NO. 72845-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

POTELCO, INC.,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

DEPARTMENT OF LABOR & INDUSTRIES BRIEF OF RESPONDENT

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I. INTRODUCTION

To ensure worker safety, an employer must provide its employees with all necessary safety equipment. According to a long-time Potelco foreman, Potelco did not make grounding mats available to protect against electrocution. Therefore, substantial evidence supports the finding of the Board of Industrial Insurance Appeals that Potelco did not provide its workers with necessary safety equipment.

The Department of Labor and Industries cited Potelco under the Washington Industrial Safety and Health Act (WISHA) for failing to provide temporary protective grounding for work on downed power lines. Potelco does not deny it failed to provide such grounding (called an equipotential zone or EPZ), but rather claims unpreventable employee misconduct excused the violation. The Board properly rejected this affirmative defense. Substantial evidence supports the Board's decision where Potelco did not provide necessary equipment and where the long-time foreman testified it was not standard practice at Potelco to set up an EPZ. This was not a case of a worker knowing a rule and failing to follow it.

Because Potelco's appeal is devoid of merit, this Court should affirm the Board's decision.

II. ISSUE

> Does substantial evidence support the Board's decision that Potelco did not prove unpreventable employee misconduct where Potelco did not provide necessary safety equipment, where the foreman testified it was not standard Potelco practice to set up an EPZ, and where key personnel did not know about the EPZ requirement?

III. STATEMENT OF THE CASE

A. Potelco Admits It Did Not Provide Grounding for Its Workers

Potelco provides power-line related services. BR Rupe 7-8.[1] In August 2011, Potelco's crew responded to a broken power pole caused by an automobile collision on Tiger Mountain Road in Issaquah. BR Rupe 9-10. The collision left high voltage power lines and the pole on or very close to the ground. BR Rupe 11-12. These power lines could become energized while the crew was working in the vicinity, and those energized lines could cause death or serious bodily harm to anyone coming into contact with them. BR Rupe 20-22, 26; BR Maxwell 120, 134-35.

WAC 296-45-345(3) requires grounding for workers at such job sites:

> Equipotential zone. Temporary protective grounds shall be placed at such locations and arranged in such a manner as to prevent each employee from being exposed to hazardous differences in electrical potential.

[1] The certified appeal board record is cited as "BR." Testimony is cited as BR followed by the witness name.

Potelco did not ensure that its workers had temporary protective grounding at the Tiger Mountain site when they performed work with the power pole and downed power lines. BR Maxwell 139; BR Rupe 18. Potelco admits to violating the EPZ rule by not having protective grounding. BR Maxwell 139.

The Board found that "while performing [the] work the line . . . crew did not place and arrange temporary protective equipotential zone grounds in a manner to prevent each employee from being exposed to hazardous differences in electrical potential." BR 3 (FF 2). Potelco does not contest this finding. App's Br. 1. Rather, Potelco contests the Department's citation for this unsafe working condition with the claim that their employees committed unpreventable employee misconduct. App's Br. 1.

Rejecting this argument, the Board decided that Potelco did not prove unpreventable employee misconduct and upheld the Department's citation. BR 3-4. It found that Potelco did not have a thorough safety program and did not give safety equipment to the workers:

> On August 4, 2011, and August 5, 2011, Potelco's safety program was not thorough, and equipment necessary to implement the required protective grounding was not provided to all its workers.

BR 3 (FF 7). The Board further found that Potelco did not communicate its safety program to the workers:

> On August 4, 2011, and August 5, 2011, Potelco's safety program and its rules were not adequately communicated to its employees.

BR 3 (FF 8). The superior court ruled that substantial evidence supported these two findings. CP 32. The issue raised in this appeal is whether substantial evidence supports the Board's findings and whether these findings support the conclusion that there was no unpreventable employee misconduct. App's Br. 1-2.

B. An EPZ Protects a Worker From Accidental Energization of the Power Line

WISHA requires grounding that protects workers working on power lines. WAC 296-45-345(3). Such grounding is provided through an equipotential zone. An EPZ is a work zone where the equipment is interconnected to protect against hazardous differences in potential electrical energy. Ex. 1 at 11-2. An EPZ protects a worker if the power line under repair becomes accidentally energized. BR Rupe 15. The EPZ protects against electrocution. BR Rupe 26; BR Maxwell 134.

A recognized way to ground when power lines are near the ground is to use an equipotential mat or blanket. BR Rupe 15, 17, 19; BR Enger 19. The Potelco safety manual calls for this method when the wires are

lying or hanging near the ground, directing that "all workers must wear approved rubber gloves or stand on a conductive mat." Ex. 1 at 11-14. The wires were near the ground at the Tiger Mountain site. BR Rupe 11.[2]

Although the Potelco safety manual lists "rubber gloves" as a method of protection, Washington does not allow rubber gloves to be used as a primary method of temporary protective grounding for projects such as the Tiger Mountain site. Ex. 1 at 11-14; BR Rupe 82; WAC 296-45-325(9).[3] Potelco uses as its safety manual a publication from its parent company Quanta that also applies to other states, and it includes information not applicable in Washington. BR Rupe 81-83.

In contrast to EPZ mats, bracket grounding is not sufficient EPZ protection. While EPZ is "a form of personal protective grounding," bracket grounding is "a form of system protective grounding." BR Rupe 22. It is a grounding method where grounding sets are installed on each side of the work, with the purpose of tripping out the system should a fault

[2] There are other ways to establish an EPZ besides a mat. For poles that are standing, a belly band or chain may be used. BR Rupe 14-16; BR Enger 18; Ex. 1 at 11-18. This was not applicable at the Tiger Mountain site because the pole was on the ground. *See* BR Enger 19; BR Rupe 27-28. An EPZ can also be built depending on what material the crew had with it. BR Rupe 79.

[3] Potelco's foreman Bill Enger believes that rubber gloves could be used if a mat is not feasible. BR Enger 45-47. However, the testimony was that rubber gloves cannot be used as the primary protection in Washington. BR Rupe 82. Further, WISHA's electrical worker protection regulations prohibit the use of rubber gloves as primary protection unless the voltage is 5,000 volts or less phase to phase. WAC 296-45-325(9). At the Tiger Mountain worksite, the voltage was 12,470 phase to phase. BR Richartz 56.

occur on the line. Ex. 1 at 11-1. This is not personal protective grounding and does not always protect the worker from accidental energization. BR Rupe 22, 24-25, 76. Here, the crew performed bracket grounding only. BR Rupe 18, 22.

C. Potelco Delegated Safety Responsibility to the Foreman as the Management Representative, and Because an EPZ Was Not Standard Practice, No EPZ Was Set Up

On the night of the violation, the Potelco crew was called out to respond to the broken pole and downed high voltage wires at the Tiger Mountain site. BR Rupe 10-11. The crew consisted of Bill Enger (foreman and lineman), Jeff Richartz (lineman), James Water (lineman), and Scott Hendrickson (apprentice). BR Rupe 13.[4]

The foreman was in charge of the crew, and Potelco made him responsible for following safety rules:

> Your foreman is your person in charge to oversee the job. He is the one to make sure the tailboard is done; everybody follows the rules and does what they're supposed to on the job site.

BR Rupe 86; BR Enger 26-27. Potelco considers the foreman a "management person," according to Larry Rupe, Potelco's safety director. BR Rupe 86. A foreman has the authority to send someone home without pay for breaking safety rules. BR Rupe 86; BR Enger 27.

[4] Unrelated to the grounding violation, James Water was killed that night when struck by a motor vehicle. BR Rupe 13-14.

On the night of the Tiger Mountain incident, the foreman, Bill Enger, held a safety meeting, a tailboard. BR Enger 24. At that meeting, he did not instruct the crew to set up an EPZ. BR Enger 24, 50. The foreman had worked for Potelco for 11 years, and the reason he did not set up an EPZ is that it was not standard practice to do so:

> Q. Back then it wasn't standard practice for you to set up an EPZ?
> A. No.

BR Enger 24; *see also* BR Enger 14, 50. None of the crew suggested setting up an EPZ. BR Enger 25.

Enger testified that in August 2011 he did not know Potelco required equipotential zones. BR Enger 14, 45. He just used bracket grounding. BR Enger 14-15. Similarly, lineman Richartz said that on other Potelco crews, grounding was done with just bracket grounding. BR Richartz 62. Richartz had worked for Potelco for seven years. BR Richartz 55.

D. The Foreman Testified That Potelco Did Not Provide EPZ Mats

The Potelco safety manual calls for the use of conductive mats when a wire is near the ground. Ex. 1 at 11-14. But foreman Enger testified that the crew did not have an EPZ mat at the time of the Tiger Mountain incident. BR Enger 23. Safety director Rupe thought that

Potelco crews had needed safety equipment, including mats. BR Rupe 19. "All the crews have at least one EPZ blanket or mat, I should say." BR Rupe 19. He testified that the Tiger Mountain crew "should have had a mat." BR Rupe 20. But he was not sure if they actually had an EPZ mat. BR Rupe 20.

According to Enger, Potelco did not keep EPZ mats in the truck:

> Q. But at that time it wasn't standard for an EPZ mat to be kept as a stock item in the truck?
> A. No, we didn't have one.
> Q. That night you didn't put one in the truck?
> A. I don't think we had them available at the yard.

BR Enger 23. Later in his testimony he reaffirmed that Potelco did not make the mats available, "As I recall, looking back, I don't believe we had them." BR Enger 51. When asked if he asked someone if EPZ mats were available, he responded, "No, there was no one to ask at night." BR Enger 51. He testified that because the pole was on the ground, "a grounding mat, a bonding mat" should have been used. BR Enger 19.[5]

E. A Journeyman Lineman Described Potelco's Training on EPZ as Not in Depth

In this case, it has been the Department's position that Potelco did not provide adequate training in EPZs. *E.g.*, CP 16-17. Potelco's safety manual is 783 pages and has a chapter on EPZ grounding. Ex. 1; BR

[5] He also testified that rubber gloves could have been used, but this is not an option in Washington. WAC 296-45-325(9); BR Enger 19; BR Rupe 82; BR Richartz 56.

Rupe 33, 39, 81-82. As described above, the manual is not specific to Washington. BR Rupe 81-83. It includes directions about using rubber gloves that Potelco's safety director recognized are not sufficient protection under Washington law. WAC 296-45-325(9); Ex. 1 at 11-14; BR Rupe 82.

In any event, Enger, the foreman, had not read the grounding section in the manual. BR Enger 53. The safety manual is kept at Potelco's headquarters, with an option to take a CD. BR Rupe 33. Rupe did not say whether the workers actually took the CD. BR Rupe 33. Rupe also did not say that Potelco discussed the EPZ chapter or the rubber glove issue with its employees when it made the manual available. *See* BR Rupe 33.

In addition, new hires are given a safety orientation, with a code of conduct booklet. BR Rupe 33-34. Potelco presented no evidence that EPZ grounding was discussed in this booklet or orientation. *See* BR Rupe 33-38; Ex. 32.

Potelco provides weekly and monthly training on various topics, with no evidence presented that these covered EPZ grounding or that the linemen here attended any such EPZ training. BR Rupe 39-40. The linemen here attended a 10 hour training (called the OSHA-10 T&D), where, according to Rupe, EPZ was a topic discussed. BR Rupe 40-42;

Ex. 9-12, 26. In Enger's deposition he testified that he could not remember getting any EPZ training before August 2011. BR Enger 12, 30. At hearing, Enger said he verified after reviewing training records that he had EPZ training in 2006. BR Enger 7, 11. When pressed, however, he could not recall that Potelco told him that when there is a line down—like at the Tiger Mountain site—he should set up an EPZ. BR Enger 45.

Likewise, lineman Richartz stated that he had gone through EPZ training, but "they were not in depth." BR Richartz 61-62. He thought he should use bracket grounding despite taking the training. *See* BR Richartz 62.

After the Tiger Mountain incident, Potelco provided more training in EPZ grounding in November 2011 and 2012. BR Rupe 57-58; BR Enger 7; Ex. 9-12.

Potelco has random safety audits for daytime work and for storms, but it does not audit "call outs" such as the Tiger Mountain call out. BR Rupe 83-84; BR Richartz 59.

Potelco has a discipline system, though there is no evidence discipline was meted out for the Tiger Mountain incident. BR Rupe 20. Moreover, there was another EPZ violation at a Potelco job site in March 2011 for which there was no discipline. BR Rupe 98-100. At that time,

the Department inspector told Rupe about the need to set up an EPZ well before the Tiger Mountain incident. BR Maxwell 132-33.

IV. STANDARD OF REVIEW

Review in this matter is governed by RCW 49.17.150. In a WISHA appeal, the court directly reviews the Board's decision based on the record before the agency. *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 of fact are conclusive if they are supported by substantial evidence when considering the record as a whole. RCW 49.17.150; *Mowat Constr. Co. v. Dep't of Labor & Indus.*, 148 Wn. App. 920, 925, 201 P.3d 407 (2009). Evidence is substantial if it is sufficient to convince a fair-minded person of the truth of the declared premise. *Mowat Constr. Co.*, 148 Wn. App. at 925.

Under the substantial evidence standard of review, the court will not reweigh the evidence. *Zavala v. Twin City Foods*, __ Wn. App. ___, 343 P.3d 761, 776 (2015). Rather, it views the evidence in the light most favorable to the prevailing party at the Board, here the Department. *See Frank Coluccio Constr. Co. v. Dep't of Labor & Indus.*, 181 Wn. App. 25, 35, 329 P.3d 91 (2014).

The court construes WISHA statutes and regulations "liberally to achieve their purpose of providing safe working conditions for workers in

Washington." *Frank Coluccio Constr.*, 181 Wn. App. at 36; RCW 49.17.010. The court gives substantial weight to the Department's interpretation of WISHA. *See Frank Coluccio Constr.*, 181 Wn. App. at 36.

V. ARGUMENT

Here the Department provides multiple arguments why this Court should affirm the Board decision that Potelco did not prove unpreventable employee misconduct. Viewing the evidence in the light most favorable to the Department as must occur here, substantial evidence supports finding that Potelco did not prove any of the elements of the unpreventable employee misconduct defense.

Reasons to affirm the Board's decision include the following facts. First, Potelco did not provide EPZ mats. Second, setting up EPZ was not standard practice by Potelco managers. Third, the foreman did not know that he needed to set up an EPZ. Based on these facts which must be accepted as true, Potelco cannot contest that substantial evidence supports the Board's findings that Potelco did not provide the necessary safety equipment to its employees, that its program was not thorough, and that it did not adequately communicate safety rules to its employees. Each one of these findings independently supports the conclusion that Potelco cannot prove unpreventable employee misconduct.

A. To Prove Unpreventable Employee Misconduct, Potelco Must Show That It Provided the Necessary Equipment and Provided a Thorough Safety Program Where Employees Know the Safety Rules

It is well-established that in Washington unpreventable employee misconduct is an affirmative defense to WISHA citations that the employer must prove. *Wash. Cedar & Supply Co. v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 911, 83 P.3d 1012 (2003).

RCW 49.17.120(5) provides for the affirmative defense of unpreventable employee misconduct, requiring that the employer must provide safety equipment to its employees as a part of a thorough safety program and requiring that employees know about the safety rules:

> (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.

(Emphasis added). An employer advancing an unpreventable employee misconduct defense must prove each element of the test. RCW 49.17.120(5); *Wash. Cedar*, 119 Wn. App. at 911. "[E]vidence must support the employer's assertion that the employees' misconduct was an

isolated occurrence and was not foreseeable." *BD Roofing, Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 98, 111, 161 P.3d 387 (2007). The defense is viable where the violative conduct was truly idiosyncratic, implausible, and unforeseeable. Mark A. Rothstein, *Occupational Safety and Health Law* § 5:27, at 246 (2015).

Here special rules apply because a management representative was involved. When a supervisory employee is involved, as here with the foreman, "the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his or her supervision." *Sec'y of Labor v. Archer-W. Contractors, Ltd.*, 15 BNA OSHC 1013, 1991 WL 81020, at *5 (No. 87-1067 1991). "[I]n cases involving negligent behavior by a supervisor or foreman which results in dangerous risks to employees under his or her supervision, such fact raises an inference of lax enforcement and/or communication of the employer's safety policy." *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1277 (6th Cir. 1987).[6]

[6] For help in deciding cases where there is an absence of state law on point, Washington looks to the Occupational Safety and Health Administration laws and consistent federal decisions. *See Wash. Cedar*, 119 Wn. App. at 911-12; *Elder Demolition, Inc. v. Dep't of Labor & Indus.*, 149 Wn. App. 799, 806, 207 P.3d 453 (2009).

B. Substantial Evidence Supports the Board's Finding That Potelco Did Not Provide a Thorough Safety Program That Included Provision of Necessary Equipment Where Potelco Did Not Provide EPZ Mats

1. The Court May Not Reweigh the Evidence That Potelco Did Not Provide Mats

An employer is required to provide safety equipment as part of the first element of the unpreventable employee misconduct defense. The defense requires:

> A thorough safety program, including work rules, training, and *equipment* designed to prevent the violation.

RCW 49.17.120(5)(a)(i) (emphasis added). A safety program is thorough when it is "thoroughly outlined." *Legacy Roofing, Inc. v. Dep't of Labor & Indus.*, 129 Wn. App. 356, 364, 119 P.3d 366 (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, with necessary safety equipment provided to the workers. *See In re Exxel Pacific, Inc.*, No. 96 W182, 1998 WL 718040 (Wash. Bd. Ind. Ins. App. July 6, 1998); RCW 49.17.120(5)(a).

Substantial evidence supports the Board's findings that Potelco did not have a thorough safety program and it did not provide necessary equipment. Potelco argues that "substantial evidence established that Potelco has conducted safety trainings designed to prevent WISHA

violations, including the violation of WAC 296-45-345(3)." App's Br. 11. The question is not whether substantial evidence supports a finding that there is a thorough safety program under RCW 49.17.120(5)(a)(i). The question is whether substantial evidence supports the Board's finding that the program was not thorough:

> On August 4, 2011, and August 5, 2011, Potelco's safety program was not thorough, and equipment necessary to implement the required protective grounding was not provided to all its workers.

BR 3 (FF 7).

First, Potelco has waived a challenge to the Board's finding that it did not have equipment because it presented no argument about the equipment in its briefing, merely assigning error to finding of fact 7. App's Br. 1-2, 9-11. Where a party purports to assign error to a finding of fact but fails to present clear argument as to how the finding is not supported by substantial evidence, the finding is a verity. *See In re Estate of Lint*, 135 Wn.2d 518, 531-33, 957 P.2d 755 (1998). "It is incumbent on counsel to present the court with argument as to why specific findings of the trial court are not supported by the evidence and to cite to the record to support that argument." *Id.* at 532. A party cannot rehabilitate its failure to argue an issue by presenting it in its reply. *See Cowiche Canyon*

Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *Joy v. Dep't of Labor & Indus.*, 170 Wn. App. 614, 629-30, 285 P.3d 187 (2012).

Notably, despite the Department arguing at the superior court that Potelco did not have a thorough safety program because it did not have EPZ mats, Potelco did not justify the lack of equipment below in its reply brief at the superior court. CP 16, 22-29. A party who has an opportunity to respond to an opponent's factual claims and neglects to do so admits the accuracy of such claims. *See Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 270, 840 P.2d 860 (1992). A party must raise an issue at superior court in order for this Court to review it. RAP 2.5(a).

Second, if the Court chooses not to treat the finding as a verity, substantial evidence supports the Board's finding that Potelco did not provide the necessary equipment to the workers. There cannot be a thorough program if the employer does not provide the necessary equipment to its workers. RCW 49.17.120(5)(a)(i) (requiring an employer to show "[a] thorough safety program, including work rules, training, and *equipment* designed to prevent the violation.").

Potelco's safety manual directs the use of "conductive mats" for downed lines. Ex. 1 at 11-14. Rupe, the safety director, testified that that the Tiger Mountain crew "should have had a mat." BR Rupe 20. But the

crew did not have one that night. According to Enger, Potelco did not keep EPZ mats in the truck:

> Q. But at that time it wasn't standard for an EPZ mat to be kept as a stock item in the truck?
> A. No, we didn't have one.
> Q. That night you didn't put one in the truck?
> A. I don't think we had them available at the yard.

BR Enger 23. He later reaffirmed that there were no mats available. BR Enger 51. The court must accept this evidence as true. *See Frank Coluccio Constr.*, 181 Wn. App. at 35 (evidence viewed in the light most favorable to the party prevailing at the Board).

In contrast, the court does not view Potelco's evidence on disputed points as true nor draw inferences in its favor from the evidence. Safety director Rupe believed that the crew had the necessary equipment, though he was not 100 percent sure if it actually had an EPZ mat that night. BR Rupe 19-20. To accept Rupe's view that the crew had the necessary equipment would be to discount Enger's testimony that a mat was not available. But the court does not reweigh credibility. *Thomas v. State*, 176 Wn. App. 809, 813, 309 P.3d 761 (2013). Here, viewing the evidence in the light most favorable to the Department, it is evident that Potelco did not provide a critical safety component to ensure its workers' safety. Because substantial evidence supports the finding of an absence of

equipment, the Board correctly concluded that Potelco did not prove unpreventable employee misconduct under RCW 49.17.120(5)(a)(i).

2. The Court May Not Reweigh the Evidence That EPZs Were Not Standard Practice

Substantial evidence also supports the Board's finding that the safety program was not thorough. BR 3. Enger, the foreman, testified that he did not set up an EPZ because it was not standard practice to do so:

> Q. Back then it wasn't standard practice for you to set up an EPZ?
> A. No.

BR Enger 24; *see also* BR Enger 14, 50. Potelco's unpreventable employee misconduct defense fails on this testimony alone.

Accepting this testimony as true, as must be done on substantial evidence review, it conclusively shows that Potelco's safety program was not thorough because it was not "standard practice" to use an EPZ. *See Frank Coluccio Constr.*, 181 Wn. App. at 35 (evidence viewed in the light most favorable to the prevailing party below). This was confirmed by the testimony of lineman Richartz who said that in August 2011 and before, the Potelco crews on which he worked only did bracket grounding. BR Richartz 62. Bracket grounding is not temporary protective grounding as required by WAC 296-45-345(3). BR Rupe 22, 25, 76.

Substantial evidence also supports that the program was not thorough in other respects. On appeal, Potelco highlights evidence favorable to it about its manual and its training. App's Br. 9-10. Potelco neglects to mention testimony that its safety manual was not specific to Washington and included safety equipment deemed insufficient under Washington law. *See* BR Rupe 81-82; WAC 296-45-325(9). While safety director Rupe testified that workers received orientation about safety procedures, he did not testify that the orientation included a discussion of how its safety manual did not always apply in Washington. BR Rupe 33-34.

While Potelco presented some evidence of training regarding EPZ, it did not provide evidence that the entire crew received the training on more than one occasion. Ex. 9-12. For example, lineman Waters took the 10 hour training in 2006 (called the OSHA-10 T&D) that may have included a portion on EPZs, but he did not have any further training in temporary protective grounding after that date. Ex. 10. Providing one training in a several-year time period can hardly be described as thorough. In any event, Potelco's own lineman described the training as "not in depth." BR Richartz 61. In his deposition, Enger testified that he could not recall having been trained at all on EPZs before the Tiger Mountain job. BR Enger 32-33. It was only after Potelco's attorney refreshed his

recollection before the hearing that he remembered that he had taken a training in 2006 (the OSHA-10 T&D). BR Enger 32. Substantial evidence supports the Board's finding that Potelco did not provide a thorough training program because a fact-finder could reasonably believe that Potelco did not provide necessary equipment, did not have EPZs as a standard practice, and did not provide adequate training.

C. Substantial Evidence Supports the Board's Finding That Potelco Did Not Communicate Its Safety Rules to Its Employees Where Long-time Employees Did Not Know About the EPZ Requirement

1. The Court Cannot Reweigh the Evidence that the Foreman Did Not Know About the EPZ Requirement

Substantial evidence demonstrates that Potelco did not communicate its safety rules to its employees. Potelco argues that "substantial evidence showed that Potelco adequately communicated its work rules to employees." App's Br. 12. The Department does not agree with this assertion, but this is irrelevant. Potelco has again inverted the standard of review. The question is not whether there was evidence to support finding adequate communication but rather whether substantial evidence supports the Board's finding that the safety program was not communicated to its workers:

> On August 4, 2011, and August 5, 2011, Potelco's safety program and its rules were not adequately communicated to its employees.

BR 3 (FF 8).

The affirmative defense of unpreventable employee misconduct requires clear communication of the safety rules: "The defense addresses situations in which employees disobey safety rules despite the employer's diligent communication and enforcement." *Asplundh Tree Expert Co. v. Dep't of Labor & Indus.*, 145 Wn. App. 52, 62, 185 P.3d 646 (2008).

Undebatable proof that the safety rules were not adequately communicated to the workers is that neither the foreman Enger nor the lineman Richartz knew to set up an EPZ and thought that bracket grounding was sufficient. BR Enger 14, 24, 45, 50; BR Richartz 62. A reasonable fact-finder could rely on this evidence to find that Potelco's safety rules were not communicated to these workers. Below Potelco argued that the mere existence of a safety violation does not show inadequate communication; otherwise an employer could never show the unpreventable employee misconduct defense. CP 24. But Enger was a foreman and journeyman lineman for 11 years at Potelco and Richartz was a journeyman lineman for seven years at Potelco. Neither of them knew that bracket grounding was insufficient and that WISHA rules required an EPZ. BR Enger 4, 14, 24, 45, 50; BR Richartz 55, 62. This is not a "mere existence of a safety violation" but rather a systemic problem at Potelco.

CP 24. The violation was not "an isolated occurrence" that was not foreseeable. *See BD Roofing*, 139 Wn. App. at 111. This is not a situation of workers knowing a rule and not following it. A fact-finder could reasonably believe based on Enger's and Richartz's testimony that they did not know about the EPZ rule because Potelco did not adequately communicate the rule to them.

In Potelco's superior court brief, Potelco paints a picture of safety director Rupe coming into Potelco to get all employees to use an EPZ, explaining that linemen were slow to adopt EPZs because they were used to bracket grounding. CP 26-27. The implication is that Rupe has changed the culture. CP 27. This narrative is fundamentally flawed because it asks the Court to reject Enger's and Richartz's testimony that an EPZ was not used by Potelco crews and accept Rupe's apparent view that it was. But inferences are not taken in favor of Potelco; to the contrary, the court takes inferences in favor of the Department. *See Frank Coluccio Constr.*, 181 Wn. App. at 35.

Potelco's arguments to overturn the Board's finding of inadequate communication are devoid of merit. Here, the court must accept the absence of knowledge about an EPZ as true and the absence of knowledge provides substantial evidence of inadequate communication. *See Legacy*, 129 Wn. App. at 364-65. The *Legacy* Court looked to a discrepancy

between the company's testimony of ideal company practice and what "actual company practice" was to uphold a finding of no communication. *Id.* at 365. Here, Potelco's ideal might be the use of EPZs (though its manual contradicts the ideal and advocates the use of rubber gloves), but the actual practice as testified to by the long-time foreman and lineman is to just use bracket grounding and to not set up an EPZ. Ex. 1 at 11-14; BR Enger 14, 24, 45, 50; BR Richartz 62. This provides substantial evidence that Potelco did not communicate to its employees that bracket grounding was insufficient and that WISHA rules also require an EPZ. Based on this, the Board decision must be affirmed.

2. Potelco Failed To Provide Adequate Communication When the Management Representative Did Not Communicate the EPZ Rule to the Crew and When It Provided Inadequate Training on the EPZ Requirement

Substantial evidence also supports the finding that the safety program and rules were not adequately communicated in other ways. Potelco's management representative, foreman Enger, did not communicate Potelco's EPZ rules to the crew at the safety meeting. BR Richartz 57; BR Enger 4. This proves lack of adequate communication. Foreman Enger was the on-site management representative in charge of enforcing safety rules. BR Rupe 86-87. Because the management representative in charge of enforcing safety rules did not communicate the

rule on Potelco's behalf, a fact-finder could accept that Potelco is not adequately communicating its rules to its employees. Potelco states that "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." App's Br. 11 (citing *Legacy Roofing*, 129 Wn. App. at 364-65). It is true such a meeting would be such evidence, but here at the safety meeting before the incident, the management representative did not communicate the need to set up an EPZ to the crew. BR Enger 24, 50.

Potelco seems to argue that because it had one training on EPZ, the OSHA 10 T&D, which these crew members attended years earlier, that it satisfied its responsibility to adequately communicate its safety rules to the workers. App's. Br. 11; Ex. 9-12, 26. But a fact-finder could believe that one training is not sufficient training on EPZ grounding over the years, particularly where the training was described as not being in depth and where the danger presented to its workers are energized power lines that can cause serious injury or death. BR Richartz 61; BR Rupe 26; BR Maxwell 134-35. The need to reinforce the EPZ requirement is particularly true where the safety director, Rupe, describes an environment

where the linemen are historically used to using bracket grounding. BR Rupe 77.

Potelco cites to methods that it says communicated its safety rules to the workers, but cites nothing in the record to show that it trained each of the linemen here on EPZ rules in Washington in its new employee orientation, or during monthly and weekly meetings. App's Br. 11. At superior court, Potelco argued that the fact that Enger had never read the safety manual and the fact that Rupe had never seen a lineman read a safety manual, did not mean the manual was not communicated to the workers when Potelco made it available. CP 25; BR Rupe 81; BR Enger 46. Potelco seeks to show communication by making a 783-page document on a CD available to workers. But a fact-finder could believe that providing a 783-page document on a CD to a worker is not adequate communication because of the sheer size of the manual, in the absence of testimony, that showed that each of the sections were explained to each of the linemen here and that the differences in Washington law were explained to the linemen here. A fact-finder could reject the contention that the provision of the OSHA 10 T&D training five years before the violation cured the defect of the manual when the training was described as not being "in depth." BR Richartz 61; Ex. 10, 26. There is no basis

on which Potelco can establish that substantial evidence does not support the Board's finding of inadequate communication.

D. Substantial Evidence Supports Finding That Potelco Did Not Take Steps To Discover and Correct Safety Violations Where It Did Not Audit Call Outs

Substantial evidence supports the finding that Potelco did not take steps to discover and correct safety violations as required by the third element of RCW 49.17.120(5)(a)(iii). The Board made explicit findings about the first two elements of the unpreventable employee misconduct defense only. BR 3. However, Potelco carried the burden of proof on all four elements of the affirmative defense. *See Asplundh Tree*, 145 Wn. App. at 61. As the party that carries the burden of proof, the absence of a finding of a material issue is the equivalent of a finding against the party on that issue. *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 524, 22 P.3d 795 (2001). Recognizing this, Potelco has provided argument on the third and fourth elements of the test. App's Br. 12-13. Neither is met.

The third element is that steps must be taken to discover and correct violations of the rules. RCW 49.17.120(5)(a)(iii). Again applying the wrong standard of review, Potelco argues that substantial evidence supports finding that it took steps to discover and correct the safety violation. App's Br. 12. It points to its safety managers providing random inspections and to other elements of its audit program. App's Br. 12.

Although Potelco has random safety audits for daytime work and for storms, it does not audit "call outs" such as the Tiger Mountain call out. BR Rupe 83-84; BR Richartz 59. Therefore, Potelco's audit program could not discover any safety violations at any "call out" worksites. A fact-finder could reasonably believe that workers, such as Enger and Richartz here, who know that there were no audits of call outs, could behave in an unsafe manner because no one would ever check up on them. Substantial evidence supports finding that Potelco did not take steps to discover and correct safety issues.

E. Substantial Evidence Supports Finding That Potelco's Program Was Not Effective in Practice Where Its Foreman Did Not Know of Its Rules

Substantial evidence also supports finding that Potelco's program was not effective in practice. To prove the defense, Potelco must prove "[e]ffective enforcement of its safety program as written in practice and not just in theory." RCW 49.17.120(5)(a)(iv). Applying the wrong standard of review, Potelco reiterates its earlier arguments about its program and communication of its program. App's Br. 13. As explained in detail above, Potelco's program was neither thorough nor adequately communicated, so therefore it cannot be effective in practice. (Likely this is why the Board did not make an explicit finding on the fourth element.)

A key element to an effective program is discipline and correction of previous problems. The existence of prior violations is not a complete bar to the unpreventable employee misconduct defense, but it is evidence that the conduct was foreseeable and preventable. *BD Roofing, Inc.*, 139 Wn. App. at 111. Here, there was another EPZ violation at a Potelco job site in March 2011 where there was no discipline. BR Rupe 98-100. At that time, the Department inspector told Rupe about the need to set up an EPZ. BR Maxwell 132. Yet there is no evidence that the crew for this March 2011 incident was disciplined or educated. Rupe tried to explain this by saying that the foreman from the jobsite in March 2011 left Potelco. BR Rupe 107. But the foreman is not the only member of a crew and the entire crew was not educated or disciplined. A fact-finder could reasonably believe that if Rupe had taken proper heed of the inspector's warning, the Tiger Mountain incident need not have occurred. It is notable that after the Tiger Mountain incident, Potelco provided an in-depth training on EPZ, with no explanation as to why this was not done earlier even though Potelco knew that its linemen were only using bracket grounding. BR Rupe 57-58; BR Enger 7.

Another significant reason why the fact-finder could believe the program was not effective in practice is the fact that there was a foreman involved in the Tiger Mountain incident. As discussed above, where a

foreman is involved in a WISHA violation there is an inference of lax enforcement. *Brock*, 818 F.2d at 1277. Potelco argued below that presence of a foreman did not mean that the unpreventable employee misconduct defense is not available. CP 29. This is correct, however, the defense is more difficult to prove precisely because a management representative is involved in the decision not to provide a safe workplace. "When the alleged misconduct is that of a supervisory employee, the employer must also establish that it took all feasible steps to prevent the accident, including adequate instruction and supervision of its employee." *Archer-W. Contractors*, 1991 WL 81020 at *5. Here, there is no evidence that Potelco supervised its foreman in general and specifically on the EPZ requirement. Enger testified that it was standard practice to not use an EPZ and that he did not know to use an EPZ. BR Enger 14, 24, 45, 50. Potelco did not supervise him to correct this misunderstanding of this critical worker-safety requirement. Richartz, now a foreman, corroborated this misunderstanding. BR Richartz 62.

Potelco represents that it has a goal to provide EPZ (even though its manual improperly advocates for rubber gloves), but a reasonable fact-finder could believe that this goal existed only in theory and not in practice. The crew on the ground, including the key management representative, thought that bracket grounding was sufficient and did not

know that EPZ was required. With such evidence, Potelco cannot prove unpreventable employee misconduct; rather it was Potelco's own negligence that caused the violation.

VI. CONCLUSION

Potelco turns the standard of review upside down. Instead of looking to see if substantial evidence supports the Board's decision, Potelco erroneously looks to see if substantial evidence supports its version of the facts. Applying the correct standard of review, it is manifest that substantial evidence supports the findings of the Board. To claim unpreventable employee misconduct, Potelco must show it provided safety equipment, but substantial evidence shows that it did not provide EPZ mats and that it was not standard practice to use an EPZ. For these reasons alone, the defense fails. Moreover, substantial evidence supports that safety rules were not communicated to Potelco employees when they did not know of the rule and when the foreman did not tell them about the rule. This Court should affirm the trial court decision that affirmed the Board's decision to uphold the Department's citation.

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RESPECTFULLY SUBMITTED this 28th day of April, 2015.

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COURT OF APPEALS. DIVISION I
OF THE STATE OF WASHINGTON

POTELCO INC, Appellant, v. WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	DECLARATION OF MAILING

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department's Brief of Respondent and this Certificate of Service in the below described manner:

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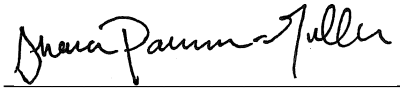

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