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STATE OF WASHINGTON

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No. 46256-7-II

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

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POTELCO, INC.,

*Plaintiff/Appellant,*

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

*Defendant/Respondent.*

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**REPLY IN SUPPORT OF OPENING BRIEF OF  
APPELLANT POTELCO, INC.**

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**ORIGINAL**

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## **I. INTRODUCTION**

This appeal relates to citations assessed against Potelco, Inc. (“Potelco”) under the Washington Industrial Safety and Health Act of 1937 (“WISHA”) based on the conduct of Labor Ready-employed flaggers at two Potelco worksites.

The Department of Labor and Industries (“Department”) has not established that Labor Ready’s flaggers violated WISHA’s sign-spacing requirement at Potelco’s Bremerton worksite, when the flaggers appropriately spaced warning signs based on the road conditions at the worksite. In addition, the Department has not established that Labor Ready’s flaggers violated WISHA’s advance warning sign requirement at Potelco’s Bainbridge worksite, when another contractor set up a series of three advance warning signs in each direction of that worksite.

The Department has not established that Potelco is liable for the actions of Labor Ready’s flaggers, in any event. The Department identifies no significant evidence in support of its contention that Potelco is liable under the applicable economic realities test for the conduct of the flaggers. Indeed, the key factors under that test show that Potelco was not responsible for the flaggers at the worksites: the flaggers considered Labor Ready, not Potelco, their employer; Labor Ready, not Potelco, paid their

wages; and Labor Ready supervisors, not Potelco's, had the power to control, hire, fire, and modify the employment of the flaggers.

Because there is not "substantial evidence" in the record to uphold the Board's decision to affirm the citations, and because assigning liability to Potelco under the circumstances would effectively render it strictly liable for the flaggers' conduct, something not envisioned by WISHA, Potelco requests that this Court vacate the Citations and penalties against Potelco.

## II. ARGUMENT

### A. **Advanced Warning Signs Were Properly Spaced At Potelco's Bremerton Worksite**

Labor Ready's flaggers set up three advance warning signs consistent with WAC 296-155-305(8)(c) at Potelco's Bremerton worksite. *See* Potelco's Opening Br. at IV(B). The warning signs were spaced appropriately based on the road conditions at the worksite. *Id.*

Nevertheless, the Department argues that Potelco violated WAC 296-155-305(8)(c) because "[f]ailing to have any distance between the last sign before the flagger and the flagger, fails to notify drivers of an *upcoming* flagger." (Dept.'s Br. at 17) (emphasis in original). This argument ignores the fact that there were *two additional* warning signs in advance of the flagger and the worksite. After passing the first two

advance warning signs, drivers would certainly be aware of the worksite, and would easily see the third warning sign and the flagger standing by that sign. Thus, the warning signs at Potelco's Bremerton worksite were indeed placed "in a manner that alerts drivers approaching the worksite ... of an upcoming flagging operation" consistent with the purpose of the regulation. *See Potelco, Inc. v. Dep't of Labor & Indus.*, 166 Wn. App. 647, 654, 272 P.3d 262 (2012).<sup>1</sup>

**B. WAC 296-155-305(8)(C) is Unconstitutionally Vague As Applied To Potelco In This Case.**

WAC 296-155-305(8)(c) is unconstitutionally vague as applied to Potelco because it allows employers to adjust the spacing between warning signs based on road conditions (which the flaggers did), but provides no additional guidance as to how advanced warning signs and flaggers should be spaced when roadway conditions permit (which allowed the Department to make an arbitrary discretionary decision to cite Potelco for allegedly violating that statute). *See Potelco's Opening Br.* at IV(C).

The Department argues that Potelco cannot complain about the vagueness of WAC 296-155-305(8)(c) because Potelco allegedly engaged

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<sup>1</sup> The Department has mischaracterized Potelco's argument as an affirmative defense of "infeasibility." (Dept.'s Br. at 18-19). Potelco, however, has always maintained that it complied with WAC 296-155-305(8)(c), based on the road conditions at the Bremerton worksite. The Department's mischaracterization is apparently an attempt to shift the burden of proof to Potelco to disprove the alleged violation.

in conduct that is “clearly proscribed” by that statute. (Dept.’s Br. at 22-24). The Department claims that “[f]lexibility does not equal vagueness.” *Id.* at 24. But there are no constraints on the “flexibility” in WAC 296-155-305(8)(c). And when there were three warning signs at Potelco’s worksite which adequately alerted drivers of the upcoming flagging operation, Potelco’s conduct is not “clearly proscribed” by that statute. In fact, even the Department’s own inspector could not consistently interpret the requirements of WAC 296-155-305(8)(c) as they applied to Potelco.<sup>2</sup> Thus, the Department cannot credibly argue that Potelco’s conduct was “clearly proscribed.”

WAC 296-155-305(8)(c) is unconstitutionally vague as it was applied to Potelco in this case.

**C. A Series Of Three Warning Signs Preceded Potelco’s Bainbridge Worksite In Every Direction**

Potelco’s foreman, Larry Hensley, testified unequivocally that there were at least three advance warning signs in each direction of

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<sup>2</sup> The Department claims that the contradictions in the testimony of the Department’s inspector “are for the fact-finder to weigh, which the Court of Appeals does not second guess.” As an initial matter, the Board did not formally weigh or adopt either conflicting opinion of the Department’s inspector, because the Board mistakenly believed that “Potelco did not argue that WAC 296-155-305(8)(c) was not violated.” (CABR at 36). In any event, the Court of Appeals is free to consider the conflicting testimony as concrete proof that even the Department cannot consistently interpret the vaguely worded WAC 296-155-305(8)(c).

Potelco's worksite (some were set up by another contractor, Hoss Brothers, and others were set up by Labor Ready's flaggers). (Certified Appeal Board Record ("CABR"), Transcript of Larry Hensley's testimony, January 22, 2013 ("Hensley") at 42, 72-73). The signs provided drivers with adequate notice of Potelco's worksite, and complied with WAC 296-155-305(8)(a). *See* Potelco's Opening Br. at IV(D).

According to the Department, this argument "asks the Court to reject Inspector Drapeau's testimony and accept Hensley's testimony." (Dept's Br. at 20). That is not the case. In fact, the testimony of Inspector Drapeau and Mr. Hensley do not conflict. Ms. Drapeau testified about the advance warning signs that she remembered observing, but she also testified that she could not recall whether there were other contractors working in the area, or whether those contractors had set up additional flagging signs. (CABR, Transcript of Amy Drapeau's Testimony, January 22, 2013 ("Drapeau") at 12).

Mr. Hensley, on the other hand, specifically recalled the worksite and signage set up by the Hoss Brothers. The Board accepted that testimony. It held only that "Potelco was unable to take advantage of the warning signs placed by other contractors" because those signs were not within 300 feet of Potelco's worksite. (CABR at 35). As noted in

Potelco's opening brief, WAC 296-155-305(8)(a) does not require advance warning signs to be within 300 feet of a worksite, and is silent on situations where multiple employers are working in the same vicinity. *See* Potelco's Opening Br. at IV(D). The Department does not dispute this, and it has not established that the requirements of WAC 296-155-305(8)(a) or the purposes of WISHA were not met at Potelco's Bainbridge worksite.

**D. Potelco Does Not Exercise Sufficient Control Over Labor Ready's Flaggers To Be Liable Under the Economic Realities Test**

As discussed in Potelco's Opening Brief, under the economic realities test, Potelco is not liable for the offending conduct of Labor Ready's flaggers.<sup>3</sup>

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<sup>3</sup> The Department acknowledges that the economic realities test controls, but also argues that finding Potelco liable would be consistent with decisions addressing "multi-employer" worksites. (Dept.'s Br. at 36). This multi-employer theory of liability is inapplicable to this case and was rejected by the Board, which concluded that the worksites at issue here were "joint employer" job sites.

Briefly, a multi-employer worksite involves construction sites where employees of several subcontractors work at the same location under the direction of a general contractor. *In re Skills Resource Training Center*, BIIA Dec., 95 W253 at 2 (1997). At such worksites, a general contractor may be responsible, under certain circumstances, for a subcontractor's WISHA violation. *In re Exxel Pacific, Inc.*, BIIA Dec., 96 W182 (1998). In contrast, a "joint-employer" worksite involves jobsites where a company uses leased or temporary employees. *In re Skills*, BIIA Dec., 95 W253 at 2. At joint-employer worksites, an employer is liable for WISHA violations only when it controlled the employee(s) who committed the violations as determined using the economic realities test. *Id.* For purposes of WISHA liability, courts must distinguish

Despite acknowledging that the flaggers “self-identified as *Labor Ready* [not Potelco] employees[,]” (Dept.’s Br. at 31), the Department contends that the first factor of the economic realities test (who the workers consider their employer) weighs against Potelco because Labor Ready’s flaggers indicated that Mr. Hensley was “in charge.” (Dept.’s Br. at 31-32). The Department’s stretched interpretation of the first factor should not be permitted. It is plain from the flagger’s own testimony that they knew Labor Ready was their employer. The first factor of the economic realities test weighs in favor of Potelco.

In regard to the second factor of the economic realities test (who pays the workers’ wages), the Department contends that, even if Labor Ready issued paychecks to its flaggers, Potelco’s payment to Labor Ready for their services in providing flaggers should be considered payment of wages directly to the flaggers. (Dept.’s Br. at 32). But this argument would

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between joint-employer and multi-employer worksites, based on the circumstances at the site. *In re Skills*, BIIA Dec., 95 W253 at 2.

The Board properly concluded that the Potelco worksites at issue here were joint-employer worksites: Potelco was not acting as a general contractor managing several subcontractors, and the flaggers were, essentially, leased from Labor Ready. (CABR at 32). Further, the Potelco worksites were not construction sites. Because the worksites here are more accurately described as joint-employer sites and not multi-employer sites, the cases cited by the Department that analyze liability under a multi-employer theory of liability are inapposite.

find liability based solely on the fact that the money Labor Ready makes from the fees it charges various clients is presumably used, in turn, to pay its employees' wages. This argument is not supported by the language of the economic realities test and should be rejected.<sup>4</sup>

Regarding the third and fourth factors of the economic realities test, the Department claims that Potelco had the responsibility and power to control Labor Ready's flaggers because there was no Labor Ready supervisor on site and because Potelco's foreman discussed the day's work with the flaggers. But the substantial evidence shows that Potelco did not control the flaggers: Labor Ready supervisors have authority to enter Potelco worksites and influence the work performed by its flaggers (Hensley at 75-76); Potelco relies on Labor Ready for guidance about flagging safety (*id.* at 43, 68); and Potelco expects the flaggers to be the flagging experts—properly certified, thoroughly trained, and knowledgeable about WISHA's flagging requirements (*id.*). Labor

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<sup>4</sup> For support of its proposition that Potelco ultimately paid the flaggers' wages, the Department cites *Sec'y of Labor v. MLB*, 12 O.S.H. Cas. (B.N.A.) 1525, 1985 WL 44744, \*6 (O.S.H.R.C. 1985). (Dept's Br. at 32). In that case, however, the sub-contractor that had provided the temporary workers did in fact pay the employees who were "hired" by the general contractor. *MLB*, 1985 WL 44744 at \*6. And the Occupational Safety and Health Review Commission did not hold that an employer who obtains labor from a staffing agency is considered to have directly paid the wages of the workers obtained. *Id.* In any event, ultimately the Commission decided that the second factor was not relevant to its decision.

Ready therefore has ultimate responsibility and control of its own flaggers, not Potelco.

The Department further contends that the fifth factor of the economic realities test (who has authority to hire, fire, or modify the employment condition) weighs against Potelco because Potelco can shut down a jobsite where flaggers are used. (Dept.'s Br. at 32). This is not the same as firing the flaggers. Indeed, even if Potelco did shut down a worksite, Labor Ready would be free to send those same flaggers to another job assignment. In other words, Potelco has no authority over the employment relationship between Labor Ready and its flaggers.

The Department concedes that the record contains no evidence regarding the sixth and seventh factors of the economic realities test—whether the workers' ability to increase their income depends on efficiency rather than initiative, judgment, and foresight (sixth factor), and how the workers' wages are established (seventh factor). These factors cannot be used to establish Potelco's liability here.

Thus, the economic realities test, as a whole, shows that Potelco is not liable for the actions of Labor Ready's flaggers.

**E. If Held Liable For Violations Committed By Labor Ready Flaggers, Potelco Would Effectively Face Strict Liability**

As described in Potelco's opening brief, Washington's legislature did not intend for WISHA to be a strict liability statute. *See* Potelco's Opening Br. at IV(F). Although WISHA's knowledge element theoretically prevents the Department from holding employers strictly liable for WISHA violations, the Board holds that the knowledge element is satisfied unless an employer trained the offending employee on the relevant WISHA standard. *See In re Potelco, Inc.*, BIIA Dckt. No. 09 W0196, 2011 WL 1903454, \*3 (Mar. 1, 2011).

The Department does not dispute that for any WISHA violation committed by Labor Ready's flaggers, WISHA's knowledge element would necessarily and automatically be satisfied as to Potelco because Potelco provides no training to those flaggers (Labor Ready trains its own employees). This in essence renders Potelco strictly liable for the actions of Labor Ready's employees.

The Department claims that Potelco should nevertheless be held responsible for the actions of Labor Ready's employees because Potelco allegedly "created the hazards" at its worksites. (Dept.'s Br. at 35). This contention is premised on the flawed notion that Potelco controlled the flaggers here. It did not. The only hazard at Potelco's worksite involved a

Labor Ready flagger stepping into the lane of traffic at the Bremerton site.<sup>5</sup> Potelco did not request or demand that the flagger step into the lane of traffic, and was not even aware that he had done so. (Hensley at 79-80). That hazard was created solely by Labor Ready's own flagger, not Potelco. Potelco is therefore not responsible for creating an allegedly "unsafe work place."

WISHA is not a strict liability statute and Potelco should not be liable for alleged WISHA violations of Labor Ready's employees.

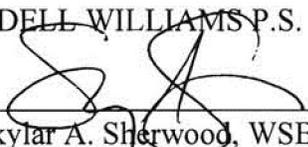
### **III. CONCLUSION**

Potelco respectfully requests that the Court dismiss the Citations in this matter in their entirety.

DATED this 26<sup>th</sup> day of November, 2014.

RIDDELL WILLIAMS P.S.

By

  
\_\_\_\_\_  
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<sup>5</sup> As discussed above, the sign spacing at Potelco's Bremerton worksite and the advance warning signs set up by Hoss Brothers at Potelco's Bainbridge worksite adequately alerted drivers to the presence of the flaggers and the worksites. Accordingly, there was no hazard associated with the number of advance warning signs or the layout of those signs at either worksite.

CERTIFICATE OF SERVICE

I, Jazmine Matautia, certify that:

1. I am an employee of Riddell Williams P.S., attorneys for Appellant Potelco, Inc. in this matter. I am over 18 years of age, not a party hereto, and competent to testify if called upon.
2. On Wednesday, November 26, 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:

James Mills, WSBA #36978  
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 26<sup>th</sup> day of November, 2014.

  
\_\_\_\_\_  
Jazmine Matautia

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