

No. 73735-0-I

**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 REPLY BRIEF

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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2005 FEB 21 PM 4:27

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I. INTRODUCTION

Potelco reasonably relied on Salmon River Helicopters to safely deliver concrete and gravel to areas of Potelco's Baker-Sedro project. A Potelco employee was unfortunately injured when Salmon River flew its helicopter with a long-line attached too close to an energized line at the worksite.

Potelco asks the Court to vacate the WISHA Citation the Department issued to Potelco following this incident. That Citation is based on the Department's mistaken belief that Potelco's injured employee was not competent to assist Salmon River deliver materials to Potelco's worksite. In reality, all Potelco employees were qualified to perform their assigned tasks. And Potelco did not have knowledge of any alleged WISHA violations, in any event.

II. ARGUMENT

A. POTELCO'S EMPLOYEES WERE QUALIFIED

Any employee that understands the hazards concerning *his or her individual* position is a "qualified employee." WAC 296-45-035 (emphasis added).¹

Mr. Wheeler and his crew were assigned to perform "grunt work"² at the Sedro-Woolley project, including digging holes for concrete anchors and helping Salmon River deliver concrete to those holes. (CP at 164,

¹ "Qualified employees" are not limited to journeyman lineman.

² Potelco's civil crews, including Mr. Wheeler and Mr. Jesmer, perform grunt work at Potelco worksites, which is manual labor such as driving a work truck, hand digging, and locating utilities for linemen. CP at 164.

170, 174). The crew had sufficient training and experience to perform this work. Mr. Wheeler and Mr. Jesmer had both attended an OSHA 10 training course that covers the basics of electrical safety, and both had worked at other jobsites that contained energized lines. (CP at 183, 208-09, 356-59, Exhibits 2-4, 8).

Mr. Wheeler knew that the No. 1 line was energized at 115 KV, he knew the minimum approach distance for a 115 KV line, and he understood that he should not work with any conductive object within that distance.³ (CP at 179, 185) Mr. Jesmer likewise understood that line was energized, and knew to keep his distance from energized lines. (CP at 192-93, 215). Accordingly, Mr. Wheeler and his crew were qualified to assist with the fly-in operation.⁴

B. POTELCO DID NOT HAVE KNOWLEDGE OF THE ALLEGED VIOLATIONS

Potelco believed that Mr. Wheeler and his crew would be far from any energized line – the No. 1 line was over 90 feet in the air.

³ The Department argues that Mr. Wheeler and his crew were not qualified because they could not “identify live parts of electric equipment, determine nominal voltage and minimum approach distances, or properly use specialized electrical materials and tools.” (Respondent’s Br. at 22). But that is irrelevant here because Mr. Wheeler actually identified live parts of electrical equipment (he knew the No. 1 line was energized), he was aware of the nominal voltage (115 KV), he knew the MAD for a 115 KV line, and also knew that he should not use materials or tools within that distance.

⁴ Contrary to the Department’s argument, Mr. Wheeler and Mr. Jesmer did not need additional training to understand the hazard at structure 4/3. (Respondent’s Br. at 22-23). Instead, they needed to understand only that the helicopter’s long line was conductive – information which was concealed from Potelco by Salmon River.

They weren't working on or around energized lines. They were working on a dead decommissioned line. They weren't working on the live transmission Baker one line.

(CP at 311, 347). Potelco believed that no conductive object would be brought near that line, based on Salmon River's assurance that its long-line was non-conductive. (CP at 292, 300, 308). Thus, Potelco had no knowledge that Mr. Wheeler or his crew would work in "areas containing ... energized lines or parts of equipment." Potelco likewise had no knowledge that there was any alleged "change in the hazards" at the Sedro-Woolley site.⁵

The Department argues that Potelco "could have known" the long line was conductive. (Respondent's Br. at 25). As the Department recognizes, however, an employer is not responsible for everything it could have known in an abstract sense. Instead, an employer is liable for an alleged violation only when it "could have known of its existence by being *reasonably diligent*." *In re Longview Fibre*, 2003 WL 23269365, *2, BIIA Dckt. No. W0321 (2003) (emphasis added). In other words, it is not enough to show that it was *possible* for an employer to have discovered a violation. Instead, the Board consistently requires evidence that an employer *was not diligent*, given the specific facts in a case. *See In*

⁵ The Department argues there was a change in the hazards at Potelco's worksite because structure 4/3 was allegedly "closer to the energized Baker 1 transmission line than *any other* jobsite on the project." (Respondent's Brief at 17) (emphasis added). Structure 4/3 may have been closer to the No. 1 line than other structures where Mr. Jesmer worked (CP at 201), but it was not closer to other angled structures at the Sedro-Woolley Project (CP at 314-15).

re Traffic Control Services, 2007 WL 3054890, *5-7, BIIA Dckt. No. 06 W0021 (2007); *In re Longview Fibre*, 2003 WL 23269365, *2-4. There is no such evidence here.

The Department argues that Potelco lacked diligence by relying on Salmon River's representations about its own equipment. (Respondent's Br. at 27-28). The Department asserts that Potelco should have ignored Salmon River's assurances, and should have independently tested the long-line. *Id.* However, "an employer reasonably may rely on an outside contractor to perform specialty work within its expertise, even when assisted by the employer's employees ... [i]n many situations in the workplace, it is natural for an employer to rely on upon the specialist to perform work related to that specialty safely in accordance with [WISHA] standards." *Sec'y of Labor v. Imperial Aluminum*, 24 O.H.S.C. 2081, 2013 WL 6911242, *8-9 (O.S.H. Rev. Comm'n 2013) (vacating citation for violation committed by contractor, because employer had no knowledge of violation and relied on contractor to perform work safely).⁶

That is precisely what happened here. Potelco does not own or operate any helicopters. It has no personal experience with delivering materials by helicopter. It reasonably relied on Salmon River – a helicopter delivery specialist⁷ – to perform this task safely.⁸

⁶ When interpreting WISHA, Washington courts will also consider its federal counterpart, the Occupational Safety and Health Act ("OSHA"), and federal decisions interpreting OSHA. *Inland Foundry Co. v. Dep't of Labor & Indus.*, 106 Wn. App. 333, 336, 24 P.3d 424 (2001) (citing decisions by the Occupational Safety & Health Rev. Commission).

⁷ The Department disputes that Salmon River touts its experience with delivering

Potelco therefore did not have actual or constructive knowledge of the alleged violations.

III. CONCLUSION

Potelco respectfully requests that the Court dismiss Citation No. 316278589 in its entirety.

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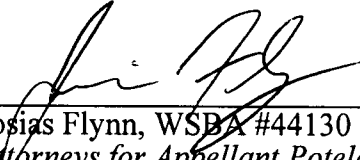
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materials by helicopter. (Respondent's Br. at 28, n. 9). In 2012, before Potelco began the Baker-Sedro project, Salmon River's publicly available website indicated that "Salmon River Helicopters has moved hundreds of yards of concrete by helicopter. We deliver concrete to cell tower, repeater, ski lift, power pole and building sites where roads are not available. We have experience setting the cell towers and power poles into position. *Aerial construction delivery work is a specialty of ours.*" (available at <http://web.archive.org/web/20120101093758/http://www.srhelicopters.com/construction.html>) (last accessed December 1, 2015) (emphasis added). It further stated that "[w]ith some of the best long line pilots in the industry we provide long line training. The pilots that will be teaching you are the best in their field, with up to 25,000 hrs of actual long line experience." (available at <http://web.archive.org/web/20120101093104/http://www.srhelicopters.com/long-line-school.html>) (last accessed December 1, 2015) (emphasis added). Salmon River makes these same representations today. *See* <http://srhelicopters.com/services/construction/> and <http://srhelicopters.com/services/long-line-school/> (last accessed December 1, 2015). Furthermore, Potelco had previous experience with Salmon River at the Baker-Sedro project, because Salmon River had successfully delivered materials to every inaccessible structure at that project the year before. (CP at 319).

⁸ The Department's arguments about the muddy conditions at the worksite are a red herring. For one, there was absolutely no evidence to suggest that the helicopter's long-line was in fact dirty. And in any case, witnesses for both Potelco and the Department agreed that the long-line was conductive because of a conductive wire that was concealed inside of the line – not because of any muddy conditions at the worksite. (CP at 230-32, 305-06).

DATED this 21st day of December, 2015.

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CERTIFICATE OF SERVICE

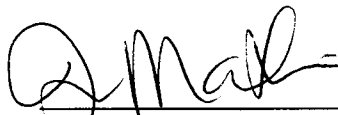
I, Jazmine Matautia, certify that:

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 December 21, 2015, 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:

William F. Henry, Assistant Attorney General
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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 21st day of December, 2015.



Jazmine Matautia

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