NO. 93406-1

SUPREME COURT OF THE STATE OF WASHINGTON

POTELCO, INC.,

Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This is a worker safety case involving a routine application of substantial evidence review. A Potelco employee was seriously injured while working without protective grounding on a high voltage transmission line. The Department of Labor and Industries cited the company under the Washington Industrial Safety and Health Act (WISHA) for failing to create an equipotential zone (EPZ) at the work site and for failing to effectively enforce its safety program. The Board of Industrial Insurance Appeals and the superior court affirmed the citations, rejecting Potelco's argument that unpreventable employee misconduct excused these safety violations.

The court of appeals affirmed. The court determined that substantial evidence supported the Board's decision where Potelco did not take adequate steps to discover and correct safety violations and failed to effectively enforce its safety program in practice. Substantial evidence likewise showed that Potelco could have known of the violations had it exercised reasonable diligence. The court adhered to well-established precedent in reaching its decision.

Potelco now asks this Court to conduct a third level of appellate review and to reapply the substantial evidence test to a record that amply supports the Board's findings. Such substantial evidence questions do not

present an issue of substantial public interest under RAP 13.4(b)(4). This Court should decline further review of Potelco's appeal.

II. STATEMENT OF ISSUES

Discretionary review is not warranted in this case, but if the Court were to grant review the following issues would be presented:

1. Does substantial evidence support the Board's finding that Potelco failed to prove unpreventable employee misconduct where the evidence showed that Potelco supervisors usually would warn workers of upcoming safety inspections, employees routinely violated safety rules, and the company rarely disciplined its workers for safety violations?
2. Does substantial evidence support the Board's finding that Potelco knew of the violations where the violations occurred in plain view and a Potelco foreperson witnessed the violative conduct?

III. STATEMENT OF THE CASE

A. A Potelco Employee Was Seriously Injured While Working on a High Voltage Transmission Line without Protective Grounding

Potelco is a utility contractor that installs and maintains high voltage transmission lines. CP 9. In March 2011, Potelco was working on a de-energized high voltage line in the Sedro-Woolley area. CP 9, 187. A

second live line, roughly 30 feet away, ran parallel to the de-energized line for about 25 miles. CP 187. The proximity of the two lines made it possible for the de-energized line to become charged by the live line through a mechanism known as induction. CP 9. The induction hazard was especially great because the two lines ran parallel to each other for so great a distance. CP 9, 247, 352, 521-22, 524.

The project involved the replacement of transmission poles and wires. CP 9, 187. To reduce the induction hazard, Potelco planned to "cut air" into the de-energized line before work began. CP 187. This would involve breaking the line into sections to reduce the length of line that could become energized through induction. CP 10, 299, 326.

The Department's safety standards for electrical workers require the creation of an equipotential zone before working on de-energized transmission lines. WAC 296-45-345(3). To establish an EPZ, "[t]emporary protective grounds shall be placed at such locations and arranged in such a manner as to prevent each employee from being exposed to hazardous differences in electrical potential." WAC 296-45-345(3). An EPZ protects workers from the risk of electrocution and death. CP 355-56, 358-59, 473. When working on transmission lines that are lying or hanging near the ground, Potelco's safety rules require that workers use conductive mats to create an EPZ. CP 360-61, 473-74, 515.

At a meeting before work began, Potelco management discussed the induction hazard and the plan to cut air into the line. CP 188. Safety coordinators Larry Rupe and George Bellos went through Potelco's safety procedures, including equipotential grounding. CP 297-99, 329-30, 444-47. But Potelco did not tell its workers to use conductive mats to create an EPZ when working on the ground. CP 273-74, 297-99, 330. Potelco also made no arrangements to notify workers when air had been cut into the de-energized line. CP 10, 255, 450, 514, 517-18. It did not tell its workers to await notification before beginning their work. CP 10, 249, 255, 275-76, 318-19, 326, 517-18.

Gavin Williams was foreperson of a crew working on the replacement project. CP 187. Potelco assigned the crew to work on a section of the line near two transmission poles. CP 188. The crew planned to lower the transmission wires to the ground, remove the old poles, set new poles in place, and lift the wires back onto the new poles. CP 304-05. By working on the ground, the crew could complete the project more quickly. CP 305, 306-07. Williams wanted to impress his superiors and felt pressure to replace at least one pole before the end of the day. CP 324. The mentality of the crew was "production, production, production." CP 305-06.

The crew did not create an EPZ before beginning work on the line. CP 188-89, 307, 320-21. The protective grounds available at the work site were not long enough to establish an EPZ. CP 304-05, 307. The crew did not have conductive mats to create an EPZ on the ground. CP 273-74, 307-08, 330. One of the crew members had never seen conductive mats while working at Potelco. CP 307-08.

Potelco did not cut air into the de-energized transmission line, and it had become charged with dangerous electrical energy through induction. CP 9, 189, 276. At the work site, two crew members began to lower the line until it was hanging about ten feet above the ground. CP 189, 251-52. The crew's second-step apprentice tried to grab the wire to secure it. CP 189. When he touched the line, he suffered serious electrical shock injuries due to induction. CP 9, 189, 356.

Paramedics arrived and airlifted the apprentice to Harborview Medical Center in Seattle, where he was placed into an induced coma. CP 189, 435. Fortunately, he survived and eventually recovered from his injuries. CP 435.

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B. The Department Cited Potelco for Failing to Create an EPZ and for Failing To Effectively Enforce Its Written Safety Program; the Board Affirmed

The Department cited Potelco for failing to create an EPZ and for failing to effectively enforce its written accident prevention plan.[1] The Department classified these violations as serious violations. CP 132-38. Potelco appealed to the Board. CP 127. It did not dispute that it failed to create an EPZ or that its crew violated the company's written safety program. CP 188-89. Rather, Potelco argued that its failure to create an EPZ resulted from unpreventable employee misconduct, that it effectively enforced its written safety rules, and that the cited violations were not serious because the company could not have known of them even with the exercise of reasonable diligence. CP 26-33.

At hearing, two crew members testified about Potelco's safety program. They explained that a foreperson or general foreperson would usually warn workers of Potelco's site inspections, allowing employees to avoid being caught breaking safety rules. CP 288-89, 290-91, 311, 316-17. Potelco workers routinely violated safety regulations, but the company rarely disciplined employees, even in instances where a foreperson observed the violations. CP 256-57, 283, 286-87, 309-11, 315. Most

[1] This appeal involves only these two safety violations. A third violation—Potelco's failure to determine the hazardous conditions at its worksite—was vacated by the Board and is not at issue in this appeal.

Potelco employees viewed production as more important than safety. CP 323.

Potelco's safety coordinator testified that Potelco did not usually document verbal warnings to employees, even though failing to do so violated Potelco's written disciplinary policy. CP 516, 522-23, 774. In the two years before the incident, Potelco took only five disciplinary actions against employees. CP 500. There was no evidence that any of these actions was the result of a safety inspection. CP 500-05.

The Board rejected Potelco's unpreventable employee misconduct defense. CP 12. It found that the company did not take adequate steps to discover and correct safety violations where its employees were warned in advance of upcoming safety inspections. CP 11 (Finding of Fact (FF) 11). The foreperson's involvement in the EPZ violation also demonstrated that the company did not effectively enforce its safety program in practice. CP 11 (FF 12).

The Board found that Potelco also did not effectively enforce its written accident prevention plan, explaining that the company had failed to adequately enforce its own disciplinary policy. CP 11-12 (FF 13). Because Potelco failed to document verbal warnings, the Board noted that the company's workers could repeatedly break the same safety rules without receiving progressive discipline. CP 11-12 (FF 13). This created

an environment where Potelco's employees readily ignored safety rules in order to perform work faster. CP 11-12 (FF 13).

Finally, the Board determined that the violations were properly characterized as serious violations. CP 12. It rejected Potelco's assertion that it did not know of the violations. CP 11. The Board explained that given the foreperson's presence at the worksite, Potelco knew or, in the exercise of reasonable diligence, could have known that no EPZ had been established. CP 11 (FF 9).

C. The Superior Court and Court of Appeals Affirmed the Board

The superior court affirmed the Board, and the court of appeals affirmed the superior court. *Potelco, Inc. v. Dep't of Labor & Indus.*, 194 Wn. App. 428, ¶ 1, __ P.3d __ (2016). The court of appeals explained that substantial evidence supported the Board's finding that Potelco did not prove the elements of unpreventable employee misconduct. *Potelco*, 194 Wn. App. 428, ¶ 13. To establish this affirmative defense, an employer must show:

i. A thorough safety program, including work rules, training, and equipment designed to prevent the violation;
ii. Adequate communication of these rules to employees;
iii. Steps to discover and correct violations of its safety rules; and
iv. Effective enforcement of its safety program as written in practice and not just in theory.

RCW 49.17.120(5)(a). The court noted that "the 'evidence must support the employer's assertion that the employees' misconduct was an isolated occurrence and was not foreseeable.'" *Potelco*, 194 Wn. App. 428, ¶ 16 (quoting *BD Roofing, Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 98, 111, 161 P.3d 387 (2007)).

Here, the court of appeals reviewed the record and held that substantial evidence showed that Potelco failed to take adequate steps to discover and correct safety violations. *Potelco*, 194 Wn. App. 428, ¶ 22. The court noted that Potelco's employees were usually forewarned of safety inspections, that the company rarely penalized its workers for safety violations, and that it did not enforce its progressive disciplinary policy. *Potelco*, 194 Wn. App. 428, ¶¶ 19-21. The court explained that this same evidence also showed that Potelco did not effectively enforce its safety program in practice. *Potelco*, 194 Wn. App. 428, ¶ 26.

Substantial evidence likewise showed that Potelco knew or, through the exercise of reasonable diligence, could have known of the violative conditions at its work site. *Potelco*, 194 Wn. App. 428, ¶ 35. The court noted that knowledge is established where a violation is in "plain view." *Potelco*, 194 Wn. App. 428, ¶ 33 (citing *BD Roofing*, 139 Wn. App. at 109-10). Because the record demonstrated that any bystander could readily have observed the EPZ violation, the court explained that

"[o]n this basis alone, Potelco had sufficient knowledge of the violative condition." *Potelco*, 194 Wn. App. 428, ¶ 35.

In addition, Potelco did not dispute that the foreperson actually knew of the EPZ violation. Given his status as a supervisor with authority to fire other employees for safety violations, the court explained that the Board "could rightly treat his knowledge as being imputed to Potelco." *Potelco*, 194 Wn. App. 428, ¶ 35. Thus, substantial evidence supported the Board's finding that Potelco knew or could have known of the violative conditions at its work site.

IV. ARGUMENT

A. Discretionary Review Is Not Warranted Where Potelco Simply Asks This Court To Reweigh the Evidence

No issue of substantial public interest is raised by the court of appeals' correct application of substantial evidence review. Potelco identifies no specific error by the court of appeals or the Board. It does not contend that an incorrect standard was applied; nor does it argue that the evidence relied on by the court was not sufficient to support the Board's findings. Instead, throughout its petition for review, Potelco merely points to other evidence in its favor, implicitly asking this Court to reweigh the evidence. Although it purports to ask for "guidance for employers on what reasonable measures satisfy the WISHA standards" for unpreventable

employee misconduct, Pet. 8-9, Potelco's petition is little more than a request for this Court to second guess the trier of fact and reweigh the evidence.

Such arguments provide no basis for review. Like the court of appeals, this Court does not reweigh the evidence or substitute its own judgment when it conducts review for substantial evidence. *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001); *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 34, 891 P.2d 29 (1995). Because Potelco merely asks this Court to reweigh the evidence, the company's request for discretionary review should be denied.

B. There Is No Issue of Substantial Public Interest Where the Court of Appeals Applied Long-Standing Principles of Law

The court of appeals applied well-established principles in affirming the Board's findings and conclusions. Contrary to Potelco's assertion, this case would not "clarify under what circumstances an employer 'knew or could have known' of a violation of WISHA for purposes of classifying a violation as 'serious.'" Pet. 9. It has long been the law that either actual or constructive knowledge is sufficient to prove a serious violation. *BD Roofing*, 139 Wn. App. at 109-10; *see*

Legacy Roofing, Inc. v. Dep't of Labor & Indus., 129 Wn. App. 356, 359, 119 P.3d 366 (2005). Constructive knowledge may be shown through evidence that the violation was in "plain view." *BD Roofing*, 139 Wn. App. at 109-10. A violation is in plain view where it was "readily observable or in a conspicuous location in the area of the employer's crews." *Erection Co., Inc. v. Dep't of Labor & Indus.*, 160 Wn. App. 194, 207, 248 P.3d 1085 (2011).

Here, as the court of appeals explained, the violation was in plain view. The court noted that the entire work site was "in the open," allowing any bystander to observe that Potelco failed to create an EPZ. *Potelco*, 194 Wn. App. 428, ¶ 35. The court explained that "[o]n this basis alone, Potelco had sufficient knowledge of the violative condition." *Potelco*, 194 Wn. App. 428, ¶ 35. This unremarkable application of long-standing precedent does not raise an issue of substantial public interest and provides no basis for review.

Nor does the court of appeals' alternative basis for finding employer knowledge warrant further review. The court explained that where a supervisor has knowledge of a safety violation, such knowledge can be imputed to the employer. *Potelco*, 194 Wn. App. 428, ¶ 33. Here, Potelco vested its foreperson, Williams, with supervisory authority, including the power to fire other employees for safety violations. Because

there was no dispute that the foreperson actually knew of the safety violations at the work site, the court noted that "the Board could rightly treat his knowledge as being imputed to Potelco." *Potelco*, 194 Wn. App. 428, ¶ 35.

In its petition for review, Potelco does not disagree with the general principle that a supervisor's knowledge can be imputed to an employer. Instead, it merely notes that some federal courts have determined that it is not appropriate to impute the supervisor's knowledge of his or her own violative conduct. Pet. 9-10. It asserts that where it is a supervisor that commits an infraction, there must be other evidence showing that the employer could have foreseen the violative act. Pet. 10.

This proposition, however, has no application to this case. In contrast to the federal decisions cited by Potelco, the EPZ violation here did not consist of the foreperson's actions alone. There were four other Potelco employees working on the transmission line without proper protection at the time of the accident. CP 10 (FF 4, 6). As the Eleventh Circuit has explained, all federal courts agree that a supervisor's knowledge of a subordinate's misconduct should be imputed to the employer. *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1317 (11th Cir. 2013). Because the foreperson was aware of the conduct of the crew members, under any variation of the case law, his knowledge

was properly imputed to Potelco.

Potelco's argument also fails on its own terms. As the court of appeals explained, there was ample evidence that the conduct of the foreperson's crew was foreseeable. The court noted that Potelco's unannounced safety inspections were infrequent, noncompliance rarely discovered, and safety violations usually unpunished. *Potelco*, 194 Wn. App. 428, ¶¶ 19-21. In the absence of such enforcement measures, most Potelco workers believed production and not safety to be of primary importance. CP 323-24. The court of appeals noted that "the combination of Potelco's lax enforcement of its safety rules and Williams'[s] perception of pressure to work quickly made this violation foreseeable." *Potelco*, 194 Wn. App. 428, ¶ 26.

Finally, review is unwarranted because the court of appeals' decision does not foreclose examination of the issue described by Potelco in a future case. In noting that the Board could rightly impute the foreperson's knowledge to Potelco, the court was careful to explain that it was not announcing "the perimeters of this rule." *Potelco*, 194 Wn. App. 428, ¶ 33 n.6. In a future case involving a supervisor's violation of a safety regulation, parties will remain free to argue that the supervisor's knowledge of his or her own conduct should not be imputed to the employer. But any determination regarding that issue should await a case

with appropriate facts.

C. There Is No Merit to Potelco's Suggestion that Review is Automatically Appropriate Because WISHA Promotes a Public Interest in Protecting Workers

Potelco argues that review should be granted simply because WISHA standards are "designed to promote the 'public interest.'" Pet. 10 (citing RCW 49.17.010). While it is true the Legislature enacted WISHA to provide workplace safety protection to workers, this does not mean that all WISHA cases must be accepted for review. Such a blanket rule is both unworkable and inconsistent with RAP 13.4(b). Because this case raises no issue of substantial public interest, this Court should deny Potelco's petition for review.

V. CONCLUSION

This Court should deny Potelco's petition for review where the company simply asks the Court to reweigh the evidence. The court of appeals' correct application of existing case law does not raise an issue of substantial public interest. Potelco's petition for review should be denied.

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RESPECTFULLY SUBMITTED this 9th day of September, 2016.

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SUPREME COURT OF THE STATE OF WASHINGTON

POTELCO, INC., Petitioner, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON Respondent.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the DEPARTMENT'S ANSWER TO PETITION FOR REVIEW, and this CERTIFICATE OF SERVICE in the below described manner:

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RESPECTFULLY SUBMITTED this 9th day of September, 2016.

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Good morning, Mr. Carpenter,

Attached for filing please find the Department's Answer to Petition for Review and Certificate of Service.

Thank you,

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