

No. 46256-7-II

**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

I.	INTRODUCTION.....	1
II.	ASSIGNMENTS OF ERROR.....	2
III.	STATEMENT OF THE CASE.....	5
	A. STATEMENT OF FACTS	5
	B. PROCEDURAL BACKGROUND.....	13
IV.	ARGUMENT.....	14
	A. STANDARD OF REVIEW	14
	C. WAC 296-155-305(8)(C) IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO POTELCO IN THIS CASE.....	17
	D. A SERIES OF THREE WARNING SIGNS PRECEDED POTELCO’S BAINBRIDGE WORKSITE IN EVERY DIRECTION, IN COMPLIANCE THE RELEVANT REGULATION.....	19
	E. POTELCO IS NOT LIABLE FOR ALLEGED VIOLATIONS OF LABOR READY’S FLAGGERS UNDER THE ECONOMIC REALITIES TEST.....	22
	F. POTELCO WOULD EFFECTIVELY FACE STRICT LIABILITY FOR THE ACTIONS OF LABOR READY’S FLAGGERS.....	26
V.	CONCLUSION.....	29

TABLE OF AUTHORITIES

STATE COURT CASES

<i>Dep't of Labor and Indus. v. Tyson Foods, Inc.</i> , 143 Wn. App. 576, 178 P.3d 1070 (2008).....	14
<i>J.E. Dunn NW., Inc. v. Dep't of Labor & Indus.</i> , 139 Wn. App. 35, 156 P.3d 250 (2007).....	14
<i>In re Longview Fibre</i> , BIIA Dkt No. 02 W0321, 2003 WL 23269365 (Nov. 5, 2003).....	26
<i>Martinez Melgoza & Assoc., Inc. v. Dep't of Labor & Indus.</i> , 125 Wn. App. 843, 106 P.3d 776 (2005).....	15
<i>In re Obayashi Corp.</i> , BIIA Dkt No. 07 W2003, 2009 WL 2949358 (June 10, 2009)	26
<i>In re Potelco, Inc.</i> , BIIA Dckt. No. 09 W0196, 2011 WL 1903453 (Mar. 1, 2011).....	27
<i>Silverstreak, Inc. v. Dept. of Labor and Indus.</i> , 159 Wn.2d 868, 154 P.3d 891 (2007).....	17, 18
<i>In re Skills Resource Training Center</i> , BIIA Dkt No. 95 W253, 1997 WL 593888 (Aug. 5, 1997).....	22, 23
<i>Stuckey v. Dep't of Labor and Indus.</i> , 129 Wn.2d 289, 916 P.2d 399 (1996).....	15
<i>In re Traffic Control Services</i> , BIIA Dkt No. 06 W0021, 2007 WL 3054890 (July 16, 2007).....	26

STATE STATUTORY AUTHORITIES

RCW 49.17.010	31
RCW 49.17.060.	26, 27, 28
RCW 49.17.150	17
RCW 49.17.150(1).....	16

WAC 296-155-305.....	22
WAC 296-155-305(8)(a)	passim
WAC 296-155-305(8)(c)	passim
WAC 296-155-305(8)(c)	14
WAC 296-155-305(9)(b)	14, 15

ADDITIONAL AUTHORITIES

CABR, Transcript of Amy Drapeau’s Testimony, January (“Drapeau”).....	8, 9, 10, 23, 24, 25
CABR, Transcript of Larry Hensley’s Testimony, January (“Hensley”)	5, 6, 7, 8, 9, 10, 11, 12, 13, 21, 23, 24, 25, 26
CABR, Transcript of Jeremy Ketchum’s Testimony, Jan. (“Ketchum”)	11, 12, 13, 16, 17, 18, 19, 23
CABR, Transcript of Judge Straume’s Opening Statement,.....	14

I. INTRODUCTION

Potelco, Inc. (“Potelco”) is an electrical contractor that performs work on high-voltage power lines. Potelco’s worksites are sometimes located near streets and throughways, and require flagging operations to control traffic. At these worksites, Potelco uses flaggers from third-party vendors, such as Labor Ready. This appeal addresses flagging operations at two Potelco worksites located in Kitsap County, Washington: one in Bremerton; and one on Bainbridge Island.

At the Bremerton worksite, Labor Ready flaggers set up a series of three advanced warning signs on the road adjacent to where Potelco was working. Based on the low-speed road conditions, the spacing between the signs provided drivers sufficient advanced notice of the flaggers and the worksite.

At the Bainbridge location, another contractor, Hoss Brothers, was working on the same street as Potelco. Hoss Brothers had set up a series of three advanced warning signs to notify drivers about the construction taking place on that street. Rather than flooding the area with work signs, Labor Ready flaggers set up enough additional signs to provide notice to drivers who might emerge from the few driveways between Hoss Bros. and Potelco’s worksites.

The Department of Labor and Industries (“Department”) issued Potelco citations under Washington’s Industrial Safety and Health Act (“WISHA”) in connection with these worksites. The Department alleges that (a) the sign spacing at Potelco’s Bremerton worksite was not “appropriate,” (b) a Labor Ready flagger stepped briefly into the lane of traffic at Potelco’s Bremerton worksite, and (c) there were not enough advanced warning signs at Potelco’s Bainbridge worksite.¹

Potelco respectfully requests that the Court vacate the citations because the flagging operations complied with the relevant WISHA standards, given the conditions at each worksite. Potelco should not be held liable for the actions of Labor Ready’s flaggers in any event because it did not control those flaggers and because Potelco would effectively face strict liability for the flaggers’ actions.

II. ASSIGNMENTS OF ERROR

Potelco respectfully asserts that the Superior Court erred in affirming Findings of Fact Nos. 2-3, and 12-13, and in adopting Conclusions of Law Nos. 2, 4, and 7-8 as set forth in the Board’s Decision and Order, because these Findings of Fact were not supported by

¹The Department also alleged that Potelco did not have a traffic control plan at either worksite as required by WISHA. Those alleged violations were previously dismissed and are not the subject of this appeal.

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 Board erred in adopting Finding of Fact No. 2.

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

Did the Board err in adopting Finding of Fact No. 2, when substantial evidence shows that Potelco's Bainbridge Worksite was preceded by a series of three advance warning signs in each direction of the worksite?

Assignment of Error No. 2: The Board erred in adopting Finding of Fact No. 3.

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

Did the Board err by adopting Finding of Fact No. 3, when the substantial evidence fails to establish that Potelco's employees were exposed to a hazard of inadequate warning signs at Potelco's Bainbridge Worksite?

Assignment of Error No. 3: The Board erred in adopting Finding of Fact No. 12.

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

Did the Board err by adopting Finding of Fact No. 12, when the substantial

evidence fails to establish that Potelco's employees were exposed to a hazard of being struck by passing vehicles at the Bremerton Worksite, when Potelco had a series of three advance warning signs preceding its worksite?

Assignment of Error No. 4: The Board erred in adopting Finding of Fact No. 13.

Statement of Issues Pertaining to Assignment of Error No. 4:
Did the Board err by adopting Finding of Fact No. 13, when the substantial evidence fails to establish that Potelco's employees were exposed to a hazard of inadequate warning signs?

Assignment of Error No. 5: The Board erred in adopting the Conclusion of Law No. 2.

Statement of Issues Pertaining to Assignment of Error No. 5:
Did the Board err in adopting Conclusion of Law No. 2, when it is based on factual findings that are not supported by substantial evidence, and when the weight of the evidence shows that the citation was improperly issued and should be vacated?

Assignment of Error No. 6: The Board erred in adopting the Conclusion of Law No. 4.

Statement of Issues Pertaining to Assignment of Error No. 6:

Did the Board err in adopting Conclusion of Law No. 4 when it is based on factual findings that are not supported by substantial evidence, and when the weight of the evidence shows that the citation was improperly issued and should be vacated?

Assignment of Error No. 7: The Board erred in adopting the Conclusion of Law No. 7.

Statement of Issues Pertaining to Assignment of Error No. 7:
Did the Board err in adopting Conclusion of Law No. 7 when the weight of the evidence shows that the citation was improperly issued and should be vacated?

Assignment of Error No. 8: The Board erred in adopting the Conclusion of Law No. 8.

Statement of Issues Pertaining to Assignment of Error No. 8:
Did the Board err in adopting Conclusion of Law No. 8, when the weight of the evidence shows that the citation was improperly issued and should be vacated?

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

Potelco performs work on power lines. (Certified Appeal Board Record (“CABR”), Transcript of Larry Hensley’s Testimony, January 22,

2013 (“Hensley”) at 74.) Sometimes, Potelco worksites require flagging operations. *Id.* at 75. For those worksites, Potelco contracts for flagging services with outside vendors, including Labor Ready. *Id.* Flaggers from these outside vendors are not Potelco employees. *Id.*

When a flagging operation is needed, the relevant Potelco general foreman calls Labor Ready or another outside vendor to request flaggers. *Id.* Potelco relies on Labor Ready to provide trained, certified flaggers. *Id.* at 76. And Potelco relies on the flaggers to set up safe, WISHA-compliant flagging operations. *Id.* at 76-77. Potelco does not train, supervise, or manage Labor Ready’s flaggers. *Id.* Instead, the flaggers have a supervisor at Labor Ready. *Id.* at 75. Labor Ready’s supervisors maintain ultimate control over their flaggers, even when those flaggers are working at a Potelco worksite. Labor Ready’s supervisors may enter Potelco worksites to monitor flaggers, and may give the flaggers instructions at Potelco worksites. *Id.* at 76. In contrast, Potelco does not tell the flaggers how to perform their specific flagging duties; nor does it tell flaggers where to stand or where to set up signs. *Id.* at 76, 79. The Potelco crew members are otherwise occupied and focused on doing their high voltage work, not supervising the flaggers. *Id.*

1. **Potelco's "Bainbridge Worksite" (relating to Citation No. 315249847)**

A Potelco crew led by foreman Larry Hensley was assigned to rebuild a power pole on October 11, 2011, on Bainbridge Island, WA. (Hensley at 43.) The pole was near the intersection of Winslow Way and Madison Avenue² ("the intersection"). *Id.* This job required Potelco to use a flagging operation. *Id.* at 44.

There was extensive and ongoing construction being conducted (of which Potelco was not a part) throughout the length of Winslow Way and on neighboring streets. Thus, at the same time Potelco was doing its work rebuilding a power pole, a general contractor, Hoss Brothers, was also working on Winslow Way, within a few blocks of the intersection and near Potelco's worksite, apparently conducting work relating to the ongoing construction project. *Id.* at 45. Hoss Brothers had been working up and down Winslow Way for the previous few months and on October 11, 2011, it was also using a flagging operation. *Id.* at 46. Accordingly, Hoss Brothers had set up a series of advance warning signs to alert drivers to the presence of its operation. *Id.* at 46.

²Winslow Way runs east and west, while Madison Avenue runs north and south. (Hensley at 72.)

In particular, on Madison Avenue, north of the intersection, Hoss Brothers had set up four advance warning signs. *Id.* at 72. About a block south of the intersection on Madison Avenue, Hoss Brothers had set up three advance warning signs. *Id.* In addition, Hoss Brothers had also set up at least three signs east and west of the intersection on Winslow Way. *Id.* at 72-73. In other words, due to Hoss Brothers' existing signage, there were at least three advance warning signs on Winslow Way and Madison Avenue in all directions from the intersection and Potelco's worksite. (Hensley at 46, 72-73.) The speed limit on Madison Avenue and Winslow Way was 25 miles per hour. (CABR, Transcript of Amy Drapeau's Testimony, January 22, 2013 ("Drapeau") at 37.)

When Mr. Hensley arrived at the intersection on the morning of October 11, four Labor Ready flaggers were already on-site. *Id.* at 44. Mr. Hensley met with the flaggers to inform them where Potelco's jobsite would be set up. *Id.* at 47. He stated that there were at least three existing signs out in every direction from the intersection (referring to the Hoss Brothers signage). *Id.* He also asked the flaggers to erect additional signs for the benefit of any drivers who might emerge from the few driveways located between the intersection and the first Hoss Brothers sign, who would otherwise have no notice of the worksite. *Id.* 47-48. Aside from

this, Mr. Hensley relied on the flaggers to set up a proper flagging operation, based on Potelco's location and the work the Potelco crew would be doing.³ *Id.* at 43, 48-49, 68. After meeting with the flaggers, Mr. Hensley and his crew set up its worksite and began rebuilding the power pole. *Id.* at 49.

Department Compliance Safety and Health Officer ("CSHO") Amy Drapeau received an anonymous referral about Potelco's worksite on Bainbridge Island. (Drapeau at 66.) According to the caller, there were some problems with the flaggers at that location. *Id.* Inspector Drapeau went to Potelco's worksite to investigate. *Id.* at 67. Inspector Drapeau did not find any problems with the flaggers, but she believed that the flagging operation lacked sufficient advance warning signs. *Id.* at 74. Inspector Drapeau approached Mr. Hensley, described her concern, and asked Mr. Hensley to erect additional signs. (Hensley at 49.) Inspector Drapeau, however, did not inform Mr. Hensley how many signs to erect or where to place those signs. *Id.* at 49-50. Nonetheless, Mr. Hensley complied with her request and the flaggers erected more signs. *Id.* at 50, 65.

³Potelco crew members occasionally help flaggers set up signs for flagging operations as the signs and stands require a vehicle to transport. (Hensley at 48.) But even when a Potelco crew helps the flaggers, they still rely on the flaggers to determine how to set them up, which signs to use, and how many. *Id.* at 49.

Although Inspector Drapeau asserts that there were only two advance warning signs near the intersection—one on Winslow Way east of Potelco’s worksite, and one on Winslow Way west of Potelco’s worksite (Drapeau at 7)—she (and the Department) has no evidence to refute Mr. Hensley’s testimony that Hoss Brothers had already set up sufficient signage in all directions from the intersection. Specifically, Inspector Drapeau could not recall how far she looked for signs in each direction from the intersection (Drapeau at 9-12), nor could she recall whether there were any other contractors working near the intersection (*id.* at 12). In fact, Hoss Brothers was indeed conducting work near this intersection and had set up the required number of advance warning signs. (Hensley at 45-46, 72-73.)

Based on Inspector Drapeau’s investigation, the Department issued Potelco Citation No. 315249847, citing Potelco for an alleged repeat serious violation of WAC 296-155-305(8)(a) for allegedly failing to establish a series of three advance warning signs in each direction of Potelco’s worksite from the intersection of Winslow Way and Madison Avenue (“Bainbridge Citation”).⁴

⁴The Department also cited Potelco for an alleged failure to have a traffic control plan onsite. The Board correctly vacated that citation because it was not supported by the evidence. (CABR at 38, 40.)

2. **Potelco's "Bremerton Worksite" (relating to Citation No. 315583005)**

Citation 315583005 relates to a different Potelco crew led by Mr. Hensley that was replacing a power line near 645 4th Street, in Bremerton, WA on December 21, 2011. (Hensley at 77-78.) Because the crew needed to park one of its work trucks in the lane of traffic on 4th Street to perform their work, they needed a flagging operation. *Id.* at 78. When Mr. Hensley arrived at the jobsite, flaggers from Labor Ready were already on-site. *Id.* Mr. Hensley discussed the day's work with the flaggers and what his crew would be doing that day, and requested that the flaggers set up an appropriate flagging operation. *Id.* at 77-79.

After learning where Potelco planned to work, Labor Ready's flaggers set up a flagging operation. (Hensley at 79.) The flaggers set up three advance warning signs. (CABR, Transcript of Jeremy Ketchum's Testimony, Jan. 22, 2013 ("Ketchum") at 6.) The distance between Potelco's worksite on 4th Street and the nearest cross street, Park Avenue, was relatively short, likely less than 150 feet. (Ketchum at 60). (CABR Hearing Transcript, Jan. 22, 2013, Exhibits ("CABR Exhibits") 1A, 7B.) The sign closest to Potelco's worksite ("sign 1") was a "flagger ahead" sign (CABR Exhibit 1A), which was located a short distance from Potelco's worksite. *Id.* The next warning sign ("sign 2") was placed

further away from the worksite, approximately 47 feet from the “flagger ahead” sign. (Ketchum at 60, CABR Exhibit 7B.) The final sign (“sign 3”) was approximately 37 feet from sign 2. (CABR Exhibits 7B, 8.) Sign 3 was on 4th Street, directly next to the intersection with Park Ave. *Id.* One Labor Ready flagger positioned himself within a few feet of sign 1, presumably because of the space restrictions at the site. (Ketchum at 14, 55, CABR Exhibit 1A.) The Department effectively agreed that it was not practical to erect signs on 4th Street on the other side of the intersection from the worksite in order to achieve the required sign spacing established by WAC 296-155-305(8)(c), because parked cars that lined the sides of 4th Street would have obscured any signs that might have been placed along 4th Street. (Ketchum at 44-45; CABR Exhibit 7B.)

After Mr. Hensley’s meeting with the flaggers, he met with his own crew in an alley near 4th Street for a pre-job safety meeting (“tailboard”). (Hensley at 79.) During the tailboard, Department Compliance Safety and Health Officer (“CSHO”), Jeremy Ketchum, observed the flaggers at Potelco’s worksite. (Ketchum at 14, Hensley at 80.) Inspector Ketchum noticed the Labor Ready flagger standing in the roadway, very near the “flagger ahead” sign. (Ketchum at 14.) Inspector Ketchum subsequently approached Mr. Hensley to address his

observations. (Ketchum at 18, Hensley at 80.) At this time, Mr. Hensley's crew had not begun any work and Mr. Hensley had not returned to 4th street from the tailboard to observe the flaggers. (Hensley at 79-80.) Because of Inspector Ketchum's observations of the flaggers, Mr. Hensley decided to shut down the worksite and called the flaggers' supervisor at Labor Ready to report the flagging issues. *Id.*

Based on Inspector Ketchum's inspection, the Department issued Potelco Citation No. 315583005, which included the following alleged violations of WISHA:

- Violation 1-1 alleged a serious violation of WAC 296-155-305(8)(c) ("Bremerton Citation 1-1"), which generally requires 100 feet spacing between advance warning signs. Inspector Ketchum believed that Potelco violated this provision because a flagger was standing too close to the "flagger ahead" sign (sign 1).
- Violation 1-2 alleged a serious violation of WAC 296-155-305(9)(b) ("Bremerton Citation 1-2"), which requires flaggers to stand on the shoulder adjacent to the road user being controlled or in the closed lane prior to stopping road users. Inspector Ketchum believed that Potelco violated this provision because he observed the flaggers standing in the lane of traffic before road users had stopped.⁵

B. PROCEDURAL BACKGROUND

⁵The Department also cited Potelco for an alleged failure to have a traffic control plan onsite. The Board correctly vacated this citation because it was not supported by the evidence. (CABR at 40.)

Potelco appealed the Bainbridge and Bremerton Citations to the Board on April 12, 2012 (CABR at 54-55, 179-180). The Board consolidated both appeals, and a hearing was held at the Board's Seattle office before Judge Steven Straume on January 22, 2013. (CABR at 74, Transcript of Judge Straume's Opening Statement, January 22, 2013 at 3.) Judge Straume issued a Proposed Decision and Order on April 15, 2013, affirming the Citations as modified. (CABR at 25-41.) Potelco filed a timely Petition for Review. (CABR at 3-21.) On May 20, 2013, the Board denied Potelco's Petition for Review and adopted Judge Straume's Proposed Decision and Order as the Board's final Decision and Order. (CABR at 1.) On June 19, 2013, Potelco appealed the Board's Decision and Order to the Kitsap County Superior Court. (*Potelco, Inc. v. Dep't of Labor and Indus.*, Kitsap County Cause No. 13-2-01367-5, Notice of Appeal to Superior Court (filed 6/20/2013)). On April 17, 2014, Judge Jennifer Forbes entered a memorandum order affirming the Board's Decision and Order. (Clerk's Papers ("CP") at 67-80.)⁶ Potelco timely appealed to this Court on May 14, 2014. (*Potelco, Inc. v. Dep't of Labor*

⁶On June 27, 2014, Judge Forbes signed a judgment and order summarizing her memorandum order. (*Potelco, Inc. v. Dep't of Labor and Indus.*, Kitsap County Cause No. 13-2-01367-5, Judgment (entered 6/27/2014)), which was entered after Potelco filed its designation of clerks papers on June 16, 2014 (CP at 81-83).

and Indus., Kitsap County Cause No. 13-2-01367-5, Notice of Appeal to Washington State Court of Appeals, Division II (filed 5/16/2014)).

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. ADVANCED WARNING SIGNS WERE PROPERLY SPACED AT POTELCO'S BREMERTON WORKSITE

WAC 296-155-305(8)(c) sets forth the required spacing for advanced warning signs. For urban streets with a speed limit of 25 mph or less, there must be at least 100 feet between warning signs. WAC 296-155-305(8)(c). While a drawing within WAC 296-155-305(8)(c) arguably suggests that the first warning sign should be 100 feet from the flagger, the actual text of the regulation states that the spacing between warning signs may be adjusted to fit roadway conditions. Even then, WAC 296-155-305(8)(c) provides no specific guidance on how sign spacing may be adjusted if roadway conditions warrant it. *See* WAC 296-155-305(8)(c).

Here, the flaggers set up three advance warning signs consistent with WAC 296-155-305(8)(c), but due to road conditions, namely the length of the roadway on 4th Street between the job site and Park Ave, there was not enough space to allow for 100 feet between each sign and the flagger. (Ketchum at 60, CABR Exhibit 8.) This point is not disputed—indeed, Inspector Ketchum agreed that there was not enough space on the roadway for the first sign to be placed at least 100 feet away from the flagger and that the flaggers were correct to condense the sign spacing and their positioning relative to the signs. (Ketchum at 44-45.) Inspector Ketchum nonetheless concluded that the sign spacing was not “appropriate” and issued Bremerton Citation 1-1. *Id.*

This opinion of Inspector Ketchum, which finds no support in WAC 296-155-305(8)(C) or any other source of guidance,⁷ is apparently the sole basis for the Board's decision to affirm Violation 1-1 of Citation No. 315583005. Because Inspector Ketchum's opinion has no basis in fact or law, substantial evidence does not support the Board's conclusion that Potelco violated WAC 296-155-305(8)(c).

C. **WAC 296-155-305(8)(C) IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO POTELCO IN THIS CASE**

Department regulations are unconstitutionally vague if they allow the Department to make arbitrary discretionary decisions. *Silverstreak, Inc. v. Dept. of Labor and Indus.*, 159 Wn.2d 868, 890, 154 P.3d 891 (2007). A Department regulation that requires conduct in terms so vague that people of common sense must guess as to its meaning violates essential due process. *Id.* If employers cannot rely on clear Department

⁷Other than the WAC at issue, Inspector Ketchum mentioned only one source that may be relevant—the Manual of Uniform Traffic Control Devices (“MUTCD”) (Ketchum at 55-56). The MUTCD, however, provides only a “recommended advance warning sign minimum spacing” of 100 feet on low-speed urban roads. MUTCD, § 6C.04, Table 6C-1 (emphasis added). It goes on to state that “The distances contained in Table 6C-1 are *approximate*, are intended for *guidance purposes only*, and should be applied with engineering judgment. *These distances should be adjusted for field conditions, if necessary, by increasing or decreasing the recommended distances.*” *Id.* at § 6C.04 (emphasis added). Thus, the MUTCD actually envisions and validates the adjustments to the sign spacing that the flaggers made here given the field conditions and provides no support for Inspector Ketchum's opinion.

interpretations in effect at the time they act, they are left to guess at the meaning of regulations. *Id.*

The Department has not identified a single regulation or credible source providing guidance to employers as to how advanced warning signs and flaggers should be spaced when roadway conditions permit (or, as here, require) spacing other than as provided in WAC 296-155-305(8)(c). People of common sense are therefore left to guess as to the meaning of the WISHA regulation, in violation of essential due process. *Id.* at 890. Indeed, in this case, the Department's own inspector could not identify what sign spacing would have been appropriate and admitted that the flaggers were correct to condense the sign spacing and their positioning. (Ketchum at 44-45.)

Moreover, Inspector Ketchum's testimony indicates that even he could not consistently apply WAC 296-155-305(8)(c) case to case. While he initially testified at hearing that it was appropriate for the flaggers to reduce the 100 foot spacing requirement based on the road conditions (Ketchum at 44-45), he later contradicted himself, stating that it was *not* appropriate to reduce the spacing requirement here. (Ketchum at 58.) On cross-examination, Inspector Ketchum was asked to provide a reason for his sudden change of opinion. *Id.* at 59. Inspector Ketchum took a long

pause to ponder the question, but was still unable to provide an explanation. *Id.* at 58-59. Inspector Ketchum’s unexplained about-face underscores the problem here: that the cited regulation is too vague to provide anyone—employers and the Department alike—with meaningful notice of the relevant standard, and is therefore unconstitutionally vague.

D. A SERIES OF THREE WARNING SIGNS PRECEDED POTELCO’S BAINBRIDGE WORKSITE IN EVERY DIRECTION, IN COMPLIANCE WITH THE RELEVANT REGULATION

WAC 296-155-305(8)(a) requires three sign advance warning sequences on all flagging operations on roadways with a speed limit below 45 miles per hour. WAC 296-155-305(8)(a) does not explicitly address situations, such as here, in which multiple employers are working in the same vicinity, each with their own flagging operation, and whether in such circumstances, multiple employers may rely on each other’s signage to satisfy the standard. Indeed, WAC 296-155-305(8)(a) is silent as to whether each employer working on a single street must set up their own series of advance warning signs.

While WAC 296-155-305(8)(a) does not address this situation, the Federal Highway Administration’s Manual on Uniform Traffic Control (“MUTCD”) does and is persuasive here. *See generally* WAC 296-155-305 (adopting relevant guidelines and recommendations in the MUTCD

for portions of WISHA's signaling and flagging provisions). According to the MUTCD, "[t]he use of warning signs should be kept to a minimum as the unnecessary use of warning signs tends to breed disrespect for all signs." MUTCD § 2C.02. This is practical guidance for the reality of construction sites where multiple contractors or subcontractors may work near each other on or around a single road. If WAC 296-155-305(8)(a) is interpreted to require each employer at a multi-employer worksite or area to have their own set of advance warning signs, the roadway would quickly become clogged with signs, effectively rendering each individual sign meaningless, leading to confusion for drivers, which results in unsafe conditions for workers—precisely what WISHA's signaling and flagging provisions are meant to avoid.

In this case, the existing Hoss Brothers signage at the worksite not only satisfied the standard in WAC 296-155-305(8)(a), but provided clear signage for drivers leading up to the Potelco worksite at the intersection, thereby better ensuring the safety of the flaggers and Potelco crew. Interpreting WAC 296-155-305(8)(a) as Inspector Drapeau did, to require Potelco to set up its own advance warning sequence in addition to the existing Hoss Brothers signage, would have resulted in at least 24 advance

warning signs leading up to the intersection. (Hensley at 50, 72-73).⁸ This would have been excessive and likely to lead to driver confusion and/or disregard for all signage in the area, heightening the risk to all workers in the area, including the flaggers and Potelco crew at issue here.

The Board contended that Potelco's worksite needed to be within 300 feet of Hoss Brothers' worksite, in order for Hoss Brothers' signs to cover the Bainbridge worksite. (CABR at 35.) This conclusion finds no support in the relevant regulation, WAC 296-155-305(8)(a), which says nothing about such a requirement—it discusses only the distance between advance warning signs and a single worksite. It is silent on situations where multiple employers are working in the same vicinity, and says nothing about the distance between such worksites.

In sum, the existing Hoss Brothers advance warning signs surrounded Potelco's worksite in each direction and complied with WAC 296-155-305(8)(a), which does not explicitly require an employer, under such circumstances, to set up additional signage where pre-existing signage is sufficient. In this case, doing so would have likely created driver confusion or disregard for flagging signs, nullifying the purpose of signage. The Department has not established that under these facts, the

⁸Inspector Drapeau does not recall whether there were other contractors working in the area, or whether those contractors set up flagging signs. (Drapeau at 12.)

requirements of WAC 296-155-305(8)(a) or the purposes of WISHA were not met. Accordingly, the Department has not met its burden of proving a WISHA violation.

E. POTELCO IS NOT LIABLE FOR ALLEGED VIOLATIONS OF LABOR READY'S FLAGGERS UNDER THE ECONOMIC REALITIES TEST

Under WISHA, employers are responsible for the safety and health of their own employees. *See* RCW 49.17.060. Sometimes, generally in situations involving leased or temporary employees, two employers may share responsibility for the same employees. *See In re Skills Resource Training Center*, BIIA Dkt No. 95 W253, 1997 WL 593888, *2 (Aug. 5, 1997). When there is a WISHA violation involving such leased or temporary employees, the Board uses the “economic realities” test to determine which employer should be issued the WISHA citation. *Id.* at

*4. The test requires an analysis of:

- (1) who the workers consider their employer;
- (2) who pays the workers' wages;
- (3) who has the responsibility to control the workers;
- (4) whether the employer has the power to control the workers;
- (5) whether the employer has the power to fire, hire, or modify the employment condition of the worker;

- (6) whether the workers' ability to increase their income depends on efficiency rather than initiative, judgment, and foresight; and
- (7) how the workers' wages are established.

Id. The key question is whether the employer has the right to control the worker. *Id.* In a joint-employer situation, it is inappropriate to cite an employer for a WISHA violation unless that employer controlled the workers. *Id.* at *2.

The Board summarily concluded that Potelco controlled the flaggers at the Bainbridge and Bremerton worksites based only on the fact that Mr. Hensley was the Potelco foreman at those worksites. (CABR at 33-34.) Although Potelco has general authority over its own worksites (Hensley at 61), this does not *de facto* confer authority over each and every worker that might perform work at a particular worksite. Application of the economic realities test here shows that Potelco was not the responsible employer and should not have been cited for the conduct of Labor Ready's flaggers:

- *Factor 1: Who the workers consider their employer.*
The flaggers here considered Labor Ready to be their employer, not Potelco. (Drapeau at 3, Ketchum at 42.)

- *Factor 2: Who pays the workers' wages.* Labor Ready sets and pays the flaggers' wages, not Potelco. (Drapeau at 5.)
- *Factors 3 and 4: Who has the responsibility to control the workers and whether the employer has the power to control the workers.* Labor Ready supervises its own flaggers, not Potelco. (Hensley at 42-43.) Indeed, Mr. Hensley does not consider himself responsible for directing the Labor Ready flaggers (Hensley at 42) and if he had any issue with them, he would have to contact the relevant Labor Ready supervisor to remedy the problem (*id.* at 43, 77).
- *Factor 5: Whether the employer has the power to fire, hire, or modify the employment condition of the worker.* Mr. Hensley cannot hire or fire the flaggers, cannot discipline them, and cannot otherwise change their employment situation. (Drapeau at 5, Hensley at 77.)⁹

⁹Factors 6 and 7 would weigh in favor of finding Labor Ready the controlling employer as only it has access to the information necessary to prove those elements.

With no authority to discipline, fire, or suspend Labor Ready's flaggers, a Potelco foreman's only remedy when a flagger is acting inappropriately or unsafely is to shut down the worksite and inform the flaggers' Labor Ready supervisor (Hensley at 77). In contrast, the Labor Ready supervisor is authorized to enter the Potelco worksite at any time, provide relevant instruction to the flaggers, remove flaggers from Potelco's worksite, discipline flaggers, and terminate the flaggers' employment. *Id.* 42-43, 75-77; (Drapeau at 6). Under the economic realities test, Labor Ready is responsible for the flaggers' alleged conduct and the Department improperly cited Potelco.

In addition, Washington Regional Directive ("WRD") 1.15 sets forth the Department's protocol for assessing "dual employer" situations where there is a "primary employer" (*i.e.*, an employer of record), and a "secondary employer" (*i.e.*, an on-site employer). *See* WRD 1.15, § I (July 7, 2006). To the extent this situation presented a dual employer situation, Potelco was a secondary employer, and is liable for violations only when supervising or controlling Labor Ready's flaggers. *Id.* at § III(D). Importantly, WRD 1.15 states that a secondary employer does *not* control employees from a temporary employment agency (*e.g.*, Labor Ready), when the contractor relies on the temporary agency for guidance

about workplace safety. WRD 1.15 at § IV(B). That is precisely Potelco's relationship with Labor Ready flaggers. Potelco expects the flaggers to be the flagging experts—properly certified, thoroughly trained, and knowledgeable about WISHA's flagging requirements. (Hensley at 43, 68.)

Under the economic realities test set forth in *In re Skills* and under the Department's own WRD 1.15, Potelco was improperly cited for the conduct of Labor Ready's flaggers.

F. **POTELCO WOULD EFFECTIVELY FACE STRICT LIABILITY FOR THE ACTIONS OF LABOR READY'S FLAGGERS**

The Citations at issue should be vacated because they would effectively hold Potelco strictly liable for the conduct of non-employees. The Board has long held that WISHA does not establish a strict liability standard for employers. *In re Obayashi Corp.*, BIIA Dkt No. 07 W2003, 2009 WL 2949358, *4 (June 10, 2009); *In re Longview Fibre*, BIIA Dkt No. 02 W0321, 2003 WL 23269365, *1 (Nov. 5, 2003); *In re Traffic Control Services*, BIIA Dkt No. 06 W0021, 2007 WL 3054890, *7 (July 16, 2007). Indeed, WISHA's purpose is to promote safe working conditions “*insofar as may reasonably be possible.*” RCW 49.17.010 (emphasis added). As such, WISHA contains a knowledge element—that

is, the Department must establish that an employer knew or should have known about a WISHA violation. *In re Longview Fibre*, 2003 WL 23269365 at *2. The Board has interpreted this element, however, to require far less than actual knowledge in its traditional sense. For example, the Board states that an employer has “constructive knowledge” of a violation (i.e., should have known a violation would occur), when the employer does not train the offending employee on the cited WISHA regulation. *See In re Potelco, Inc.*, BIIA Dckt. No. 09 W0196, 2011 WL 1903453, *4 (Mar. 1, 2011). As noted above, Potelco does not provide any training to Labor Ready’s flaggers, as Labor Ready trains its own flaggers. Thus, for any WISHA violations committed by flaggers at Potelco worksites, WISHA’s “knowledge” element may necessarily be satisfied. In essence, this holds Potelco strictly liable for any such violations. Potelco could escape strict liability only by training Labor Ready’s flaggers on all relevant WISHA flagging regulations. This, however, would defeat Potelco’s very purpose for using Labor Ready flaggers—which is to obtain flaggers who are properly certified, thoroughly trained, and currently prepared to perform their flagging duties.¹⁰

¹⁰ In addition to being foreclosed from rebutting the “knowledge” element of a

Holding Potelco liable for the violations in this case would essentially render Potelco strictly liable anytime a contracted flagger violates WISHA. This is contrary to WISHA and Board case law and warrants vacating the Bainbridge Citation and Bremerton Citations 1-1 and 1-2.

WISHA citation, Potelco would also be unable to establish any affirmative defenses to WISHA liability. For example, in cases where a citation is issued but the employer believes it has taken all reasonable efforts to comply with WISHA, the employer generally may pursue the affirmative defense of unpreventable employee misconduct, which, if established, releases the employer of any liability for the cited violation. RCW 49.17.120(5)(a); *Legacy Roofing, Inc. v. Wash. State Dept. of Labor and Indus.*, 129 Wn. App. 356, 362-63, 119 P.3d 366 (2005). In this way, the employee misconduct defense protects employers from strict liability for employees' misconduct.

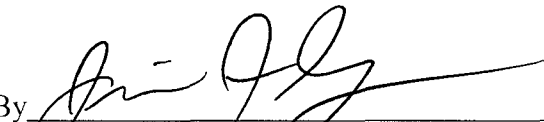
To establish the employee misconduct defense, WISHA requires the employer to show, among other things, that it provided training to employees that is designed to prevent the violation. (1) a thorough safety program, including work rules, training, and equipment designed to prevent the violation; (2) adequate communication of these rules to employees; (3) steps the employer takes to discover and correct violations of its safety rules; and (4) steps the employer takes to effectively enforce its safety program as written in practice, not just in theory. RCW 49.17.120(5)(a). Here, however, because the flaggers Potelco uses are not Potelco employees, Potelco does not provide them with a copy of the safety program, Potelco does not train the flaggers or communicate any safety requirements or rules to them, and Potelco is unable to discipline them as it would its own employees. (Hensley at 42-43, 76, 79-80, 89-90.) Thus, in the case of flaggers provided by third-party vendors, such as Labor Ready, Potelco will never be able to establish at least three of the four elements of the employee misconduct defense, essentially rendering it strictly liable anytime a contracted flagger violates WISHA

V. CONCLUSION

Potelco respectfully requests that the Court dismiss the Bremerton and Bainbridge Citations in their entities.

DATED this 29th day of August, 2014.

RIDDELL WILLIAMS P.S.

By 
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Josias Flynn, WSBA #44130
Attorneys for Appellant Potelco, Inc.

CERTIFICATE OF SERVICE

I, Jazmine Mataulia, certify that:

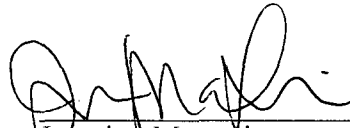
1. I am an employee of Riddell Williams P.S., attorneys for Appellant Potelco, Inc. in this matter. I am over 18 years of age, not a party hereto, and competent to testify if called upon.

2. On Thursday, August 29, 2014, I served a true and correct copy of the foregoing document on the following party, attorney for Respondent, via hand delivery, and addressed as follows:

Anastasia Sandstrom, WSBA #24163
Washington Attorney General's Office
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Seattle, Washington, this 29th day of August, 2014.


Jazmine Mataulia

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