

73226-9

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No. 73226-9-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 OPENING BRIEF

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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I. INTRODUCTION

Potelco, Inc. (“Potelco”) is an electrical contractor that performs work on high-voltage power lines. The Department of Labor and Industries (the “Department”) issued Potelco a citation under the Washington Industrial Safety and Health Act (“WISHA”) for failure to set up an equipotential zone (“EPZ”) at a worksite in Sedro-Woolley, Washington, and for allegedly failing to effectively enforce its safety program.

Potelco respectfully asks the Court to vacate the citation because Potelco effectively enforces its safety program and because the failure to establish an EPZ was the result of the unpreventable employee misconduct of certain Potelco crew members; each of whom had received intensive training and instruction relating to the cited conduct before the Department’s inspection.

II. ASSIGNMENTS OF ERROR

Potelco respectfully asserts that the Superior Court erred in affirming Findings of Fact Nos. 5, 9, and 11-14, and in adopting Conclusions of Law Nos. 2-4 as set forth in the Board’s Decision and Order, because these Findings of Fact were not supported by substantial evidence and did not in turn support the Conclusions of Law. Potelco also

respectfully asserts that the Superior Court erred in granting statutory attorneys' fees to the Department as the prevailing party. Specifically:

Assignment of Error No. 1: The Superior Court erred in adopting Finding of Fact No. 5.

Statement of Issues Pertaining to Assignment of Error No. 1:

Did the Superior Court err in adopting Finding of Fact No. 5 when the substantial evidence shows that Potelco informed its employees not to begin working until air had been cut into the transmission line at the worksite?

Assignment of Error No. 2: The Superior Court erred in adopting Finding of Fact No. 9.

Statement of Issues Pertaining to Assignment of Error No. 2:

Did the Superior Court err by adopting Finding of Fact No. 9 when the substantial evidence shows that Potelco did not know or have reason to know that Williams would fail to establish an EPZ, after being specifically instructed to do so?

Assignment of Error No. 3: The Superior Court erred in adopting Finding of Fact No. 11.

Statement of Issues Pertaining to Assignment of Error No. 3:

Did the Superior Court err by adopting Finding of Fact No. 11 when the

substantial evidence shows that Potelco took adequate steps to discover and correct violations of its safety rules?

Assignment of Error No. 4: The Superior Court erred in adopting Finding of Fact No. 12.

Statement of Issues Pertaining to Assignment of Error No. 4:
Did the Superior Court err by adopting Finding of Fact No. 12 when the substantial evidence shows that Potelco effectively enforced its safety program in practice?

Assignment of Error No. 5: The Superior Court erred in adopting Finding of Fact No. 13.

Statement of Issues Pertaining to Assignment of Error No. 5:
Did the Superior Court err by adopting Finding of Fact No. 13 when the substantial evidence shows that Potelco effectively enforced its safety program in practice, that Potelco took adequate steps to ensure that its safety inspections were random and unannounced, and that Potelco supervisors were aware of disciplinary actions?

Assignment of Error No. 6: The Superior Court erred in adopting Finding of Fact No. 14.

Statement of Issues Pertaining to Assignment of Error No. 6:
Did the Superior Court err by adopting Finding of Fact No. 14 when the

substantial evidence shows that did not know or have reason to know that Williams would fail to establish an EPZ after being specifically instructed to do so?

Assignment of Error No. 7: The Superior Court erred in adopting Conclusion of Law No. 2.

Statement of Issues Pertaining to Assignment of Error No. 7:

Did the Superior Court err by adopting Conclusion of Law No. 2 when the substantial evidence shows that the violation of WAC 296-45-345(3) at Potelco's worksite was the result of unpreventable employee misconduct?

Assignment of Error No. 8: The Superior Court erred in adopting Conclusion of Law No. 3.

Statement of Issues Pertaining to Assignment of Error No. 8:

Did the Superior Court err by adopting Conclusion of Law No. 3 when the substantial evidence shows that the violation of WAC 296-45-345(3) at Potelco's worksite was the result of unpreventable employee misconduct?

Assignment of Error No. 9: The Superior Court erred in adopting Conclusion of Law No. 4.

Statement of Issues Pertaining to Assignment of Error No. 9:

Did the Superior Court err by adopting Conclusion of Law No. 4 when the substantial evidence shows that Potelco effectively enforces its safety

program?

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

Potelco was hired to replace old transmission poles and lines in and around Sedro-Woolley, Washington (the “Sedro-Woolley project”).

(Clerk’s Papers “CP” at 187.) Potelco was working on a 115,000 volt de-energized transmission line and there was a separate energized 115,000 volt transmission line running parallel to the de-energized line. *Id.* The two lines were approximately 30 feet apart and paralleled each other for approximately 25 miles. *Id.* The first day of the Sedro-Woolley project was March 28, 2011. *Id.* at 188.

Before the project began, Potelco performed a Job Hazard Analysis and determined all relevant safety conditions related to the work to be performed. *Id.* at 480, 524-25, 704-747.

On March 25, 2011, Potelco safety coordinator George Bellos held a new hire orientation and safety meeting with employees who were assigned to work on the Sedro-Woolley project, including the crew involved in this incident—Gavin Williams, Robb Schwilke, Brent Murphy, Bill Sword, and Kathryn Evans. (CP at 187, 297, 419, 422, 481-483.) During new hire orientation, Bellos discussed Potelco’s safety rules

with the employees, and informed employees that they must always set up an equipotential zone (“EPZ”)¹ when working on or near electrical lines. (CP at 297-98, 420, 484, 679-87.) Bellos specifically described the process for building an EPZ, whether an employee would be working in the air or on the ground. *Id.* at 420, 422-23, 444. In addition, Bellos discussed the particular hazards of the Sedro-Woolley project, including the hazard of induced voltage from the paralleling line and he stated that the only way to protect against the induction hazard is to build an EPZ. *Id.* at 299, 318, 420-21.

On the morning of March 28, 2011, before any work began, Potelco held a safety meeting with all employees assigned to work on the Sedro-Woolley project, including Williams, Schwilke, Murphy, Sword, and Evans. *Id.* at 187, 245, 297. At this safety meeting, Bellos again emphasized that the Sedro-Woolley project presented a significant induced voltage hazard and reiterated that all crews were to build an EPZ at every work location. *Id.* at 245, 247, 262, 299, 318, 426-28, 484. Bellos then described the specific method for creating an EPZ on the Sedro-Woolley project. (CP at 274, 428.) Potelco management also informed employees

¹ An equipotential zone is an arrangement where overhead transmission lines are connected to the ground in such a way that employees are at the same electrical potential as the lines they are working on. (CP at 473-74.)

that the de-energized transmission line would be cut into smaller sections, in order to reduce the induction hazard. *Id.* at 248-49, 299. All crews were instructed to not begin working until the line had been cut; there was no urgency for the crews to start replacing poles on March 28. *Id.* at 300, 314, 424.

After the safety meeting, the crew went to its assigned section of the jobsite, near poles 10/1 and 10/2 on the Sedro-Woolley transmission line. *Id.* at 188. Before any work began, Williams conducted a tailboard that described the work to be performed and the hazards of the job, including the hazard of induced voltage. *Id.* at 773.

By this time, Potelco had communicated to the crew several times—through the safety meetings on March 25 and March 28—the hazards of the job (including the significant potential for induced voltage) and the appropriate safety measures and practices to be used (which included building an EPZ at every work location). (CP at 245, 247, 262, 299, 318, 420-23, 426-28.)

And by this time, the crew had also been advised that there was no need to rush to replace poles on March 28, there was no expectation that pole/line replacement work would be started on March 28, and the crew had received no communication that the transmission line had been cut

into smaller sections. (CP at 300, 319, 424.) The crew nonetheless started work to replace pole 10/2 without establishing an EPZ. *Id.* at 188-89.

As part of their unapproved work on pole 10/2, Sword and Evans removed the line from the stays, let the line down, and floated it approximately 10 feet above the ground. *Id.* at 189. Williams then attempted to grab the transmission line using a tool called “slack blocks” so he could bring the line to the ground with his hands. *Id.* Williams was unable to capture the line using the slack blocks. *Id.* Murphy then tried to grab the transmission line. In so doing, he came into contact with the line and sustained electrical shock injuries. *Id.*

Department Compliance Safety and Health Officer George Richard Maxwell (“Inspector Maxwell”) opened an inspection of the Sedro-Woolley project the day after the incident involving Murphy after receiving a referral about the incident. *Id.* at 341, 343.

Following Inspector Maxwell’s inspection, the Department issued Potelco Citation No. 314800384, which originally contained three alleged violations:

- Violation 1, Item 1a (“Citation 1-1a”) alleged a serious violation of WAC 296-45-075(7) for allegedly failing to

determine the safety related conditions of the Sedro-Woolley project before work began.

- Violation 1, Item 1b (“Citation 1-1b”) alleged a serious violation of WAC 296-800-14025 for allegedly failing to establish, supervise, and enforce its accident prevention program (“APP”) in a manner that is effective in practice.
- Violation 1, Item 2 (“Citation 1-2”) alleged a serious violation of WAC 296-45-345(3) because the crew failed to establish an EPZ at its worksite.

B. PROCEDURAL BACKGROUND

Potelco appealed the Citation to the Board on December 13, 2011 (CP at 141-42). The Board conducted a hearing at its Seattle office before Judge Michael E. Metzger on February 5-6, 2013. *Id.* at 240, 369. Judge Metzger issued a Proposed Decision and Order on April 29, 2013, affirming Citation 1-1b and Citation 1-2, and vacating Citation 1-1a. *Id.* at 52-124. Potelco and the Department both filed timely Petitions for Review². *Id.* at 19-33, 36-39. The Board granted the Parties’ Petitions for Review, and on August 14, 2013, the Board issued a Final Decision and Order affirming the Citations 1-1b and 1-2. *Id.* at 5-13. On September 16,

² Neither party challenged the Board’s decision to vacate Citation 1-1a, and that Citation is not at issue in this appeal.

2013, Potelco appealed the Board's Decision and Order to the Skagit County Superior Court. (*Potelco, Inc. v. Dep't of Labor and Indus.*, Skagit County Cause No. 13-2-01595-4, Notice of Appeal to Superior Court, Dkt. #1.) On February 18, 2015, Judge Dave Needy entered an order affirming the Board's Decision and Order. CP 796-798. Potelco timely appealed to this Court on December 15, 2014. (*Potelco, Inc. v. Dep't of Labor and Indus.*, Skagit County Cause No. 13-2-01595-4, Notice of Appeal to Washington State Court of Appeals, Division I, Dkt. # 27.)

IV. ARGUMENT

A. STANDARD OF REVIEW

When reviewing Board rulings, this Court sits in the same position as the Superior Court and reviews the Board's decision directly. *Dep't of Labor and Indus. v. Tyson Foods, Inc.*, 143 Wn. App. 576, 581, 178 P.3d 1070 (2008); *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 must be supported by substantial evidence when considering the record as a whole. RCW 49.17.150(1). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person that a finding is true. *Martinez Melgoza & Assoc., Inc. v. Dep't of Labor & Indus.*, 125 Wn. App. 843, 847-48, 106 P.3d 776 (2005). Conclusions of law must be appropriate

based on the factual findings. RCW 49.17.150; *Martinez Melgoza*, 125 Wn. App. at 847-48. Courts review questions of law, such as the Board's interpretation of a statute, de novo. *Stuckey v. Dep't of Labor and Indus.*, 129 Wn.2d 289, 295, 916 P.2d 399 (1996).

CITATION 1-2 SHOULD BE VACATED BECAUSE THE VIOLATION WAS THE RESULT OF UNPREVENTABLE EMPLOYEE MISCONDUCT

The Department may not issue a citation if unpreventable employee misconduct ("UEM") caused the violation. RCW 49.17.120(5)(a). UEM "addresses situations in which employees disobey safety rules despite the employer's diligent communication and enforcement," and "defeats the Department's claim, even when the Department has proven all the elements of a violation...." *Asplundh Tree Expert Co. v. Wash. State Dept. of Labor and Indus.*, 145 Wn. App. 52, 62, 185 P.3d 646 (2008). The defense applies "when an unsafe action or practice of an employee results in a violation." *In re Jeld-Wen of Everett*, BIIA 88 W144, 1990 WL 205725 at *5 (1990). To establish the affirmative defense of UEM, 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). Citation 1-2 should be vacated because it was the result of the unforeseeable and unpreventable misconduct of Williams and his crew, who ignored specific instructions from Potelco and worked on the Sedro-Woolley project without establishing an EPZ, in violation of the applicable WAC and Potelco's safety rules.

1. POTELCO HAS A THOROUGH SAFETY PROGRAM

A safety program is thorough for purposes of RCW 49.17.120(5)(a)(i) when it is "thoroughly outlined." *See Legacy Roofing Inc. v. Wash. State Dep't of Labor & Indus.*, 129 Wn. App. 356, 364 (2005). The program may be detailed in a manual covering the employer's rules, orientation and trainings, safety pre-planning, safety meetings, monitoring and discipline, and other safety rules and equipment. *See In re Exxel Pacific, Inc.*, BIIA 96 W182, 1998 WL 718040 at *10 (1998). Potelco's safety program meets these requirements.

Potelco has a detailed Company Policy and Safety Guide ("Safety Manual") that covers a wide range of topics, including EPZ. (CP at 402-404, 589-624.) In addition, Potelco provides several types of safety

trainings to its employees: (a) new employee training to all employees when they are first hired (CP at 404, 419); (b) monthly safety trainings for any employee who needs instruction on a specific topic, including EPZ (CP at 314, 397, 406); and (c) weekly safety meetings that review various hazards employees face during their normal workday. *Id.* In addition, before beginning work on any job, foremen must conduct a job hazard assessment with their crews, during which the crews identify dangers associated with the task at hand and discuss how they will mitigate those dangers. *Id.* at 397, 407. Potelco also provides its employees with equipment necessary to perform their work safely, including the equipment required to build an EPZ. *Id.* at 513, 520. As the Board found, Potelco has “an adequate safety program, including safety rules and safety training for its employees.” (CP at 11 – Finding of Fact No. 10.)

Thus, the substantial evidence shows that Potelco has a thorough safety program designed to prevent WISHA violations, including the violation of WAC 296-45-345(3) cited here.

2. POTELCO ADEQUATELY COMMUNICATES ITS SAFETY RULES TO EMPLOYEES

Potelco’s work rules required employees to establish an EPZ anytime they would be working with transmission lines at the Sedro-Woolley project. (CP at 245-47, 262, 297-98, 398, 420, 422-23, 428, 444,

589-624.) Before any work began, Potelco repeatedly communicated this rule to every employee assigned to that project. (CP at 245, 262, 299, 421-23, 426-28.) In fact, “[Potelco] management insisted” that all crews were to build an EPZ. *Id.* at 245. Had Williams and his crew followed Potelco’s explicit instructions, the violation at issue would not have occurred. Thus, the substantial evidence shows that Potelco adequately communicated to employees its work rule designed to prevent the violation. The Board agreed. *See, e.g.*, CP at 7. (“The evidence shows with little doubt that Potelco did an adequate job of lining out the crew, informing them of the hazards on site, and providing them with the proper equipment or at least making sure the proper equipment was available to them.”)

3. POTELCO TAKES STEPS TO DISCOVER AND CORRECT SAFETY VIOLATIONS

An employer takes adequate steps to discover and correct safety violations to deter future violations by consistently counseling, penalizing, or disciplining employees caught violating the rules. *See Legacy Roofing*, 129 Wn. App. at 365. Regular visits to job sites by trained, full-time safety officers are evidence that an employer took steps to discover and correct safety violations. *Id.* at 365-66.

Potelco employs several safety coordinators, whose main duty is to perform safety audits on Potelco crews. (CP 399, 407.) These coordinators conduct random inspections daily and do not inform crews when they will be inspected. (CP at 317, 408.) Each Potelco crew is inspected for safety compliance several times per month. *Id.* at 410. When a safety violation is discovered, the offending crew is counseled and/or disciplined, and is later re-inspected to ensure safety compliance. *Id.* at 411, 463-65. The Board nonetheless believed that Potelco's efforts to discover and correct safety violations were inadequate because Potelco crews sometimes know when to expect a safety audit, having been tipped off by their coworkers at other neighboring work sites. *Id.* at 7, 409. The Board relied heavily on this fact when it rejected Potelco's employee misconduct defense. *Id.* at 7. This, however, is not substantial evidence that Potelco failed to take steps to discover and correct safety violations.

In an age where mobile phones are ubiquitous, Potelco cannot control or prevent employees from contacting their coworkers, and it would not be possible to identify which employees had engaged in the conduct. But rather than do nothing, if "the word's out" that Potelco's Safety Department is in the area, Potelco's safety inspectors will inspect crews in a different area where they are unlikely to be expected. *Id.* at

409. Thus, Potelco has taken adequate steps to discover and correct safety violations.

4. POTELCO EFFECTIVELY ENFORCES ITS SAFETY PROGRAM IN PRACTICE

An employer's safety program is effective in practice when the employer shows a consistent pattern of safety meetings, inspections, and frequent reminders regarding safety compliance. *Exxel*, 1998 WL 718040 at *12. The actions an employer takes to discipline employees for safety violations are also indicative of the effectiveness of its safety program. *See id.* at 19. A program is effective when an employee's misconduct was an isolated occurrence and was not foreseeable. *BD Roofing, Inc. v. Dept. of Labor and Indus.*, 139 Wn. App. 98, 111, 161 P.3d 387 (2007).

As already discussed, Potelco holds regular safety meetings, inspects crews, and disciplines safety violators. Potelco crews attend monthly, weekly, and daily safety meetings. Potelco puts a strong emphasis on safety. (CP at 323, 451.) Despite these safety-related efforts, the Board believed that Potelco's safety program was not effective for several reasons.

For one, the Board reasoned that Potelco does not effectively enforce its safety program because the verbal warnings it gives employees for violating safety rules are not always documented. (CP at 11 – Finding

of Fact No. 13.) However, whether discipline is effective should be determined by whether it achieves its goal to promote a safe work place, not by whether it is documented. Evans testified that a Potelco safety coordinator once saw her working without wearing safety glasses, in violation of Potelco's safety rule. (CP at 329.) The safety coordinator gave Evans a verbal warning and reminded her that she must wear safety glasses while working. *Id.* Evans understood that she would be subject to more severe discipline if she were caught violating this rule again, so from that point on she made sure to wear safety glasses. *Id.* at 331. Regardless of whether this particular verbal warning was documented, it served its purpose to promote a safe work place by causing Evans to wear her glasses. In light of this testimony, failing to document every single verbal warning that occurs in the field is not substantial evidence that Potelco discipline policy is ineffective.

The Board also found that Potelco does not effectively enforce its safety program because Potelco's crews sometimes know when to expect a safety audit. (CP at 11 – Finding of Fact No. 13.) As already discussed, this cannot be controlled, and Potelco takes steps to ensure that many of its safety audits remain unannounced and random. This simply is not

substantial evidence to refute the effectiveness of Potelco's safety program.

In addition, the Board also found that Potelco's safety program was ineffective because a violation occurred in this case. (CP at 11 – Finding of Fact No. 12.) This reasoning is improper because it would essentially render the employee misconduct defense moot, which applies only when the Department has already established the elements of a violation. Accordingly, the mere fact that a violation occurred cannot serve as substantial evidence that an employer failed to effectively enforce its safety program.

Finally, the Board relied heavily on foreman Williams' role in the violation when ruling that Potelco's safety program was ineffective. (CP at 8, 11 – Finding of Fact No. 12.) A safety program is effective when an employee's misconduct was an isolated occurrence and was not foreseeable. *BD Roofing*, 139 Wn. App. at 111. The conduct of Williams and his crew was both isolated and unforeseeable, given that: (a) Potelco several times stressed to the crew that there was a significant induced voltage hazard at the Sedro-Woolley worksite and reminded them the only way to protect against that hazard is to build an EPZ; and (b) the crew members were trained on EPZ and understood how to establish one.

Considering Potelco's specific instructions to foreman Williams and the other safety measures already discussed, the violation was the result of UEM, despite Williams' role in the violation. Potelco has an effective safety program and has proven the UEM defense.

C. CITATION 1-1B SHOULD BE VACATED BECAUSE POTELCO EFFECTIVELY ENFORCES ITS SAFETY PROGRAM IN PRACTICE

WAC 296-800-14025 requires employers to establish, supervise, and enforce an APP in a manner that is effective in practice. To sustain a violation of this provision, the evidence must show how an employer's APP is deficient. *See, e.g., In re J.E. Dunn Northwest, Inc.*, BIIA 02 W0517, 2008 WL 5663986 at *6 (2008). There is not substantial evidence that Potelco's APP is deficient.

In concluding that Potelco violated WAC 296-800-14025, the Board relied on precisely the same evidence discussed in relation to Potelco's employee misconduct defense. (CP at 8.) But as just described, that evidence shows that Potelco effectively enforces its safety program. For the same reasons, Potelco did not violate WAC 296-800-14025.

D. CITATIONS 1-1B AND 1-2 WERE INAPPROPRIATELY DESIGNATED AS "SERIOUS"

A violation is "serious" if:

There is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use in such workplace, *unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.*

RCW 49.17.180(6) (emphasis added). The conduct of Williams and his crew was entirely unforeseeable. There is no substantial evidence that Potelco could have known, even with reasonable diligence, that the crew would disregard Potelco's repeated warnings regarding induced voltage hazards and instructions to use EPZ on the Sedro-Woolley project.

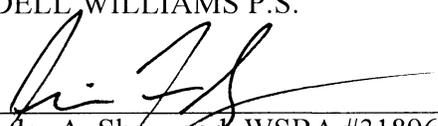
V. CONCLUSION

Potelco respectfully requests that the Court dismiss Citation No. 31480034 in its entirety.

DATED this 2nd day of July, 2015.

RIDDELL WILLIAMS P.S.

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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 Tuesday, July 2, 2015, I served a true and correct copy of the foregoing document on the following party, attorney for Respondent, via email and hand delivery, and addressed as follows:

William F. Henry, WSBA #45148
Assistant Attorney General
Washington Attorney General's Office
Labor & Industries Division
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 2nd day of July, 2015.



Jazmine Matautia