit Nos. 5, 9-12.) Potelco also communicates its general safety rules to its employees through the various channels and methodologies discussed above, including training its employees on safety rules during new employee orientation, and conducting monthly and weekly safety meetings, and tailboard safety meetings. *Supra*, Section IV(B)(i).

The substantial evidence showed that Potelco adequately communicates its work rules to employees.

3. POTELCO TAKES STEPS TO DISCOVER AND CORRECT SAFETY VIOLATIONS

An employer takes adequate steps to discover and correct safety violations to deter future violations by consistently counseling, penalizing, or disciplining employees caught violating the rules. *See Legacy Roofing*, 129 Wn. App. at 365. Regular visits to job sites by trained, full-time safety officers are evidence that an employer took steps to discover and correct safety violations. *Id.* at 365-66.

Potelco has a safety inspection program to monitor its employees and ensure that they follow all safety rules. Potelco employs several safety coordinators, whose main job duty is to perform safety audits on Potelco crews. (Rupe Tr. at 30-31, 61-62.) These safety managers conduct random and unannounced inspections daily. *Id.* at 62-63. When a safety violation is discovered, the offending crew is counseled and/or disciplined, and the crew is later re-inspected to ensure compliance with all safety issues. *Id.* at 63-64, 66-67. Potelco established, with substantial evidence, that it takes steps to discover and correct safety violations.

4. POTELCO EFFECTIVELY ENFORCES ITS SAFETY PROGRAM IN PRACTICE

An employer's safety program is effective in practice when the employer shows a consistent pattern of safety meetings, inspections, and frequent reminders regarding safety compliance. *Exxel*, BIIA Dec., 96 W182 at 20. The actions an employer takes to discipline employees for safety violations are also indicative of the effectiveness of its safety program. *See id.* at 25. A program is effective when an employee's misconduct was an isolated occurrence and was not foreseeable. *BD Roofing, Inc. v. Dept. of Labor and Indus.*, 139 Wn. App. 98, 111, 161 P.3d 387 (2007).

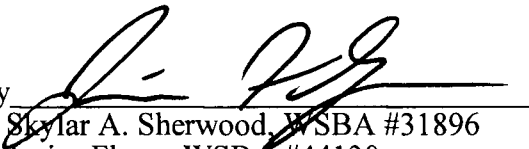
As already discussed, Potelco holds regular safety meetings, inspects crews, and disciplines safety violators. Potelco crews attend monthly, weekly, and daily safety meetings. Potelco emphasizes safety, and effectively enforces its safety program in practice. Potelco provided detailed EPZ training to every member of the crew, before the Department's inspection in this case. (Enger Tr. at 10-11; Exhibit Nos. 5, 9-12.) Given these efforts, Potelco could not foresee that the crew would fail to establish an EPZ at the Tiger Mountain worksite and therefore is not liable for the alleged violation.

V. CONCLUSION

Potelco respectfully requests that the Court dismiss Citation
No. 315093880 in its entirety.

DATED this 2nd day of March, 2015.

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CERTIFICATE OF SERVICE

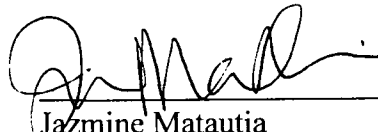
I, Jazmine Matautia, certify that:

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 March 2, 2015, I served a true and correct copy of the foregoing document on the following party, attorney for Respondent, via email, and addressed as follows:

Ingrid Golosman, Assistant Attorney General
Washington Attorney General's Office
Labor & Industries Division
800 Fifth Avenue, #2000
Seattle, WA 98104-3188

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 2nd day of March, 2015.



Jazmine Matautia