NO. 46256-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

POTELCO, INC.,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

BRIEF OF RESPONDENT

ROBERT W. FERGUSON
Attorney General

JAMES P. MILLS
Assistant Attorney General
WSBA No. 36978
Office of Attorney General
1250 Pacific Avenue, Suite 105
PO Box 2317
Tacoma, WA 98401

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Other Authorities

Regulations

I. INTRODUCTION

Potelco arranged for flaggers to protect Potelco worksites in Bainbridge Island and in Bremerton. Although the flaggers were provided by a temporary employment agency, the Board of Industrial Insurance Appeals (Board), applying the economic realities test, correctly found that Potelco was a responsible employer, because it had control of the work-site and the temporary employees. Substantial evidence in the record supports the Board's findings that: Potelco allowed a flagger to work in the roadway, even though this practice is specifically prohibited by work-place safety regulations; Potelco allowed a flagger to work right next to a warning sign, even though the regulation requires the sign to be placed in advance to a give a driver time to see the flagger working; and, Potelco failed to place three warning signs from every direction approaching a work site, as required by regulation. The Board properly concluded that Potelco violated worker safety regulations regarding flagging operations at the two worksites.

The Board properly affirmed the Department of Labor & Industries' (Department) work place safety citations. Because substantial evidence supports the Board's findings, this Court should affirm.

II. COUNTERSTATEMENT OF THE ISSUES

1. WAC 296-155-305(9)(b) prohibits a flagger from standing in a lane used by moving road users until road users have stopped. Does substantial evidence support that Potelco violated WAC 296-155-305(9)(b) when it allowed a flagger to work in the roadway at the Bremerton worksite?

2. WAC 296-155-305(8)(a) requires employers to use three warning signs in advance of a flagging operation. Does substantial evidence support that Potelco violated WAC 296-155-305(8)(a) when it allowed a flagger to work immediately adjacent to the sign and did not place the sign in advance of the flagger at the Bremerton worksite?

3. WAC 296-155-305(8)(a) requires employers to use three warning signs in advance of a flagging operation "on all roadways." Does substantial evidence support that Potelco violated the rule when the inspector testified that Potelco failed to use three warning signs in advance of the flagger in two directions of a four-way intersection at the Bainbridge Island worksite and evidence showed that signs for other projects were not in close proximity?

4. WAC 296-155-305(8)(a) allows employers to reduce the spacing between the advance warning signs in urban areas to fit roadway conditions. Is the rule unconstitutionally vague as applied to Potelco on

the Bremerton worksite when the flagger was standing directly beside the third advance warning side rather than behind it by 100 feet or a distance reduced to fit roadway conditions?

5. Both the off-site "primary" employer and the on-site "secondary" employer can be held responsible for violations of the Washington Industrial Health & Safety Act (WISHA) involving temporary employees under the economic realities test. Does substantial evidence support that Potelco is a secondary employer for the Labor Ready employees who may be held responsible for the WISHA violations at the Bremerton and Bainbridge Island worksites when Potelco controlled the worksites and the flaggers and the other elements of the economic realities test are demonstrated?

III. COUNTERSTATEMENT OF THE FACTS

A. Potelco Allowed a Flagger to Work in the Roadway and Failed to Ensure That There Was Adequate Spacing Between the Flagging Station and Warning Signs at the Bremerton Worksite

Jeremy Ketchum and Amy Drapeau, compliance safety and health officers for the Department, inspected Potelco's worksite in Bremerton, Washington in October 2011. BR Ketchum 13-15.[1] Inspector

[1] The certified appeal board record will be cited as "BR" followed by the witness name and page number. Inspector Drapeau's testimony regarding the citations associated with the Bainbridge Island worksite are divided into direct and cross-examination. Cross-examination was renumbered and is designated "II."

Ketchum is trained to conduct workplace inspections; he identifies hazards and talks with employers about any concerns he identifies during the inspection. BR Ketchum 11. As part of his training with the Department, he was trained to address flagging. BR Ketchum 12. Inspector Drapeau has worked at the Department for nine years and is currently a lead safety compliance officer. BR Drapeau 63. She sits in as a supervisor, trains new employees, and reviews the reports of other officers. BR Drapeau 63.

When Inspector Ketchum and Inspector Drapeau visited Potelco's Bremerton worksite for the inspection, they saw a flagger standing in the roadway directly beside the advanced warning sign for flaggers. BR Ketchum 14, 18. This is concerning because a flagger standing in the roadway has the potential of being struck by a vehicle and if the flagger is standing at the sign, it "gives the motorist no warning that the flagger is ahead." BR Ketchum 14. Inspector Ketchum took photographs at the site, including photographs showing the flagger standing in the roadway directly beside the advanced warning sign. BR Ketchum 19, 27, 30; BR 103; Exs. 1A, 2B, 3B, 4B. Inspector Ketchum talked to Larry Hensley, who identified himself as the site foreman. BR Ketchum 17. Inspector Ketchum explained to Hensley that he was concerned that the flagger was standing in the roadway. BR Ketchum 18-19. Inspector Ketchum also spoke with the flaggers. BR Ketchum 24. One flagger,

Tom Biggs, indicated that the foreman (Hensley) was in charge of the worksite. BR Ketchum 25. Hensley told them to set up the flagging operations and conduct flagging operations at the site. BR Ketchum 25. Hensley shut down the worksite after the inspection because of the problems with the flagging operations. BR Hensley 82.

Inspector Ketchum recommended citing Potelco under WAC 296-155-305(9)(b), which requires an employer to ensure that flaggers are standing either on the shoulder adjacent to the road or on the road in the closed lane prior to the point where road users would come to a stop. BR Ketchum 31. Indeed, Inspector Ketchum observed two flaggers directing traffic and standing in the lane prior to road users coming to a stop. BR Ketchum 14, 18. Inspector Ketchum found that this could result in severe injuries. BR Ketchum 35.

Inspector Ketchum also recommended citing Potelco for its violation of the flagging regulation, WAC 296-155-305(8)(c), which requires a "three sign advance warning sequence on all roadways" when a flagging operation is used. He recommended the citation as a serious violation because Potelco did not ensure that the spacing of advance warning signs complied with the rule, which could endanger the flagger. BR Ketchum 31, 35. Specifically, Inspector Ketchum observed a flagger positioned right next to the "Flagger Ahead" sign. BR Ketchum 31-32.

Thus, there was zero distance between the flagger and the sign. BR Ketchum 53. Inspector Ketchum found that this placement violated the requirement that, on streets with 25 MPH speed limit, three advance warning signs must be spaced according to the rule. BR Ketchum 31. He found that not maintaining the required distance could result in severe injuries. The Department cited Potelco for each separate violation of flagging requirements, with a separate penalty for each violation. BR 56.

B. Potelco Did Not Ensure That the Worksite on Bainbridge Island Had Three Advanced Warning Signs for Flaggers From Each Direction

Inspector Drapeau also conducted an inspection of a worksite in December 2011 after receiving an anonymous referral. BR Drapeau 66. The referral indicated that that there were flaggers standing in the roadway and that they lacked hard hats and vests. BR Drapeau 74. The worksite was on Bainbridge Island near the corner of Winslow Way and Madison Avenue South. BR Drapeau 66-67. The speed limit on Winslow Way and Madison Avenue in the proximity to the worksite was 25 mph. BR Drapeau 37; Ex. 11B. Drapeau did not see the problems alleged by the anonymous caller when she approached the worksite, but she did see that there were missing signs warning motorists of the presence of flaggers. BR Drapeau 74. All road construction must have a least three advance warning signs from each direction. WAC 296-155-305(8)(a);

BR Drapeau 75. Here, Inspector Drapeau checked the entire site to see if the three required signs were present in each direction of the four-way intersection. BR Drapeau 74-75. Inspector Drapeau approached the site from three of the four directions and looked in the fourth direction. BR Drapeau 75. She also drove a couple of blocks around the worksite. BR Drapeau II 7. She drove up Madison Avenue heading north. BR Drapeau II 11. She found that two directions, Madison north and south from worksite, had no signage and two directions, Winslow west and east, had insufficient signage—one sign in each direction instead of the required three signs per direction. BR Drapeau II 6-7. Inspector Drapeau took photographs of the site showing that it lacked warning signs down the streets. BR Drapeau 73; Exs. 9A, 9B, 10B, 11A, and 13A.

Inspector Drapeau asked the workers who was in charge of them and they indicated that Potelco's foreman was in charge. BR Drapeau II 3. Inspector Drapeau then interviewed Hensley, the foreman. Hensley told Inspector Drapeau that the reason that they did not have additional signs was that the city told them that was all that they needed. BR Drapeau 79. Hensley did not assert that there were three signs in each direction and he did not direct Inspector Drapeau towards any. BR Drapeau 79. Hensley did not tell Inspector Drapeau that Labor

Ready was responsible for ensuring safety on the worksite. BR Drapeau II 28.

The Labor Ready flaggers attended a "tailboard" discussion about the worksite before work commenced. BR Hensley 47. Hensley did not tell the temporary employees specifically where to set up signs, but he testified he told them "we had signs out every direction, that we'd put another set behind us. Because they're so far away, we'd put an extra set up." BR Hensley I 47. The signs he describes were three or four blocks away from the Potelco worksite. BR Hensley I 47-48.

Other contractors, including Hoss Brothers, were performing work several blocks away on Winslow Way. BR Hensley 61-62. Hensley testified at hearing that he considered all of Winslow Way being worked as one jobsite, but then conceded that Hoss Brothers was not responsible for doing all the traffic control and clarified that it was "a huge jobsite, with a bunch of little jobsites inside it." BR Hensley I 47-48, 62. Ultimately, Hensley agreed that Potelco was responsible for ensuring that the road was properly flagged and that he was in control of the Potelco worksite. BR Hensley I 61-62.

Hensley testified that he tells the flaggers where the worksite is, what needs to be flagged around, and "this is what [he] need[s] done." BR Hensley 43. Potelco provides the signs and cones they need, assists

them in placing them, and makes sure that they have enough. BR Hensley 48, 68. If the flaggers were out of compliance, he would tell them so and report any problems to Labor Ready. BR Hensley 43, 64. After Inspector Drapeau raised the flagging issue, Hensley stated "we went out and set more signs out [in] each direction on top of the signs that were already out there." BR Hensley 50. Potelco took care of the issue and did not report the problem to Labor Ready. BR Hensley 66.

Inspector Drapeau recommended a citation for Potelco's violation of WAC 296-155-305(8)(a). Based on her observations, Inspector Drapeau observed that there were not three advance warning signs on Winslow Way and Madison Avenue where flaggers were directing traffic and other employees were performing construction. Inspector Drapeau found that there was only one advanced warning sign in each direction on Winslow Way and there were no advanced warning signs in both directions on Madison Avenue. She found that not maintaining the required advanced warning signage could result in severe injuries.

C. The Board Found That Potelco Violated the Flagging Regulations, and the Superior Court Affirmed

Based on the inspectors' recommendations, the Department issued two citations to Potelco, with three violations and three monetary amounts assessed. Potelco appealed to the Board. The industrial appeals judge

affirmed in part the two citations.[2] The industrial appeals judge applied the economic realities test and concluded that Potelco was an employer liable for the violations on both worksites. BR 32-34; Finding of Fact (FF) 10, 25; Conclusions of Law (CL) 6. The industrial appeals judge found that Potelco failed to place the required three advance warning signs to warn drivers approaching the flagger at its Bainbridge Island work site. BR 13; FF 2. The judge also found that "Potelco was unable to take advantage of the warning signs placed by other contractors surrounding the Potelco worksite," because "[i]t is clear from the testimony of the witnesses and the pictures taken of the worksite that none of surrounding worksites were within 300 feet of the Potelco worksite." BR 35. The industrial appeals judge concluded that Potelco violated WAC 296-155-305(8)(a) by permitting an employee to perform flagging duties without proper signage and it was a serious violation. BR 35. The industrial appeals judge also found Potelco failed to ensure adequate spacing between the flagger directing traffic on its Bremerton worksite and the advanced warning sign meant to warn drivers of his presence and that two flaggers on the Bremerton worksite were standing in the roadway in an unprotected location to conduct the flagging. FF 12; BR 36. The industrial appeals judge concluded that Potelco had committed another

[2] The industrial appeals judge dismissed two traffic plan violations and the Department did not challenge their dismissal.

violation of WAC 296-155-305(8)(a) and that they also violated WAC 296-155-305(9)(b), which requires an employer to ensure that flaggers are standing either on the shoulder adjacent to the road or on the road in the closed lane prior to the point where road users would come to a stop. BR 36.

Potelco petitioned the full Board for review. BR 3. The Board denied review, adopting the proposed decision as its decision. BR 1. Potelco appealed to superior court. CP 1-19. The superior court affirmed the Board, determining that substantial evidence supported the Board's Findings of Fact and Conclusions of Law. CP 80. This appeal follows.

IV. STANDARD OF REVIEW

In a WISHA appeal, this Court reviews the decision by the Board directly 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 substantial evidence supports them. *Elder Demolition, Inc. v. Dep't of Labor & Indus.*, 149 Wn. App. 799, 806, 207 P.3d 453 (2009); RCW 49.17.150(1). Substantial evidence is evidence sufficient to persuade a fair-minded person of the finding's truth. *Id.* at 807. Under the substantial evidence standard of review, the court will not reweigh the evidence. *Raum v. City of Bellevue*, 171 Wn. App. 124, 151, 286 P.3d 695 (2012), *review denied,* 176 Wn.2d 1024

(2013). Unchallenged findings of fact are verities on appeal. *Mid Mountain Contractors, Inc. v. Dep't of Labor & Indus.*, 136 Wn. App. 1, 4, 146 P.3d 1212 (2006).

This Court gives great deference to the Department's interpretation of WISHA. *See Lee Cook Trucking v. Dep't of Labor & Indus.*, 109 Wn. App. 471, 478 n.7, 36 P.3d 558 (2001). The court will uphold the Department's interpretation of its own WISHA regulation "if it reflects a plausible construction of the language and is not contrary to the legislative intent." *Laser Underground & Earthworks, Inc. v. Wash. State Dep't of Labor & Indus.*, 132 Wn. App. 274, 278, 153 P.3d 197 (2006).

To protect workers, Washington courts have established a guiding principle of liberal construction for interpreting WISHA and its rules. *See Elder Demolition*, 149 Wn. App. at 806. The purpose of WISHA is to "assure, insofar as may be reasonably possible, safe and healthful working conditions for every man and woman working in the state of Washington . . . ." RCW 49.17.010.

Constitutional challenges are questions of law reviewed de novo. *In re Welfare of C.B.*, 134 Wn. App. 336, 342, 139 P.3d 1119 (2006). A party challenging a statute has the burden of proving it is unconstitutional beyond a reasonable doubt. *Id.*

V. ARGUMENT

Substantial evidence supports the Board's findings that Potelco allowed its flaggers to work in the roadway and to work without adequate spacing at the Bremerton worksite, and to work without the required three advance warning signs in each direction at the Bainbridge Island worksite. Potelco's constitutional challenge to the advance warning sign regulation is without merit as Potelco cannot dispute it violated the regulation by allowing its worker to stand next to the sign under any reading of the regulation.

Although the flaggers were temporary employees of Labor Ready, WISHA places responsibility upon Potelco for safety on its worksite. Substantial evidence also supports that Potelco was a secondary employer responsible for violations on its worksite as shown by its control of the worksite, its control of the workers, and by other factors under the applicable economic realities test.

A. Potelco Violated WAC 296-155-305 by Failing to Follow the Flagging Requirements at Two Separate Worksites

The Board's decision should be affirmed because Potelco violated provisions of WAC 296-155-305 by allowing a flagger to work in a road way and by not placing the warning signs in accordance with the regulation. The Department cited Potelco for committing serious

violations of WISHA under RCW 49.17.180. Potelco argues that it did not violate the regulations or expose its employees to the hazards protected against in the regulations. App. Br. 2-5.[3] There are three violations at issue, two at the Bremerton worksite and one at the Bainbridge Island worksite.

1. Potelco Violated WAC 296-155-305(9)(b) Because It Allowed a Flagger to Stand in the Lane of Traffic Before Vehicles Had Stopped at the Bremerton Worksite

For the Bremerton worksite, the industrial appeals judge found that a flagger was working in the roadway and was exposed to the hazard of passing vehicles. FF 12, 13, 18.[4] Substantial evidence supports Findings of Fact 12, 13, and 18, and in turn supports the conclusion that Potelco violated WAC 296-155-305(9)(b).

---

[3] Potelco does not claim that the Department did not prove other elements of its prima facie case. To make a prima facie case of a serious violation of a specific rule under WISHA, the Department bears the initial burden of proving the following elements:

> (1) the cited standard applies; (2) the requirements of the standard were not met; (3) employees were exposed to, or had access to, the violative condition; (4) the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition; and (5) there is a substantial probability that death or serious physical harm could result from the violative condition.

J.E. Dunn NW, Inc., 139 Wn. App. at 44-45 (internal quotation omitted).

[4] Potelco has not assigned error to Finding of Fact 18. Because the industrial appeals judge found that a flagger was working in the roadway and was exposed to the hazard of passing vehicles, arguably it therefore is a verity on appeal that Potelco violated WAC 296-155-305(9)(b). *See Mid Mountain Contractors, Inc.*, 136 Wn. App. at 4. In any case, as shown herein, substantial evidence supports the conclusion that Potelco violated WAC 296-155-305(9)(b).

WAC 296-155-305(9)(b) prohibits flaggers from working in the roadway with moving traffic, it provides that:

> Employers, responsible contractors and/or project owners must make sure that . . . [f]laggers stand either on the shoulder adjacent to the road user being controlled or in the closed lane prior to stopping road users. A flagger must only stand in the lane being used by moving road users after road users have stopped.

WAC 296-155-305(9)(b).

Although Potelco assigns error to Findings of Fact 12 and 13, it ignores the evidence of the worker in the road, apparently believing that three warning signs, if present, would have cured the violation. App. Br. 4. But WAC 296-155-305(9)(b) is a separate requirement for the advance warning system and must be complied with. Potelco presents no argument to refute Inspector Ketchum's uncontested testimony that when the inspectors visited Potelco's Bremerton worksite for the inspection, they saw a flagger standing in the roadway directly beside the advanced warning sign for flaggers. BR Ketchum 14, 18. Photographs also show the flagger standing in the roadway directly beside the advanced warning sign. BR Ketchum 19, 27, 30; BR 103; Exs. 1A, 2B, 3B, 4B. The photographs show the flagger performing his duties from that position—switching between "slow" and "stop." *Compare* Exs. 1A, 2B, 3, and 4B. Potelco does not present argument on this violation, but asks in its

conclusion that the citations be vacated. App. Br. 29. Given the lack of argument in its appellant's brief, it has waived any such argument in its reply. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). In any case, substantial evidence supports FF 12, 13, and 18, which in turn supports CL 4 and 8. Potelco violated this regulation when it allowed a flagger to stand in the lane of traffic before road users had stopped.

2. Potelco Violated WAC 296-155-305(8)(a) by Failing to Ensure Advanced Warning Signs Were Placed With Adequate Spacing Before the Flaggers at the Bremerton Worksite

For the Bremerton worksite, the Board found that Potelco failed to ensure adequate spacing between the flagger directing traffic on its worksite and the advanced warning sign meant to warn drivers of his presence BR 12; FF 12. Substantial evidence supports this finding. Potelco violated WAC 296-155-305(8)(a) when its flagger was standing directly next to the third of three required *advance* warning signs rather than 100 feet or a distance justified by the road conditions. The Board's decision should be affirmed because Potelco violated the rule regarding the placement of signs in relation to the flagger meant to warn drivers that a flagger was present before motorists actually reached the flagger.

WAC 296-155-305(8)(c) requires employers to provide flagging under the Advance Warning Sign Spacing table (Table 1). WAC 296-155-305(8)(c). The codes provide for a minimum distance of 100 feet. *Id.* This distance may be reduced in urban areas if required to meet roadway conditions. *Id.* The worker was standing directly beside the third sign. BR Ketchum 54-56.

The purpose of this is to protect flaggers from on-coming drivers by alerting the drivers to the upcoming flagging operation:

> The Department's construction of WAC 296–155–305(8)(a) requires employers to place a three sign advance warning sequence *in a manner that alerts drivers approaching* the work site from all directions of an *upcoming* flagging operation. This interpretation of the regulation is plausible and consistent with the legislative intent to provide safe working conditions.

Potelco, Inc. v. Dep't of Labor & Indus., 166 Wn. App. 647, 654, 272 P.3d 262 (2012) (emphasis added). Failing to have any distance between the last sign before the flagger and the flagger, fails to notify drivers of an *upcoming* flagger. Potelco argues that the flagger set up the three advance warning signs consistent with WAC 296-155-305(8)(c) because due to road conditions, ("the length of the roadway on 4th Street between the jobsite and Park Ave."), there was not enough space to allow for 100 feet between each sign and the flagger. App. Br. 16. This analysis overlooks the undisputed fact that the flagger was standing directly beside the sign.

BR Ketchum 54-56. Inspector Ketchum agreed that roadway conditions could justify reducing the 100-foot spacing requirement between signs. BR Ketchum 44-45. However, "zero is [not] an appropriate reduction in this case." BR Ketchum 53.[5] To the extent that WAC 296-155-305(8)(a) is ambiguous about the reduced spacing allowed by road conditions, the Department's interpretation that the spacing cannot be "zero" is entitled to deference. *See Potelco*, 166 Wn. App. at 654; *Laser Underground*, 132 Wn. App. at 278.[6] Such an approach best advances worker safety and the Court should adopt this approach consistent with the liberal construction of WISHA. *See Elder Demolition, Inc.*, 149 Wn. App. at 806; RCW 49.17.010.

Potelco essentially argues that because of roadway conditions, it could not have set up a three-sign sequence with sufficient distance to be effective because the distance between the work site and the intersection

---

[5] Potelco says that the inspector's testimony changed on this point. App Br. 18-19. But any purported contradictions in testimony are for the fact-finder to weigh, which the Court of Appeals does not second guess. *See Venezelos v. Dep't of Labor & Indus.*, 67 Wn.2d 71, 73, 406 P.2d 603 (1965); *see also Matter of Marriage of Sedlock*, 69 Wn. App. 484, 497-98, 849 P.2d 1243 (1993).

[6] Potelco points to the Federal Highway Administration's Manual on Uniform Traffic Control Devices (MUTCD), which provides guidelines and recommendations for temporary traffic control. *See* WAC 296-155-305. It does not aide Potelco because the language of §6C.04 does not suggest that the recommended distance should be reduced to zero. *Contra* App. Br. 17, n. 7, citing §6C.04 ("The distances contained in Table 6C-1 are approximate, are intended for guidance purposes only, and should be applied with engineering judgment. These distances may be adjusted for field conditions, if necessary by increasing or decreasing the recommended distances."). Indeed, MUTCD §6F.31 reads: "The Flagger (W20-7) symbol sign . . . should be used in *advance* of any point where a flagger is stationed to control road users." (Emphasis added).

was too short. App. Br. at 16-17. But infeasibility is an affirmative defense, *Washington Cedar & Supply Co., Inc. v. Dep't of Labor & Indus.*, 137 Wn. App. 592, 604, 154 P.3d 287 (2007), which Potelco did not raise in this case. Moreover, Inspector Ketchum testified that they were able to comply with the regulation by moving the sign some distance away from the worker. BR Ketchum 45. Potelco was able to abate the hazard by moving the signs, but ultimately decided to shut down the worksite. BR Hensley 82. Substantial evidence supports finding that there was inadequate spacing when there was zero spacing.

3. Potelco Violated WAC 296-155-305(8)(a) Because It Failed to Ensure That There Were Three Advance Warning Signs for the Flaggers in Each Direction at the Bainbridge Island Worksite

For the Bainbridge Island worksite, the Board found that Potelco failed to place the required three advance warning signs to warn drivers of the upcoming flagger. BR 13. This is supported by substantial evidence. Potelco cannot rely on warning signs set up for other worksites when substantial evidence supports the conclusion that there were not signs close enough to the worksite to satisfy the requirements of WAC 296-155-305(8)(a).

Employers must provide "[a] three sign advance warning sequence on all roadways with a speed limit below 45 mph."

WAC 296-155-305(8)(a).[7] Inspector Drapeau testified that Potelco violated this provision because there was only *one* advance warning sign in each direction on Winslow Way and there were *no* advance warning signs in either direction on Madison Avenue. BR Drapeau 74-75; BR Drapeau 6-7, 11. Inspector Drapeau also observed flaggers and other workers working on the Potelco worksite. BR Drapeau II 14. Although Potelco claims to have relied on another contractor's warning signs several blocks away at another worksite, Drapeau's testimony and the photos taken on the worksite show that any purported signs were not visible in the proximity to the worksite. BR Drapeau 73-75; BR Drapeau II 6-7; Exs. 9A, 9B, 10B, 11A, and 13A. This is not a case where the area was "clogged" or "flooded" with signs as Potelco asserts. *See* App. Br. 1, 20. Rather per the testimony of the inspector there were not an adequate number of signs for the specific Potelco worksite.

Nonetheless Potelco argues that that the signs were close enough to suffice for its worksite. App. Br. 20. It points to testimony that the signs were on Winslow Way and Madison Avenue in all directions from the intersection and Potelco's worksite. App. Br. 8, 20. This argument asks this Court to reject Inspector Drapeau's testimony and accept Hensley's testimony. But the court does not reweigh the evidence under the

[7] Employers must reflect the actual condition of work zone and must be taken down or covered when work is not ongoing. WAC 296-155-305(8)(a).

substantial evidence standard of review, but rather views the evidence in the light most favorable to the prevailing party. *Raum*, 171 Wn. App. at 151; *Frank Coluccio Const. Co. v. Dep't of Labor & Indus.*, 181 Wn. App. 25, 35, 329 P.3d 91 (2014). The citation is supported by substantial evidence that the signs were not close enough to the flagger to comply with the spacing requirements of WAC 296-155-305(8)(a).

B. WAC 296-155-305(8)(c) Is Not Unconstitutionally Vague as Applied to Enforcement of the Bremerton Work Site Simply Because It Allows Employers the Flexibility to Address Road Conditions in an Urban Setting

Potelco fails to meet its burden to establish that WAC 296-155-305(8)(c) is unconstitutionally vague when the regulation allows employers to reduce the distance between the three advance warning signs and the flagging station when necessary to address road conditions.

A party who challenges a rule's constitutionality for vagueness—here Potelco—bears the burden of proving beyond a reasonable doubt that it is unconstitutionally vague. *See State v. Watson*, 160 Wn.2d 1, 11, 154 P.3d 909 (2007). A law is unconstitutional when it forbids conduct in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application. *City of Bremerton v. Spears*, 134 Wn.2d 141, 161, 949 P.2d 347 (1998).

Potelco may not assert a facial challenge here because the court evaluates vagueness challenges by inspecting the actual conduct of the party who challenges the rule and not by examining hypothetical situations at the periphery of the rule's scope. *See Weden v. San Juan County*, 135 Wn.2d 678, 708, 958 P.2d 273 (1998); *Halliburton Energy Services v. State, Dep't of Labor*, 2 P.3d 41, 50 (Alaska 2000).[8] A party who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. *See State v. Immelt*, 173 Wn.2d 1, 29-30, 267 P.3d 305 (2011); *see also City of Kennewick v. Henricks*, 84 Wn. App. 323, 326, 927 P.2d 1143 (1996) ("[T]here are statutes which contain both precisely worded prohibitions and prohibitions of uncertain application, and such statute, though potentially vague as to some conduct, may nevertheless be constitutionally applied to one whose act clearly falls within the statute's 'hard core.'" (citations omitted)). Here, Potelco cannot complain that the rule was ambiguous as to its conduct because its flagger was standing directly next to the warning sign. BR Ketchum 14, 18, 19, 27, 30; Exs. 1A, 2B, 3B, 4B. Under the plain language of the regulation, Potelco must provide a "three sign *advance* warning sequence on all roadways with a speed limit below

[8] Facial challenges for vagueness are reserved to enactments that the parties allege involve first amendment violations. *See Weden*, 135 Wn.2d at 708. Potelco has not raised such a challenge here.

45 mph." WAC 296-155-305 (emphasis added); *see contra* App. Br. 18 (claiming the Department has not identified a source providing guidance to employers). The sign must be in advance. Potelco failed to provide *any* distance between the third warning sign and the flagger it was meant to protect and did not advise motorists that he would be present and that was the basis for the Board's findings. *See* FF 12, 18; BR Ketchum 53 ("[t]he Code does not specifically give an absolute minimum. It states minimum 100 feet. The distance may be reduced in urban areas if required. However, I did not feel that zero is an appropriate reduction in this case.").[9] A person of common intelligence would understand from the WAC 296-155-305 that *advance* warning must be provided.

Moreover, a rule is not simply void because it fails to address every conceivable circumstance raised by an appellant. *See Keene v. Board of Accountancy*, 77 Wn. App. 849, 855, 894 P.2d 582 (1995) ("It is true that [the regulation] does not attempt to list all behaviors which, if engaged in concurrently, would impair independence or objectivity. However, the rule is not void simply because it does not list every possible prohibited behavior."). WAC 296-155-305 provides a detailed table explaining the spacing requirements, but provides an alternative when the

[9] Potelco claims that the inspector's testimony did not explain the appropriate distance to be applied under WAC 296-155-305(8)(c). App. Br. at 18. But this ignores that the inspector specifically testified that "zero is [not] an appropriate reduction." BR Ketchum 53.

exact spacing requirements cannot be used given the road conditions in an urban environment. Flexibility does not equal vagueness here.

Here Potelco fails to meet even the most basic requirement that the flagger stand after the sign, so its vagueness claim is a hypothetical and the courts do not strike down rules based on a hypothetical.

C. Potelco Was Properly Cited as a Secondary Employer Under the Joint Employer Worksite Test

In order to advance important safety objectives of WISHA, multiple employers may be cited for violating work place safety standards at a worksite. *See Afoa v. Port of Seattle*, 176 Wn.2d 460, 471-72, 296 P.3d 800 (2013). Potelco is not excused from complying with safety requirements on the grounds that the flaggers were temporary employees from Labor Ready. The Board determined that Potelco should be cited as an employer based on the economic realities test. CL 6; BR 32. Substantial evidence supports this determination. Potelco is a secondary employer under the economic realities test because substantial evidence supports it had ultimate control over both the Bremerton and Bainbridge Island worksites, including the control over the temporary employees hired to perform flagging work for the worksites.

The Washington courts look to federal cases interpreting Occupational Safety and Health Act (OSHA) as persuasive authority on

how to apply the provisions of WISHA because WISHA parallels OSHA. *Lee Cook*, 109 Wn. App. at 478. The Ninth Circuit and Occupational Safety & Health Review Commission apply the economic realities test in determining who is an employer in dual employment situations under OSHA. *Loomis Cabinet Co. v. Occupational Safety & Health Review Comm'n*, 20 F.3d 938, 941 (9th Cir. 1994); *Sec'y of Labor v. Griffin & Brand*, 6 O.S.H. Cas. (B.N.A.) 1702, 1703, 1978 O.S.H.D. (CCH) P 22829, 1978 WL 7060, *2 (O.S.H.R.C. 1978); *Sec'y of Labor v. Van Buren-Madawaska Corp.*, 13 O.S.H. Cas. (B.N.A.) 2157, 2158, 1989 O.S.H.D. (C.C.H.) P 28504, 1989 WL 223348, *1-2 (O.S.H.R.C. 1989).

Potelco suggests that when "there is a WISHA violation involving leased or temporary employees, the Board uses the "economic realities" test to determine *which* employer should be issued the WISHA citation." App. Br. at 22 (emphasis added). Thus, Potelco implies that only one employer may be cited as an employer when there is shared responsibility for the same employees. This is incorrect and Potelco concedes this point later in its briefing. App. Br. 22 ("Sometimes, generally in situations involving leased or temporary employees, two employers may share responsibility for the same employees."). The question to address is whether there is an employment relationship between the endangered workers and the putative employer—whether the cited entity is in fact an

"employer" and the endangered workers are "employees" as defined under WISHA. *See* RCW 49.17.020(4); *see also* RCW 49.17.020(5).[10] Under WISHA, more than one employer can be held responsible for same conduct if it is an employer under the economic realities test. *In re Skills Resource Training Ctr.*, No. 95 W253, 1997 WL 593888, *2 (Bd. Ind. Ins. App. August 5, 1997).[11] Accordingly, the Board applies the economic realities test to situations involving joint employment to determine whether liability for WISHA citation should be applied and Potelco does not dispute that economic realities test applies to the question here. App. Br. 22. The Department also has an extensive written policy consistent with these approaches.[12]

---

[10] "'[E]mployer' means any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in business, industry, profession, or activity in this state and employs one or more employees or who contracts with one or more persons, the essence of which is the personal labor of such persons[.]" RCW 49.17.020(4). "'[E]mployee' means an employee of an employer who is employed in the business of his or her employer whether by way of manual labor or otherwise and every person in this state who is engaged in the employment of or who is working under an independent contract the essence of which is his or her personal labor for an employer under this chapter by way of manual labor or otherwise." RCW 49.17.020(5).

[11] The Board designates a decision significant when it considers it to have "an analysis or decision of substantial importance to the board in carrying out its duties." WAC 263-12-195. *In re Skills Resource Training Ctr.* was designated as significant.

[12] WISHA Regional Directive 1.15 – Dual Employers & DOSH Enforcement, Department of Labor and Industries (July 7, 2006), available at http://www.lni.wa.gov/Safety/Rules/Policies/PDFs/WRD115.pdf (last visited October 10, 2014). WRD 1.15 delineates the distinction between joint employer worksites and multi-employer worksites. Joint employer worksites are sometimes referred to as "dual employer" worksites. *Id.* at 1. Joint employer situations exist when two or more employers are potentially liable for a WISHA violation, and are distinct for multi-employer situations, where parallel citations can be issued to general contractors and subcontractors. *Id.* at 1 (*citing Stute v. P.M.B.C., Inc.*, 114 Wn.2d 454, 788 P.2d 545 (1990)).

There are seven non-exclusive factors of the economic realities test generally applied: (1) Who do the workers consider their employer? (2) Who pays the workers' wages? (3) Who has the responsibility to control the workers? (4) Does the alleged employer have the power to control the workers? (5) Does the alleged employer have the ability to hire, fire, or modify the employment condition of the workers? (6) Does the workers' ability to increase their income depend on efficiency rather than initiative, judgment, and foresight? And, (7) how are the workers' wages established? *Skills*, 1997 WL 593888 at *2; *Griffin & Brand*, 1978 WL 7060 at *2; *see Loomis*, 20 F.3d at 942.

While an analysis under the economic realities test requires an inquiry into all seven factors, the third and fourth elements—the elements of control—are the most persuasive factors in determining whether a putative employer is liable in dual employment situation. *Sec'y of Labor v. MLB*, 12 O.S.H. Cas. (B.N.A.) 1525, 1984-1985 O.S.H.D. (CCH) P 27408, 1985 WL 44744, *4 (O.S.H.R.C. 1985); *see also In re Framers, Inc.*, Nos. 01 W0465 & 02 W0366, 2003 WL 22479571, *4-5 (Bd. Ind. Ins. App. Aug. 8, 2003). Control under the economic realities test as it applies to worker safety laws is chiefly concerned with control over the work environment such that abatement of hazards can be obtained. *Van Buren*, 1989 WL 223348 at *3; *MLB*, 1985

WL 44744 at *4. The economic realities test emphasizes the substance over the form of the work relationship.

Both control factors support a finding that the Potelco is an employer here. The third factor provides substantial evidence that Potelco is a secondary employer because Potelco had the responsibility to control the workers on both worksites. Indeed, through the regulations, duties are placed on "[t]he employer, responsible contractor or project owner . . ." and not merely on the entity who issues the workers' paychecks. WAC 296-155-305(7)(a), (7)(b), (9). The regulations contemplate that multiple entities will have a responsibility to control workers and "overlapping duties further WISHA's ultimate goal of ensuring a safe work place." *See Wash. Cedar*, 137 Wn. App. at 602. As the party in control of the worksites, Potelco had the responsibility to control the flaggers, and the control of the worksite is not in dispute here. Potelco did not take exception to Findings of Fact Nos. 10 and 25. Accordingly, it is a verity on appeal that Potelco controlled *the worksites*. *See Nelson v. Wash. State Dep't of Labor & Indus.*, 175 Wn. App. 718, 723, 308 P.3d 686 (2013) (failure to assign error to findings renders it verity on appeal).

Potelco's control over the worksites also means that it controlled the Labor Ready workers on the worksites. In any case, substantial evidence also supports that Potelco actually had control over the workers

at both worksites. While Labor Ready is the primary employer, who decides which sites the employees work, Labor Ready was not on-site at either worksite when the violations occurred and has limited control over the prevention or abatement of potential hazards that may be present. BR Drapeau 5; *see* BR Hensley 81-82. Conversely Potelco, the secondary employer, is onsite and in control of the abatement of potential hazards. *See* BR Hensley 47. At the Bremerton worksite, the workers indicated that Potelco's foreman was in charge of the worksite. BR Ketchum 25. Potelco told them where to set up and conduct flagging operations at the site. BR Ketchum 25. Hensley shut down the worksite after the inspection because of the flagging problems. BR Hensley 82.

At the Bainbridge worksite, the workers attended a "Tailboard" discussion before work commenced, which provided them information about how they were to perform their duties. BR Hensley 47-48. Potelco provided the signs and cones and helped them set them up. BR Hensley 48, 68. After the flagging issue at the Bainbridge site was raised, Hensley did not call Labor Ready, but "went out and set up more signs out [in] each direction[.]" BR Hensley 50, 66. In other words, Potelco was directly responsible for creating the hazard at the worksite and abating it when it was discovered. This is substantial evidence to show control.

Potelco claims that the Department's policy, WRD 1.15, concludes that a secondary employer does not control employees from a temporary employment agency when the contractor relies on the temporary agency for guidance about workplace safety. App. Br. 26 (citing WRD 1.15 at § IV(B)). Although the WRD 1.15 does not trump the application of the economic realities test in any case, Potelco misreads the application of the WRD 1.15.[13] Under a subheading that addresses how "DOSH staff [should] evaluate the nature of the dual-employer relationship," one bullet point poises the following question and answer:

> Did the violation arise because the secondary employer relied on the primary employer for guidance about workplace safety or health?
> If so, the primary employer may be responsible for the violations (in such circumstances, the secondary employer may be relieved of responsibility by demonstrating the affirmative "creating employer" defense).

This language does not preclude finding that Potelco is a secondary employer as Potelco suggests, but provides an affirmative defense that allows the employer to show that the secondary employer relied on primary employer for guidance on the worksite safety. There is no

[13] "As a general principle, all employers who knew or should have known about the violation and who had or who controlled employees who were exposed to the violation are liable for WISHA violations and should be cited." WRD 1.15 IV.C. "Secondary employers are normally liable and should be cited for each violation to which employees (whether their own or others) were exposed on site. In such circumstances, secondary employers will be liable to citation even if it is determined that the primary employer is also liable for the violation." WRD 1.15 IV.C.1.

evidence in the record that Potelco relied on Labor Ready for guidance in safety and health matters here. Potelco's foreman testified that he expected that the flaggers be properly certified, trained, and knowledgeable about the WISHA flagging requirements. BR Hensley 43, 68. Expecting employees to be prepared to follow the basic safety requirements of flagging does not equate with Potelco taking direction from Labor Ready on safety and health matters regarding flagging. The record shows that it was Hensley who directed the workers where and how to set up the work sites, not the other way around. BR Ketchum 25; BR Hensley 43 ("I tell them where my worksite is and what I need to be flagged around, this is what I need done.").

The fact-finder also weighed the other factors to determine that Potelco was a secondary employer who should be cited for its safety violations. BR 32. Substantial evidence supports this determination.

The first factor is who the workers consider as their employer. *Skills*, 1997 WL 593888 at *2. The first factor supports a finding that in practice the workers believed that Potelco was their employer for the purposes of this worksite, even if they self-identified as Labor Ready employees. Although the Department inspectors understood that the workers were temporary Labor Ready employees, the workers were "asked who was in charge of the flaggers, and both the flaggers and the

foreman said that the foreman at Potelco was." BR Drapeau II 3; BR Ketchum 42.

The second factor is who pays the workers' wages. *Skills*, 1997 WL 593888 at *2. The evidence addressing the second factor is scant in the record. Inspector Drapeau speculated that Labor Ready probably paid their paychecks, but she actually did not know the arrangement. Drapeau II 5; Drapeau II 30. Assuming Labor Ready issued the flaggers' paychecks, Potelco ultimately paid their wages by paying Labor Ready for sending it a flagging crew. *See MLB*, 1985 WL 44744 at *6.

The third and fourth factors are who has the responsibility to control the workers and whether alleged employer has the power to control the workers. *Skills*, 1997 WL 593888 at *2. As explained above, Potelco had this control.

The fifth factor is whether the alleged employer has the ability to hire, fire, or modify the employment condition of the workers. *Skills*, 1997 WL 593888 at *2. The fifth factor provides substantial evidence to support finding Potelco a secondary employer because Potelco had the power to modify the employment conditions of the flaggers for both worksites by shutting down the worksite. Potelco effectively dismissed the flaggers when Hensley shut down the Bremerton worksite and reported flagging issues to Labor Ready. BR Hensley 81-82. While

Potelco had no authority to hire and fire the workers from Labor Ready directly, shutting down the worksite is sufficient to show control. BR Hensley 81-82.

The sixth factor is whether the workers' ability to increase their income depends on efficiency rather than initiative, judgment, and foresight. *Skills*, 1997 WL 593888 at *2. The seventh factor considers how the workers' wages are established. *Skills*, 1997 WL 593888 at *2. There is insufficient information to address the sixth and seventh factors in this record. There is no information in the record about how the wages are established and whether the flaggers' have the ability to increase their income based on efficiency, initiative, judgment, and foresight. Potelco argues that these factors weigh in favor of finding Labor Ready "the controlling employer as only it has access to information necessary to prove those elements." App. Br. 24, n. 9. This analysis is incorrect because it presumes only one employer can be responsible and it also presumes that Potelco did not have access to any documentation about any agreement between Labor Ready and Potelco to provide flagging services. Although nothing in the record addresses this, Potelco's claim is not credible. In any event, the test is a balancing test and not all elements need be present to show that Potelco is a citable secondary employer. *See*

Sec'y of Labor v. FM Home Improvement, 22 O.S.H. Cas. (B.N.A.) 1531 (O.S.H.R.C.A.L.J.), 2009 WL 565082, *11 (O.S.H.R.C. 2009).

The fact-finder considered all the elements of the test. BR 32. It weighed the evidence and decided that Potelco was a secondary employer that should be cited for its safety violations regarding the flaggers. Potelco's arguments ask this Court to re-weigh the evidence. *See, e.g.*, App. Br. 24-26; App. Br. 24 n.9 ("Factors 6 and 7 would weigh in favor . . . [of Potelco]."). But this Court does not reweigh the evidence on the substantial evidence standard of review. *Raum*, 171 Wn. App. at 151. Viewing the evidence in the light most favorable to the Department, Potelco is an employer properly cited.

D. Holding Secondary Employers Who Hire Temporary Workers Responsible When They Control the Worksite Furthers WISHA's Purpose of Protecting Washington Workers

The Legislature intended WISHA to apply to "safe and healthful working conditions for every man and woman in the State of Washington". RCW 49.17.010. This direction is also reinforced by RCW 49.17.020's expansive definitions of both employee and employer and is in accord with the state's interest in creating a safe work place provided by the State Constitution. *See* Part V.C *supra; see* Const. Art. II, §

35 (mandating that the Legislature shall pass laws for the protection of people working in dangerous employments).

Employers are increasingly using temporary workers in place of full-time employees for a wide variety of work. A study conducted in 2009 showed that temporary workers in Washington State work in more hazardous industries and have higher industrial insurance claim rates than regular employees. Caroline K. Smith, *Temporary Workers in Washington*, American Journal of Industrial Medicine, February 2010, at 135, 143. Temporary workers performing construction related duties, including flaggers, are far more likely to be injured than regular employees. *Id.* at 143.

Potelco equates holding it responsible for the conduct of the temporary employees on its worksites as strict liability. App. Br. 26. Such is not the case; the Department must prove all the elements of a WISHA violation as to each putative employer in a WISHA case. *See Afoa*, 176 Wn.2d at 471-72; *see also J.E. Dunn NW,* 139 Wn. App. at 44-45. Potelco's arguments on the other hand would allow an employer to contract out of responsibility for work place safety for worksites it controls. Potelco created the hazards and should be held responsible for creating an unsafe work place.

There is also no legal support for Potelco's suggestion that it "would also be unable to establish any affirmative defenses to WISHA liability," such as unpreventable employee misconduct. App. Br. 27-28, n.10. Nothing prevents Potelco from meeting the elements of unpreventable misconduct by ensuring that between Potelco and Labor Ready that they have instituted a safety program communicated to the employees that is effective in practice as required by RCW 49.17.120(5)(a). More to the point, Potelco did not assert the unpreventable employee misconduct defense below and made *no* effort to show that it had taken steps to ensure that its temporary workers received the safety training and direction necessary to mount such a defense.

Finding Potelco liable under joint employer liability also has parallels with multi-employer worksite liability where the courts have interpreted WISHA liberally to provide wide protection to workers. Under multi-employer worksite liability, employers have a specific duty to comply with WISHA regulations, which extends "to all employees on the work site who may be affected by work safety violations, irrespective of any employer-employee relationship." *Afoa*, 176 Wn.2d at 495 (quoting *Stute*, 114 Wn.2d at 460; *see also Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 671, 709 P.2d 774 (1985). The Washington Supreme Court articulated the reasoning behind multi-employer worksite liability in

Goucher and the same reasoning applies here. The Court stated, "WISHA regulations should be construed to protect not only an employer's own employees, but all employees who may be harmed by the employer's violation of the regulations." *Goucher*, 104 Wn.2d at 672; *see also Stute*, 114 Wn.2d at 460.

In *Afoa*, the Washington State Supreme Court devoted significant discussion to the principle that under multi-employer liability, there need not be a direct employment relationship between the WISHA violator and the employee exposed to the violation. *Afoa*, 176 Wn.2d at 807-08. The Port of Seattle argued that it was not liable to Brandon Afoa, an injured worker, because Afoa's employer was not a subcontractor, but rather a licensee. *Id.* at 805. The Court rejected this argument, and specifically stated that "[n]o employer-employee relationship is required, so it makes no difference if the Port labels itself a licensor and [Afoa's employer] a licensee." *Id.* at 808. In articulating this rule, the Court pointed to the statutory language within WISHA, noting that the Legislature broadly defined "employers" and "employees." *Id.* (citing RCW 49.17.020(4); RCW 49.17.020(5); RCW 49.17.060(2)). This line of cases shows that Washington courts apply the protections of WISHA to workers broadly. Holding Potelco responsible as an employer under the economic realities test furthers the preventative purpose of the Act.

VI. CONCLUSION

Applying the plain language of the flagging regulations, Potelco committed three violations of WISHA on two different worksites. On its Bremerton worksite, Potelco failed to ensure adequate spacing between the flagger directing traffic and the advanced warning sign meant to warn drivers of his presence and the flagger was standing in the roadway itself in an unprotected location to conduct the flagging. Potelco also failed to place the required three advance warning signs at its Bainbridge Island worksite to warn drivers approaching the flagger. Substantial evidence supports the Board's determination that under the economic realities test Potelco is a responsible employer. Accordingly, this Court should affirm the decision of the trial court affirming the Board.

RESPECTFULLY SUBMITTED this 28th day of October, 2014.

ROBERT W. FERGUSON
Attorney General

JAMES P. MILLS
Assistant Attorney General
WSBA No. 36978
Office of Attorney General
1250 Pacific Avenue, Suite 105
PO Box 2317
Tacoma, WA 98401

PROOF OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that the document, to which this proof of service is attached, was delivered as follows:

☒ Original via E-filing to:

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

☒ Via US Mail and Electronic Service to:

Skylar Sherwood
Riddell Williams P.S.
1001 fourth Avenue, Suite 4500
Seattle, WA 98154
jflynn@riddellwilliams.com

Josias Flynn
Riddell Williams P.S.
1001 Fourth Avenue, Suite 4500
Seattle, WA 98154
ssherwood@riddellwilliams.com

DATED this 28th day of October, 2014, at Tacoma, WA.

Desirae Jones

Desirae Jones, Legal Assistant
DesiraeJ@atg.wa.gov

WASHINGTON STATE ATTORNEY GENERAL

October 28, 2014 - 3:27 PM

Transmittal Letter

Document Uploaded: 462567-Respondent's Brief.pdf

Case Name: Potelco v. DLI
Court of Appeals Case Number: 46256-7

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Desirae M Jones - Email: desiraej@atg.wa.gov

A copy of this document has been emailed to the following addresses:

desiraej@atg.wa.gov
Jamesm7@atg.wa.gov
jflynn@riddellwilliams.com
ssherwood@riddellwilliams.com