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NO. 97408-0

SUPREME COURT OF THE STATE OF WASHINGTON

POTELCO, INC.,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent.

**ANSWER TO PETITION FOR REVIEW
DEPARTMENT OF LABOR & INDUSTRIES**

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I. INTRODUCTION

Generalized assertions that a case is in the public interest do not form a basis for review under RAP 13.4. This case raises a routine question about whether substantial evidence supports a factual determination by the Board of Industrial Appeals that Potelco, Inc. reasonably could have known that certain equipment it operated was, in fact, a crane. This issue presents no legal conflict, or significant issue of law or public interest. Potelco asserts only that cases under the Washington Industrial Safety and Health Act are in the “public interest” so therefore review should be granted. But it presents no argument about any legal issue that warrants review, and its petition should be denied.

II. ISSUES

1. Potelco received the Elliott 30105 with a metal wire hoist line—a key attribute of cranes—and its model number, data plate, load chart, and manufacturer website all showed that it was a mobile crane. Does substantial evidence support the Board’s finding that Potelco could have known that the equipment was a crane through reasonable diligence?

III. STATEMENT OF THE CASE

A. Cranes Are Subject to Specific Safety Standards

The Legislature requires crane owners to “ensure that cranes are inspected and load proof tested by a certified crane inspector at least

annually.” RCW 49.17.420(2)(c). The Legislature directed the Department to adopt rules to implement this bill. RCW 49.17.440.

The Department’s safety regulations exempt “digger derricks” from the certification and load testing requirements when companies use them for electric power generation, transmission, and distribution work, as well as for telecommunications work. *See* WAC 296-155-52900(4)(t). A “digger derrick” is a “multipurpose vehicle-mounted machine which is primarily designed to accommodate components that dig holes, set poles, and position materials and apparatus.” WAC 296-155-52902. In contrast, a “crane” is “[p]ower-operated equipment used in construction that can hoist, lower, and horizontally move a suspended load.” WAC 296-155-52902.

B. Potelco Used an Elliott 30105 Mobile Crane at its Jobsite

In November 2015, a Department crane inspector, Brad Solheim, drove through Bellevue on his way to work when he noticed Potelco workers using a mobile crane to replace utility poles at a jobsite. Administrative Record (AR) Solheim 6, 20-21, 54; Ex 1.¹ Solheim saw Potelco’s workers using the machine to lift a 120-foot power pole.

¹ The certified appeal board record is cited as “AR.” Because the hearing transcript is separately paginated from the rest of the administrative record, citations that contain a witness’s last name refer to the page numbers in the separately paginated transcript.

AR Solheim 32. Potelco was raising the height of the power lines so the lines would accommodate a new light rail station that was going in.

AR Solheim 54.

Elliott, an industrial equipment company, manufactured the mobile crane bearing the model number 30105. AR Solheim 27; Ex 5.

The Elliott 30105 had an auger—an attachment that swings out from the machine and drills holes in the ground for utility poles. AR Solheim 31; Ex 2. It also had a pole claw on the tip of its boom, which balances utility poles as workers set them in holes. AR Solheim 31. These attachments are typical features of digger derricks but can also be on cranes. AR Solheim 56; WAC 296-155-52900(2) (listing examples of crane attachments, such as hooks, grapples, augers, and drills).

The Elliott 30105 also had a yellow nylon hoist line. AR Solheim 20-21. It was unusual for this type of crane to have a nylon hoist line, so Solheim decided to investigate further. AR Solheim 30, 33.

Solheim called Potelco's safety managers and received permission to inspect the jobsite. AR Solheim 21-23. Solheim returned to the jobsite the next morning and photographed various parts of the crane. AR Solheim 23, 25, 33; Exs 3-8. He photographed the manufacturer's data plate, attached to the base of the boom near the operator station. AR Solheim 33-34; Ex 3. This data plate identified the machine's serial

number, load charts, manufacture date, whether it had an insulated boom, and the standard under which it was manufactured. AR Solheim 34; Ex 3.

The data plate indicated the Elliott 30105 complied with the ASME B30.5 standard.² AR Solheim 34, 51. This national standard applies specifically to all mobile cranes. AR Solheim 36. The standard sets forth, among other things, how to make mobile cranes, how to test them, how to operate them, how to maintain them, what to consider with regard to power lines. AR Solheim 36. Digger derricks are manufactured under a different national engineering standard—ANSI A10.31.³ AR Solheim 36, 49, 51.

Solheim also photographed the Elliott 30105's load chart. AR Solheim 39; Ex 6. The load chart stated, "Crane meets ASME B30.5 requirements at time of manufacture." AR 5; Ex 6 (bottom of page). Crane operators use load charts to determine what items the boom can lift. AR Solheim 10, 18. If the Elliott 30105 had been manufactured under the digger derrick standard—ANSI A10.31—the load chart would have been different. AR Solheim 40. This raised a safety issue because it implicated

² ASME is an acronym for the American Society of Mechanical Engineers, a professional association that develops standards that cover many technical areas, including cranes.

³ ANSI is an acronym for the American National Standards Institute, another organization that develops standards for products.

the maximum weight the Elliott 30105 could safely lift. *See* AR Solheim 40-41.

The data plate also revealed that the Elliott 30105 did not have an insulated boom. AR Solheim 35. In contrast, digger derricks have insulated sections of their booms that make them less conductive of electricity. AR Solheim 35. The Elliott 30105 also had a warning label that warned of the dangers of working around power lines, as the manufacturing standards governing cranes, ASME B30.5, required. AR Solheim 43-44; Ex 8.

Solheim visited Elliott's website. AR Solheim 44. The website identified the 30105 model as a "boom truck," a type of mobile crane. AR Solheim 44-45; Ex 9. In his 30 years of experience with cranes, Solheim had never heard of a "boom truck" that was not a mobile crane. AR Solheim 59. While searching Elliott's website, Solheim determined that the company also made digger derricks, bearing model number D115. AR Solheim 44, 49.

The Elliott 30105 displayed the model number on its boom. Ex 1. If the machine had been a digger derrick, it would have had the "D115" model number on the boom or load charts and a different sized hoist line on the load chart. AR Solheim 50. And if it had been a digger derrick, it

would have had three permissible outrigger positions, while the Elliott 30105 only had one outrigger position. AR Solheim 51.

When Potelco had originally rented the Elliott 30105, it came with a metal hoist line. AR Solheim 55; AR Steedley 126. Cranes have metal hoist lines, while digger derricks have nylon hoist lines because nylon is less conductive of electricity. AR Davis 66; AR Steedley 83. At Potelco's request, the wire hoist line was switched out with a nylon one before Potelco used it at the construction site. AR Solheim 55; AR Steedley 84, 126.

Based on his investigation, Solheim determined the Elliott 30105 was a "mobile crane with attachments," and not a digger derrick. AR Solheim 36, 44-45. Potelco told Solheim that the Elliott 30105 was a digger derrick. AR Solheim 61. Solheim asked the company to produce documentation supporting this assertion, but it never did. AR Solheim 61.

Following Solheim's inspection, the Department cited Potelco for failing to ensure the Elliott 30105 was certified and load tested by an accredited crane certifier, as required by WAC 296-155-52901. AR 43. The Department issued the citation as a general violation and assessed no penalty against Potelco. AR 43.

C. The Board of Industrial Insurance Appeals Affirmed the Citation, Finding That Potelco Could Have Known the Elliott 30105 Was a Mobile Crane; the superior court and Court of Appeals Affirmed

Potelco appealed the citation to the Board. AR 47. It argued that it did not know about the violation because it reasonably believed it was operating a digger derrick, not a mobile crane. AR 89.

The Board affirmed the Department's citation. AR 3. The Board found the Elliott 30105 was a crane as defined by WAC 296-155-52902. AR 5 (FF 4). And the Board found that Potelco, through exercising reasonable diligence, could have known that the Elliott 30105 was a crane. AR 5 (FF 7). Among other things, the Board noted that the machine came with a metal wire hoist line, while digger derricks use nylon lines. AR 4. The Board reasoned that Potelco failed to verify whether the equipment was an exempt digger derrick before it had the lines switched out. AR 4.

The Board also reasoned that the machine's data plate stated it complied with the ASME B30.5 standard and the load chart stated, "Crane meets ASME B30.5 requirements"—the standard that applies specifically to mobile cranes. AR 4. Finally, the "equipment's boom, load chart, and data plate all listed a serial number, which the manufacturer's website identified as a type of mobile crane known as a boom truck." AR 4. The Board noted that "[w]e live in a time when access to such information has

never been easier,” concluding: “Potelco, through the exercise of even a modicum of diligence concerning each or any of these facts, as well as others, should have known that the equipment was in fact a crane subject to the certification requirement.” AR 4.

Potelco appealed the Board’s decision and order to superior court, which also affirmed. CP 41-43. Potelco then appealed to the Court of Appeals, which likewise affirmed. *See Potelco Inc. v. Washington State Dep’t of Labor & Indus.*, No. 78433-1-I, slip op. 10 (Wash. Ct. App. June 10, 2019) (unpublished decision). The Court of Appeals concluded that substantial evidence supported the Board’s determination that, through exercising reasonable diligence, Potelco could have known that the equipment was a crane, not a digger derrick. Slip op. 5-7. Based on this conclusion, the Court of Appeals determined that it did not need to decide whether Potelco had been performing “construction work” under WAC 296-45 because that exemption applied only to digger derricks, not cranes. Slip op at 9. The Court of Appeals further held that Potelco had waived its challenge to the Board’s finding that the equipment was, in fact, a crane, because it failed to make any argument supporting this assignment of error on appeal. Slip op. at 6 n.3.

IV. ARGUMENT

A Generalized Claim That Because WISHA Is In the Public Interest Does Not Support Granting Review

Neither of the two issues raised by Potelco warrant review by this Court. The Court of Appeals held that Potelco waived its first issue seeking review of the Board's finding that its equipment was, in fact, a crane. Slip op. at 6 at n. 3. And Potelco's second issue raises a routine question of whether substantial evidence supports a factual determination by the Board. It raises no conflict of law, significant legal question, or issue of substantial public interest warranting this Court's attention.

Potelco's only basis for review is that "WISHA standards are specifically designed to promote the 'public interest,' [so] clarification on these issues related to WISHA compliance involve[] issues of substantial public interest that the Supreme Court should determine." Pet. 8. But beyond asking for general guidance regarding cranes and digger derricks, it presents no argument that any legal issue in this case warrants review.

It is true that WISHA is in the "public interest." RCW 49.17.010. But unanchored to a legal issue, this does not by itself present a reason for review. If that were true then all WISHA cases would be reviewed—a result RAP 13.4 does not contemplate.

Potelco's petition should be denied.

V. CONCLUSION

Potelco presents no reason for review. This Court should deny review.

RESPECTFULLY SUBMITTED this 5th day of September, 2019.

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CERTIFICATE OF
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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 of Labor & Industries' Answer to Petition for Review and this Certificate of Service in the below described manner:

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DATED this 5th day of September 2019.


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