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No. 73226-9-I

**THE COURT OF APPEALS, DIVISION I  
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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**APPELLANT'S REPLY BRIEF**

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## **I. INTRODUCTION**

The substantial evidence supports vacating Citation No. 31480034 in its entirety because Potelco established the unpreventable employee misconduct (“UEM”) defense, and because Potelco effectively enforced its safety program. More specifically, substantial evidence shows that Potelco: (1) has a thorough safety program, (2) communicates safety rules to its employees, (3) takes steps to discover and enforce its safety rules, and (4) effectively enforces its safety program in practice. *See* RCW 49.17.120(5).

## **II. ARGUMENT**

### **1. POTELCO HAS A THOROUGH SAFETY PROGRAM**

The Department concedes that Potelco has proved the first element of the UEM defense – substantial evidence shows that Potelco has “an adequate safety program, including safety rules and safety training for its employees.” (CP at 11 – Finding of Fact No. 10; *see also* Department’s Brief (“Dept’s Br.” at 15, n. 1))

### **2. POTELCO ADEQUATELY COMMUNICATES ITS SAFETY RULES TO EMPLOYEES**

The Board found that “[t]he 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.” (CP at 7.)

Although, the Department contends that there was no clear finding of fact regarding the adequacy of Potelco’s communication of its EPZ rule, the Board’s conclusion above plainly found Potelco’s communication adequate.

Indeed, Potelco “insisted” that all crews were to build an EPZ anytime they would be working with transmission lines at the Sedro-Woolley project. (CP at 245, 262, 299, 422-23, 426-28.) And before any work began at the Sedro-Woolley project, Potelco repeatedly communicated this rule to every employee assigned to that project. (CP at 245, 262, 299, 421-23, 426-28.) The substantial evidence shows that Potelco adequately communicated its EPZ rule.

### **3. POTELCO TAKES STEPS TO DISCOVER AND CORRECT SAFETY VIOLATIONS**

Potelco takes adequate steps to discover and correct safety violations by sending safety coordinators to perform safety audits of Potelco crews, and by counseling or disciplining employees who violate those rules. (CP at 411, 463-65.) Safety coordinators *do not* inform crews when they will be inspected. (CP at 317, 408.) Despite Potelco’s best efforts, it is possible audited crews inform their coworkers at neighboring

worksites that a safety coordinator is in the area – a “common courtesy” among linemen. (CP at 409.) To address this issue, Potelco’s safety coordinators conduct audits in various, different areas where they are unlikely to be expected. *Id.* at 409. These undisputed efforts establish that Potelco has taken adequate steps to discover and correct safety violations.<sup>1</sup>

**4. POTELCO EFFECTIVELY ENFORCES ITS SAFETY PROGRAM IN PRACTICE<sup>2</sup>**

Potelco enforces its safety program by holding regular safety meetings, inspecting crews, and counseling and/or disciplining safety violations. The testimony from witnesses confirmed that Potelco’s efforts promote safety compliance. For example, Potelco’s employee Kathryn Evans testified that Potelco’s safety audit program encouraged her to

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<sup>1</sup> The Department assumes Potelco “could discipline employees who warned other crews about upcoming inspections.” (Dept’s Br. at 17.) This is pure conjecture that is unsupported by any facts whatsoever in the record. Indeed, it is premised on the flawed assumption that Potelco knows when an employee has warned another crew (as opposed to a general knowledge that the practice occurs) and who it was in any particular case. On the contrary, Potelco has no reasonable means to discover when an employee has tipped off another crew, much less ascertain who did it. But, as noted above, Potelco has taken reasonable steps to ensure safety audits remain random, by sending safety coordinators to areas where they are not likely to be expected.

<sup>2</sup> The arguments in this section apply to both Potelco’s UEM defense to Citation 1-2 (for which Potelco has shown that its safety program is effective), and also applies to Citation 1-1B (which alleges Potelco’s safety program is not effective).

follow Potelco safety rules, including the requirement that she wear safety glasses. (CP at 329-31.) Potelco's safety program is effective.<sup>3</sup>

### III. CONCLUSION

For these reasons, and the reason stated in its Opening Brief, Potelco respectfully requests that the Court dismiss Citation No. 31480034 in its entirety.

DATED this 2<sup>nd</sup> day of October, 2015.

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By 

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<sup>3</sup> The Department's arguments to the contrary are based on a similar reasoning used by the Board. (Dept's Br. at 18-22.) Potelco already responded to that reasoning in its Opening Brief, which further describes how Potelco effectively enforces its safety program. (Potelco's Br. at 16-19.)

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, October 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 2<sup>nd</sup> day of October, 2015.



Jazmine Matautia