SUPREME COURT NO. 92649-2

Court of Appeals, Division II, No. 46256-7

SUPREME COURT OF THE STATE OF WASHINGTON

POTELCO, INC.,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

DEPARTMENT OF LABOR & INDUSTRIES ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This case involves the application of well-established case law to the facts of this case in a case regarding worker safety on roadways. The Court of Appeals correctly rejected Potelco's argument that it was not an employer in control of the flaggers (who worked for a temporary labor company, Labor Ready). The undisputed evidence shows that Potelco's foreman was the only supervisor onsite and directed the flaggers' work.

WAC 296-155-304(8) requires companies to have advance signs to warns motorists that there are flaggers present in a work zone. The Court of Appeals correctly held that the regulation, which allows flaggers to reduce the spacing between the signs in urban areas to fit roadway conditions, was not unconstitutionally vague as applied to Potelco. Potelco does not contest the Court of Appeals' holdings that substantial evidence shows that a flagger was standing next to the warning sign, and that at a minimum, the rule does not allow a flagger to reduce the spacing to zero. Because the actual conduct violated the regulation, for the vagueness argument, Potelco's arguments about hypothetical facts fail.

Since Potelco's arguments lack any merit, it cannot show that this case presents a significant question of law under the state or federal constitutions, or that this case presents an issue of substantial public interest. RAP 13.4(b)(3) & (4). The Court should deny review.

II. ISSUES

If the Court accepts review, the issues will be:

A. Both the off-site "primary" employer and the on-site "secondary" employer can be held responsible for violations of the Washington Industrial Health and 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 flaggers who may be held responsible for WISHA violations, when Potelco controlled the worksites and the flaggers, and the other elements of the economic realities test are demonstrated?

B. 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, when the flagger was standing directly beside the third advance warning sign rather behind it by 100 feet or a distance reduced to fit roadway conditions?

III. STATEMENT OF THE CASE

A. At a Potelco Worksite in Bremerton, Flaggers Stood in the Roadway, Without Proper Signage

When traffic needs to be controlled in a work zone, employers must provide three warning signs before the location the flagger is standing. WAC 296-155-305; WAC 296-45-52530(1)(b). There must be at least 100 feet between each of the three warning signs if the flagger is on an urban street with a speed limit of 25 miles per hour or less. The spacing "may be reduced in urban areas to fit roadway conditions," but the

regulations do not specify how much the spacing may be reduced. WAC 296-155-305(8)(c).

Department of Labor & Industries' inspectors inspected powerline-contractor Potelco's worksite in Bremerton in October 2011. BR Ketchum 13-15. When they arrived at the worksite, they saw a flagger standing in the roadway directly beside an advance warning sign for flaggers. BR Ketchum 14, 18; Exs 1, 2. Although it is sometimes appropriate for flaggers to reduce the regulation's 100 foot spacing requirement based on road conditions, this was situation did not involve a *reduction* in space—there was *no* advance warning of the flagger. BR Ketchum 52-53.

Potelco obtained the flaggers from Labor Ready, a company that supplies temporary workers. BR Drapeau II 3; BR Ketchum 42. But the flaggers explained to the inspectors that Potelco's foreman, Hensley, was in charge of the worksite. BR Drapeau II 3; BR Ketchum 25. Hensley told the flaggers where the worksite is located, what needs to be flagged, and what he needed them to do. BR Hensley 43. The Labor Ready flaggers attended a "tailboard" discussion led by Potelco about the worksite before starting. BR Hensley 47.

There is no evidence that Labor Ready provided any instructions to the flaggers or that they had any supervisors at the worksite. The only instructions to the flaggers at the worksite came from Potelco's foreman,

Hensley. BR 33. As the only supervisor present, Hensley was the only person who could plan the worksite and the flagging safety zone around it. BR 33-34.

In addition to the fact that Potelco's foreman directed the flaggers to set up and handle the flagging at the site, Potelco supplied all of the equipment. Potelco provided the signs and cones, assisted the flaggers in placing them, and made sure that the flaggers had enough signs and cones. BR Hensley 46, 48.

After the Labor and Industries inspectors raised the flagger safety issue, Potelco's foreman exercised his authority to shut down the Bremerton worksite. BR Hensley 82. The foreman instructed the flaggers to set more signs out in each direction. BR Hensley 50. Potelco did not report the problem to Labor Ready. BR Hensley 66.

B. The Board of Industrial Insurance Appeals Found that Potelco Did Not Properly Protect the Flaggers' Safety

The Department cited Potelco for violating the flagging regulations at the Bremerton worksite. BR 168-83. In response to Potelco's appeal of the citation, the Board of Industrial Insurance Appeals found that the flaggers stood "next to" the advanced warning sign and thus "were exposed to the hazard of being struck by passing vehicles at the worksite." BR 39.

The Board found that Potelco was a responsible employer. BR 32. To ascertain who controlled the flaggers, the Board applied the economic realities test, which is a seven-factor test that analyzes whether, in a multiple employer situation, there is an employment relationship between the endangered workers and the putative employer. RCW 49.14.020(4) & (5); *Loomis Cabinet Co. v. Occupational Safety & Health Review Comm'n*, 20 F.3d 938, 941 (9th Cir. 1994); *In re Skills Resource Training*, No. 95 W253, 1997 WL 593888 (Bd. Ind. Ins. App. Aug. 5, 1997). Although Labor Ready supplied the flaggers, the Board found that Potelco controlled the flaggers at the worksite. BR 33, 41.

After the Board upheld the citation, Potelco appealed to the superior court. Potelco did not assign error to the Board's finding that Potelco controlled the flaggers at the worksite. The superior court held that substantial evidence supported the Board's findings.

The Court of Appeals upheld the Board. The Court held that Potelco was an employer under the economic realities test, explaining that Potelco's foreman was in charge of the worksite, that Potelco controlled the worksite, and that the foreman testified that he was the only supervisor at the worksite. Slip Op. at 19-20. The Court held that the Department could cite multiple employers, and Potelco was one such employer. Slip Op. at 21.

In now seeking this Court's review, Potelco's petition does not dispute the substantial evidence holding or contest that it violated the regulation. Rather, it argues that the regulation is void for vagueness and contests regulating its use of temporary workers.[1]

IV. REASONS WHY REVIEW SHOULD BE DENIED

It is undisputed that Potelco did not comply with the worker safety regulation. Because substantial evidence and well-established case law support the Court of Appeals' decision, neither of Potelco's arguments necessitates review. Holding the controlling party responsible for worker safety is consistent with the law and furthers the purpose of WISHA. RAP 13.4(b)(4). This Court should deny review.

A. Holding Potelco Responsible for the Workers It Controls Is Consistent With Well Settled Case Law

This Court has consistently held that the law places "the responsibility of protecting our state's workers on the entity best able to ensure workplace safety." *Afoa v. Port of Seattle*, 176 Wn.2d 460, 482, 296 P.3d 800 (2013). Multiple parties may be responsible for worker safety, regardless of whether there is a direct employer-employee relationship. *Id.* The key question is whether the employer has the right to control the worker. *Afoa*, 176 Wn.2d at 472 (citing *Kamla v. Space Needle*

[1] There was a second set of affirmed citations related to work at a Bainbridge site. Potelco does not ask for review of that citation, except insofar as it raises its argument about temporary workers.

Corp., 147 Wn.2d 114, 124, 52 P.3d 472 (2002)). Since the unchallenged findings of the Board establish that Potelco exercised control over the flaggers, the Court of Appeals decision is entirely consistent with the decisions of this Court. "[I]t is settled law that jobsite owners have a specific duty to comply with WISHA regulations if they retain control over the manner and instrumentalities of work being done on the jobsite." *Afoa*, 176 Wn.2d at 472.

Contrary to Potelco's petition, examining the application of the law to the facts of this case cannot provide a universal determination of who controls the workers in every hypothetical scenario involving a contractor who obtains workers from a temporary employment agency. Pet. at 9. Because the employer-employee relationship is not the determinative factor, this Court's decisions require an examination of the facts of each case to determine who is exercising control. *E.g.*, *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 460, 788 P.2d 545 (1990) (citing *Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 672, 709 P.2d 774 (1985)). The Court of Appeals correctly determined that substantial evidence supported the Board's determination that Potelco was a responsible employer for the temporary workers. Slip Op. at 18-21. Notably, Potelco does not challenge the Court of Appeals decision about substantial evidence in this Court, thus conceding the issue.

B. The Court's Application of WAC 296-155-305(8) Does Not Present an Issue of Substantial Public Interest

Potelco asks the Court to take the case to determine whether WAC 296-155-305(8)'s "three sign advance warning sequence" is unconstitutionally vague. Pet. at 10. The rule allows the distance between the warning signs and the worker to be adjusted, based on the road conditions. This case, however, does not present any issue regarding the proper distance between the signs and the worker. There was no distance at all—the flagger stood right next to the sign.

When analyzing a vagueness challenge, courts look to the actual conduct of the party challenging the rule and not the "'hypothetical situations at the periphery of the [rule's] scope.'" *Weden v. San Juan Cty.*, 135 Wn.2d 678, 708, 958 P.2d 273 (1998) (quoting *City of Spokane v. Douglass*, 115 Wn.2d 171, 182-83, 795 P.2d 693 (1990)). The regulation's plain language requires that the warning sign must be in "advance" of the flagger, and here, Potelco does not dispute that there was no distance between the warning sign and the flagger. WAC 296-155-305(8); BR Ketchum 14, 18; *see Potelco, Inc. v. Dep't of Labor & Indus.*, 166 Wn. App. 647, 653-54, 272 P.3d 262 (2012) (regulation requires three signs placed in advance). As the Court of Appeals concluded, the regulation plainly prohibited the flagger from standing next to the warning sign,

which is what occurred here. Slip Op. at 17. On these undisputed facts, there is no issue of substantial public interest. To the contrary, the public interest is served by the Court of Appeals decision that upheld WISHA's protection of the workers, and applied many decisions of this Court holding the controlling party responsible for worker safety.

V. CONCLUSION

This is not a case of substantial importance. The Court should deny review.

RESPECTFULLY SUBMITTED this 18th day of February, 2016.

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SUPREME Court NO. _____

Court of Appeals, Division II, No. 46256-7

SUPREME COURT OF THE STATE OF WASHINGTON

POTELCO, INC., Petitioner, v. DEPARTMENT OF LABOR & INDUSTRIES, Respondent.	CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, declares that on the below date, I mailed the **Department of Labor & Industries' Answer to Petition For Review** and this Certificate of Service in the below-described manner:

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DATED this 18th day of February, 2016, Seattle, Washington.

Doris Rogers

DORIS ROGERS
Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Rogers, Doris (ATG)
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Subject: 46256-7, Protelco, Inc. v. DLI

Re: Potelco, Inc. v. Department of Labor and Industries
Supreme Court No. _____
Court of Appeals, Division II, No. 46256-7

Dear Mr. Carpenter,

Please file the Department's Answer to Petition For Review in the above referenced matter.

Sincerely,

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