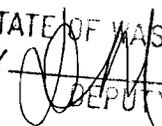


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COURT OF APPEALS
DIVISION II
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STATE OF WASHING
BY  DEPUTY

NO. 41489-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

POTELCO, INC.,
Plaintiff/Appellant

v.

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON,
Defendant/Respondent.

OPENING BRIEF OF APPELLANT POTELCO, INC.

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COURT OF APPEALS
STATE OF WASHINGTON
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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENTS OF ERROR.....	1
III.	STATEMENT OF THE CASE	4
	A. STATEMENT OF FACTS	4
	B. PROCEDURAL BACKGROUND	6
IV.	ARGUMENT.....	8
	A. STANDARD OF REVIEW.....	8
	B. THE RELEVANT REGULATIONS DO NOT REQUIRE SIGNAGE ON CENTRAL VALLEY	9
	C. POTELCO’S SIGNAGE COMPLIED WITH THE RELEVANT REGULATIONS AND ADEQUATELY PROTECTED POTELCO EMPLOYEES.....	11
	D. THE ALLEGED VIOLATION WAS NOT A SERIOUS VIOLATION	15
V.	CONCLUSION	18

TABLE OF AUTHORITIES

CASES

Dep't of Labor and Indus. v. Tyson Foods, Inc., 143 Wn. App. 576, 178 P.3d 1070 (2008) 8

In re: Asplundh Tree Expert Co, BIIA Dec., 03 W0136 (2004)..... 12, 13, 14

In re: Hawkeye Construction Inc., BIIA Dec., 06 W1072 at 2 (2007)..... 12

In Re: Olympia Glass Co., BIIA Dec., 95 W445 (1996)..... 16, 17

Martinez Melgoza & Assoc., Inc. v. Dep't of Labor & Indus., 125 Wn. App. 843, review denied, 155 Wn.2d 1015 (2005)..... 8

Stuckey v. Dep't of Labor and Indus., 129 Wn.2d 289, 295, 916 P.2d 399 (1996) 8

STATUTES AND REGULATIONS

RCW 49.17.150 8

RCW 49.17.150(1) 8

RCW 49.17.180(2) 16

RCW 49.17.180(6) 16

WAC 296-155-305 6, 9, 10, 11

WAC 296-155-305(1)(a) 11

WAC 296-155-305(8)(a) 7, 9, 10

WAC 296-45-52530(1)(a) 13

WAC 296-45-52530(1)(b)..... 1, 3, 6, 9, 10, 12

TABLE OF AUTHORITIES
(continued)

Page

WAC 296-900-14010 17

OTHER AUTHORITIES

Federal Highway Administrations Manual on Uniform
Traffic Control (“MUTCD”) 11, 12

Significant Decisions Subject Index, available at:
[http://www.bia.wa.gov/SignificantDecisions/
contents.htm](http://www.bia.wa.gov/SignificantDecisions/contents.htm) (last visited January 29, 2011) 12

WISHA Policies in Guidelines in Effect as of July 7, 2008,
available at [http://www.lni.wa.gov/
Safety/Rules/Policies/WAC/default.asp](http://www.lni.wa.gov/Safety/Rules/Policies/WAC/default.asp) (last visited
January 29, 2011) 12

I. INTRODUCTION

This matter comes before the Court on Potelco, Inc.'s ("Potelco") appeal of a safety citation issued by the Department of Labor and Industries ("Department") under the Washington Industrial Safety and Health Act ("WISHA"). In this citation, the Department alleged that the number and type of warning signs used by Potelco during a flagging operation at one of its worksites in Kitsap County constituted a serious violation of WAC 296-45-52530(1)(b). The Board of Industrial Insurance Appeals ("Board") and the Kitsap County Superior Court ("Superior Court") affirmed the Department's citation and penalty assessment.

Potelco respectfully requests that the Court reverse the Board's Decision and Order and vacate the citation and penalty because: (1) the relevant regulations do not require the signage placement or the specific signage alleged in the citation; (2) the substantial evidence in the record shows that Potelco used proper signage that adequately protected its employees; and (3) the substantial evidence in the record does not support the "serious" designation and severity rating assigned to this citation.

II. ASSIGNMENTS OF ERROR

Potelco respectfully asserts that the Superior Court erred in affirming Findings of Fact Nos. 2, 4, and 5, and in adopting Conclusions of Law Nos. 2 and 3, 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 also erred in granting statutory attorneys' fees to the Department as the prevailing party. Specifically:

Assignment of Error No. 1: The Board erred in concluding that Finding of Fact No. 2 is supported by substantial evidence.

Statement of Issues Pertaining to Assignment of Error No. 1: Did the Board err by concluding that Finding of Fact No. 2 is supported by substantial evidence where Finding of Fact No. 2 states that "no evidence was presented that the apprentice [flagger] had been trained in the placement of such signage, or in flagging activities," even though the Department's Inspector admitted that the flagger was "skilled for [the] task at hand"?

Assignment of Error No. 2: The Board erred in concluding that Finding of Fact No. 4 is supported by substantial evidence.

Statement of Issues Pertaining to Assignment of Error No. 2: Did the Board err by concluding that Finding of Fact No. 4 is supported by substantial evidence where such evidence fails to establish that (i) the flagger, who was in the wide shoulder of the road, was exposed to traffic, (ii) the mini-mart created an increased risk to the flagger, or (iii) whether a car rounding the corner at reduced speed could reasonably lead to death or serious permanent injury to the flagger?

Assignment of Error No. 3: The Board erred in concluding that Finding of Fact No. 5 is supported by substantial evidence.

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

Did the Board err in concluding that Finding of Fact No. 5 is supported by substantial evidence where such evidence shows that, absent vacating the citation and penalty, the “serious” designation and severity rating assigned by the Department were improper and the citation therefore should be reduced to a “general” violation, with a corresponding reduction of the penalty, because no injury occurred and a serious disability was unlikely to occur based on the weather conditions, road speed and use, and the safety precautions that Potelco followed?

Assignment of Error No. 4: The Board erred in adopting Conclusion of Law No. 2.

Statement of Issues Pertaining to Assignment of Error No. 4:

Did the Board err in adopting Conclusion of Law No. 2, where Conclusion of Law No. 2 is not supported by findings of fact that are, in turn, supported by substantial evidence where the weight of the evidence shows that: (i) Potelco complied with WAC 296-45-52530(1)(b) because Potelco posted three advance warning signs on the east side of the worksite on NE Paulson and Inspector Maxwell admitted that Potelco could not have posted three signs on the west side of the worksite on NE Paulson; (ii) the relevant regulations do not require Potelco to post warning signs on Central Valley (a cross-street) or require use of specific signs; and (iii) the signs Potelco used adequately protected the flagger and crew?

Assignment of Error No. 5: The Board erred in adopting the Conclusion of Law No. 3.

Statement of Issues Pertaining to Assignment of Error No. 5: Did the Board err in adopting Conclusion of Law No. 3, where Conclusion of Law No. 3 is not supported by findings of fact that are, in turn, supported by substantial evidence where the weight of the evidence shows that the citation was improperly issued and should be vacated or, in the alternative, reduced from a “serious” to a “general” violation, with a corresponding reduction in the assessed penalty?

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

On August 2, 2007, Potelco was performing pole top removal work near the intersection of Central Valley Road (“Central Valley”) and NE Paulson Road (“NE Paulson”), a rural area in Silverdale, Washington. (Certified Appeal Board Record Hearing Transcript (“Hearing Tr.”) at 27). Central Valley runs in the north-south direction, and NE Paulson runs in the east-west direction. The posted speed limit on both roads is 35 miles per hour. (Hearing Tr. Ex. 5; Hearing Tr. at 14). The worksite in question was located on NE Paulson. (Hearing Tr. at 10). NE Paulson dead ends at Central Valley. A driveway continues on the west side of Central Valley.¹

¹ Department Inspector George Maxwell did not consider NE Paulson a continuing road beyond Central Valley, but rather noted that the road “just goes

(Hearing Tr. at 34). There is a mini-mart at the northeast corner of the intersection, with parking access from both roads. (Hearing Tr. at 12).

George R. Maxwell III (“Inspector Maxwell”) is employed by the Department as a High Voltage Compliance Safety & Health Officer III. (Hearing Tr. at 4). As part of this role, Inspector Maxwell “drive(s) around to look for line crews to make sure they are following the WAC rules.” (Hearing Tr. at 5). On that clear and sunny day, Inspector Maxwell was driving northbound on Central Valley towards NE Paulson, noticed a line truck, and made a right-hand turn onto NE Paulson, pulling off the road into a wide spot to inspect the worksite. (Hearing Tr. at 9).

Before approaching the work crew, Inspector Maxwell took photos of the worksite from his car, then moved his car across the street to the mini-mart parking lot to take additional photos. (Hearing Exs. 2-4). When Inspector Maxwell arrived at the worksite, one flagger was directing traffic. (Hearing Tr. Ex. 1, no. 6-7). The flagger was stationed west of the worksite on NE Paulson, on the opposite side of the street from the worksite (i.e., the south side of NE Paulson), over 100 feet from the intersection of NE Paulson and Central Valley, according to Inspector Maxwell’s estimate. (Hearing Tr. at 28; Hearing Tr. Ex. 7).

Potelco had set up three advance warning signs on the east side of the worksite on NE Paulson (Hearing Tr. Ex. 7), and had set up one

up there and dead-ends [at Central Valley]...to me it’s just a driveway for the people that live up there.” (Hearing Tr. at 34).

advance warning sign on the roadway leading up to the flagger on the west side of the worksite (Hearing Tr. Ex. 1, Nos. 8, 9). This sign nearest the flagger read “Road Work Ahead,” and was placed approximately 60 feet in on NE Paulson from the intersection with Central Valley. (Hearing Tr. Ex. 7). Inspector Maxwell noticed the flagger when he drove around the corner onto NE Paulson, and noticed his stop/slow sign, vest, and hard hat. (Hearing Tr. Ex. 7).

Following his inspection, Inspector Maxwell issued Potelco a single citation regarding the flagging set up, alleging that Potelco committed a serious violation of WAC 296-45-52530(1)(b), which requires employers to comply with WAC 296-155-305 when flaggers are used. Specifically, the citation states that “[t]he employer did not ensure that the third step apprentice who had been assigned to flag traffic was protected. [*sic*] In that there was not a flagger ahead sign to give motorists warning of his presence.” (Hearing Tr. Ex. 7). Inspector Maxwell rated this incident a six (6) on the severity scale, the highest rating, but only a one (1) on the probability scale, the lowest rating. *Id.* The total penalty assessed for this Citation was \$1,000. *Id.* He judged the employer faith code as average. *Id.* The violation was corrected at the time of inspection. *Id.*

B. PROCEDURAL BACKGROUND

Potelco appealed this Citation and Notice of Assessment to the Director of the Division of Occupational Health and Safety on September

17, 2007. A hearing was held in Seattle at the Board before Judge Molchior on June 9, 2008. Inspector Maxwell contended that Potelco violated WAC 296-155-305(8)(a), the subsection that requires, *inter alia*, a three sign advance warning sequence on roadways with a speed limit below 45 mph. (WAC 296-155-305(8)(a); Hearing Tr. at 37). However, when asked what additional signage he believed Potelco needed to post to comply with the relevant regulation, Inspector Maxwell admitted that he did not believe that Potelco should have placed two additional warning signs on NE Paulson, but instead believed that Potelco should have placed four signs on Central Valley: two signs north of the intersection, and two signs south of the intersection with NE Paulson. (Hearing Tr. at 37, 41). In addition, Inspector Maxwell believed that the regulations required Potelco to post a sign with a flagger symbol or the words “Flagger Ahead” on NE Paulson. (Hearing Tr. at 45-46).

The Board issued its Proposed Decision and Order on October 15, 2008, (Record at 53-61), from which Potelco filed a timely Petition for Review on November 4, 2008. (Record at 37-49). On January 13, 2009, the Board, having granted Potelco’s Petition for Review, issued its final Decision and Order affirming the Citation and penalty. (Record at 2-5). Potelco then appealed the Board’s Decision and Order to the Kitsap County Superior Court (*Potelco, Inc. v. Dep’t of Labor and Indus.*, Kitsap County Cause No. 09-2-00159-8, Notice of Appeal (filed 1/26/2009)). Following a hearing on October 18, 2010, the Honorable Russell Hartman affirmed the Board’s Decision and Order, and also ordered Potelco to pay

\$200.00 in statutory attorneys fees to the Department. (Record at 38-40). Potelco timely appealed to this Court on November 18, 2010. (*Potelco, Inc. v. Dep't of Labor and Indus.*, Kitsap County Cause No. 09-2-00159-8, Notice of Appeal to Washington State Court of Appeals, Division II (filed 11/18/2010)).

IV. ARGUMENT

A. STANDARD OF REVIEW

When reviewing Board rulings, this Court stands in the same position as the Superior Court. *Dep't of Labor and Indus. v. Tyson Foods, Inc.*, 143 Wn. App. 576, 581, 178 P.3d 1070 (2008). The Board's findings must be supported by substantial evidence when considering the record as a whole. RCW 49.17.150(1). Thus, the Board's findings of fact are reviewed to determine whether they are supported by substantial evidence and whether those findings support the conclusions of law. *Martinez Melgoza & Assoc., Inc. v. Dep't of Labor & Indus.*, 125 Wn. App. 843, 847-48, review denied, 155 Wn.2d 1015 (2005). Substantial evidence is sufficient evidence that would persuade a fair-minded, rational person that a finding is true. *Martinez Melgoza*, 125 Wn. App. at 847- 848. Conclusions of law must be appropriate based on the factual findings. RCW 49.17.150; *Martinez Melgoza*, 125 Wn. App. at 847. Courts review questions of law, such as the Board's construction of a statute, de novo. *Stuckey v. Dep't of Labor and Indus.*, 129 Wn.2d 289, 295, 916 P.2d 399 (1996).

B. THE RELEVANT REGULATIONS DO NOT REQUIRE SIGNAGE ON CENTRAL VALLEY

The Department cited Potelco for a violation of WAC 296-45-52530(1)(b), which states that when flaggers are used at worksites, employers must comply with WAC 296-155-305. *See* WAC 296-45-52530(1)(b). WAC 296-155-305 contains various requirements for flagging operations. Specific to this case, employers must set up a three-sign advance warning sequence leading up to worksites that are on roadways with a speed limit below 45 miles per hour when conducting flagging operations at the worksite. WAC 296-155-305(8)(a). The Department contended, and the Board and Superior Court agreed, that Potelco's flagging operation did not comply with WAC 296-155-305(8)(a) and, thus in turn, violated WAC 296-45-52530(1)(b), because the crew did not have two-sign advance warning sequences on Central Valley, both north and south of the intersection with NE Paulson.

However, the substantial, and undisputed evidence in the record establishes that Potelco's signage complied with WAC 296-155-305(8)(a) and therefore with WAC 296-45-52530(1)(b). Specifically:

- Potelco had the proper three sign advance warning sequence on the east side of the worksite on NE Paulson. (Hearing Tr. Ex. 7).
- Inspector Maxwell admitted that, given the proximity of the worksite to the intersection at Central Valley, Potelco need

not have posted three signs on the west side of the worksite on NE Paulson. (Hearing Tr. at 41).

- Inspector Maxwell agreed that Potelco had no duty to post any signage on the driveway west of Central Valley because NE Paulson ended at Central Valley. (Hearing Tr. at 34-35).

These facts establish that Potelco in fact complied with the standard set forth in WAC 296-155-305(8)(a)—it set up a three-sign advance warning sequence east of the worksite. But given the space constraints posed by the proximity of the worksite to the NE Paulson-Central Valley intersection, Potelco could not set up an effective three-sign sequence west of the worksite. Potelco complied with the plain language of the regulation even as interpreted by Inspector Maxwell. The Department does not, and cannot, dispute the fact that neither WAC 296-45-52530(1)(b) nor WAC 296-155-305(8)(a) require or specify that three sign advance warning sequences must be continued or placed on cross streets such as Central Valley under the circumstances of this case. Inspector Maxwell may have preferred for Potelco to have placed two signs on Central Valley north of the “T” intersection with NE Paulson, and two signs on Central Valley south of the intersection. (Hearing Tr. at 41, 47). But Inspector Maxwell’s preferred set-up is not what is required by WAC 296-155-305, just as failure to post advance warning signs on a cross street is not a violation of the cited regulation. The Board’s Finding of Fact No. 4 and Conclusions of Law Nos. 2 and 3 indicating its

agreement to the contrary, is refuted by Inspector Maxwell's own testimony and the plain language of the regulation.

C. POTELCO'S SIGNAGE COMPLIED WITH THE RELEVANT REGULATIONS AND ADEQUATELY PROTECTED POTELCO EMPLOYEES

The Board found that the violation alleged by the Department exposed the flagger and the other Potelco crewmembers to traffic hazards. *See* Finding of Fact No. 4. This Finding, in turn, is apparently premised on Inspector Maxwell's opinion that the flagger was not protected because the sign nearest the flagger on the west side of the worksite on NE Paulson read "Road Work Ahead" instead of "Flagger Ahead" or instead of including a flagger symbol. But neither the WAC nor the Federal Highway Administrations Manual on Uniform Traffic Control ("MUTCD") require an employer to post these specific signs during flagging operations. *See* WAC 296-155-305; MUTCD Sect. 6F.29 (providing Guidance regarding use of a "Flagger symbol" and "Flagger word message" signs).² The MUTCD is the national standard for all traffic control devices on all public roads and state regulations require employers to set up and use temporary traffic controls according to the guidelines and recommendations in Part IV of the MUTCD. WAC 296-

² MUTCD Guidance Section 6F.29 provides: "[t]he Flagger (20-7a) symbol sign (see Figure 6F-4, Sheet 3 of 4) should be used in advance of any point where a flagger is stationed to control road users.... The Flagger (W20-7) word message sign with distance legends may be substituted for the Flagger (W20-7a) symbol sign.

155-305(1)(a); *see* MUTCD at <http://mutcd.fhwa.dot.gov/pdfs/2003r1/Ch5>.

But “the MUTCD promulgates few hard and fast rules.” *In re: Hawkeye Construction Inc.*, BIIA Dec., 06 W1072 at 2 (2007); *In re: Asplundh Tree Expert Co*, BIIA Dec., 03 W0136 (2004). And only its provisions designated as a “Standard” are mandatory. *Hawkeye*, at 3. Provisions designated as “Guidance” are merely recommendations. *Id.* Moreover, the goal of temporary traffic control, such as flagging, is to promote safety with a minimum disruption to road users. MUTCD 6G.01. Proper judgment is the key factor in determining what specific controls will accomplish that goal. *Id.* In the absence of a regulatory directive requiring that traffic be controlled in a specific way, “the Department has the burden of showing sound judgment requires a method of traffic control other than the one in use.” *In re: Asplundh Tree Expert Co*, BIIA Dec., 03 W0136 at 2 (2004).

As noted, there are no regulatory provisions in the WAC or MUTCD requiring specific signage in the circumstances of this case. And there appears to be no decisions from Washington courts or the Board, or Department policy guidelines addressing WAC 296-45-52530(1)(b) or MUTCD Section 6F.29, specifically. *See Significant Decisions Subject Index*, available at: <http://www.biia.wa.gov/SignificantDecisions/contents.htm> (last visited January 29, 2011); *WISHA Policies in Guidelines in Effect as of July 7, 2008*, available at <http://www.lni.wa.gov/Safety/Rules/Policies/WAC/default.asp> (last visited January 29, 2011).

However, *In re: Asplundh Tree Expert Co*, BIIA Dec., 03 W0136 (2004) is analogous and instructive.

In *Asplundh*, the Department cited the employer alleging a violation of WAC 296-45-52530(1)(a) for failure to provide a flagger to control traffic around Asplund's tree-trimming work, which took place in a residential area with relatively low traffic volume during daylight hours. *Id.* at 1. Finding that neither the WAC nor the MUTCD mandated the use of flaggers in that case, the Board vacated the decision because the Department failed its burden to show that sound judgment required the use of temporary traffic control other than what was used by the employer. *Id.* at 3. The Board further reasoned that “[s]peculation about the dire consequences of an accident that did not happen is not a substitute for a plausible explanation that the method of traffic control in use was not an acceptable method for keeping workers safe.” *Id.*

As in *Asplundh*, here the Department failed its burden to show that sound judgment requires a method of traffic control or signage other than what Potelco used. At the outset, Inspector Maxwell apparently mistook MUTCD's non-mandatory Guidance regarding “Flagger Ahead” and flagger symbol signs as a mandatory Standard and, as a result, erroneously cited Potelco. Further, Potelco's use of the “Road Work Ahead” sign instead of a “Flagger Ahead” or flagger symbol sign adequately protected the flagger because the sign alerted drivers to the flagger and worksite, which, given their proximity to the intersection, also could be readily seen by drivers entering NE Paulson from Central Valley. (Hearing Tr. Ex. 7).

Moreover, those drivers already would be approaching the worksite at a reduced speed, given the intersection, providing further protection to the flagger and crew.

The Board's Findings of Fact Nos. 4 and 5 and Conclusions of Law Nos. 2 and 3 that accept Inspector Maxwell's contentions that a failure to post the "Flagger Ahead" or flagger symbol sign subjected the flagger to risk of death or serious injury, are unsupported by substantial evidence in the record and are precisely the type of speculation of unrealized (and unsupported) dire consequences that was rejected by the Board in *Asplundh*. Indeed, the Board's conclusions are premised on Inspector Maxwell's unsupported and/or speculative assertions:

- Although Inspector Maxwell claimed that he believed the flagger was exposed to traffic and substantial probability of death or serious physical harm because he observed the flagger in the road during the inspection (*see* Hearing Tr. Ex. 7), Inspector Maxwell admitted that the flagger was actually standing on the road's edge and Inspector Maxwell's photos of the worksite show the flagger on the shoulder. (Hearing Tr. at 16; Hearing Exs. 2-4).
- Inspector Maxwell opined that the mini-mart at the intersection created an increased traffic awareness hazard for the flagger, as drivers could cut through the mini-mart parking lot to get to NE Paulson. (Hearing Tr. Ex. 7). But there is no evidence this was likely or something Inspector Maxwell observed.
- While Inspector Maxwell apparently believed that drivers entering NE Paulson from Central Valley could cause death or serious injury, he admitted that a driver making that turn from either direction on Central Valley would have to slow down before making the turn, would see the warning sign Potelco placed, and thereby would be alerted to the worksite ahead. (Record at 44). Indeed, although Inspector Maxwell claims

some high line poles could “possibly hinder” the visibility of drivers turning from Central Valley onto NE Paulson, he had a clear sightline of the worksite, the “Road Work Ahead” sign, as well as the flagger, his stop/slow sign, vest, and hard hat when Inspector Maxwell first approached the worksite driving north on Central Valley. (Hearing Tr. at 9, 44; Hearing Tr. Ex. 7).

Moreover, there is no evidence that a driver would be less likely to see the signage used than the signage Inspector Maxwell would have preferred. Indeed, Inspector Maxwell agreed that the first thing drivers would see upon turning onto NE Paulson would be the “Road Work Ahead” sign that Potelco used. (Hearing Tr. at 44). Even using the “Flagger Ahead” signage Inspector Maxwell would have preferred would not have provided absolute protection against rogue drivers entering the roadway who, if they were going to overlook traffic control signage, presumably would do so regardless of what it read. Simply put, the “Road Work Ahead” sign protected the flagger and crew just as effectively as a “Flagger Ahead” or flagger symbol signs would have.

Absent a regulatory directive requiring use of a “Flagger Ahead” or flagger symbol sign, and absent any plausible explanation in the record as to why the “Road Work Ahead” sign was not an acceptable method for keeping Potelco workers safe, the Board’s Finding of Fact Nos. 4 and 5, and therefore its Conclusions of Law Nos. 2 and 3, are not supported by substantial evidence.

D. THE ALLEGED VIOLATION WAS NOT A SERIOUS VIOLATION

The Board’s contentions that the Department properly applied

severity, probability and gravity ratings here, and properly calculated the \$1,000 penalty assessed, as set forth in Finding of Fact No. 5 and Conclusion of Law No. 2, are not supported by substantial evidence in the record. Absent vacation of the citation in its entirety, the violation should be reduced from a serious to a general citation, with a corresponding reduction in the penalty.

In this case, the penalty was improperly calculated and should be reduced because the alleged violation does not meet the criteria for a “serious” designation under the WISHA, and because the penalty does not reflect the low severity of the alleged violation. The Department designated the citation at issue as an allegedly “serious” violation of WISHA. A “serious” designation is not appropriate unless:

[T]here 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 work place, 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). In contrast, a violation should be designated as “general” if “[t]he . . . employer has violated a WISHA rule, but the violation does not pose a risk of serious bodily harm to its employees. It is therefore axiomatic that a general citation involves a safety violation of reduced gravity.” *In Re: Olympia Glass Co.*, BIIA Dec., 95 W445 (1996). WISHA does not mandate that the Department impose a civil penalty for “general” violations. RCW 49.17.180(2).

In addition, the Department assigned a “severity” rating of 6 to this alleged violation. Severity ratings are based on the most serious injury, illness, or disease that could be reasonably expected to occur because of a hazardous condition. WAC 296-900-14010 (emphasis added). Severity rates are expressed in whole numbers, ranging from 1 to 6, with 6 being the highest. *Id.* Violations with severity ratings of 4, 5, or 6 are designated as “serious.” *Id.* The rating of 6 here signified Inspector Maxwell’s perception that “death, injuries involving permanent, severe disability, or chronic, irreversible illness” could be reasonably expected to occur because of the alleged hazardous condition. *Id.*

The Board’s conclusion that the severity rating and serious designation were proper should be rejected for the same reasons discussed above, *see* discussion *supra* at pages 13-15, including the evidence that the flagger was standing on the shoulder (not the roadway), that there was no observed use of the mini-mart parking lot as a cut-through to avoid the intersection of NE Paulson and Central Valley, and that drivers on Central Valley would see Potelco’s signage (which would be at least as effective as the “Flagger Ahead” sign) and, in any case, would also be approaching the turn onto NE Paulson and the worksite at a reduced speed given the intersection. In addition, visibility was good on the day of the inspection and there were no visual obstructions for drivers on Central Valley in terms of their ability to see the worksite and the signage as they approached the intersection and turned onto NE Paulson. And the flagger’s hard hat, high-visibility vest, and stop/slow sign also would have increased his visibility to

drivers. Based on the circumstances at the worksite and the evidence in the record, there was not substantial probability of death or serious physical harm (negating the “serious” designation), and death or injuries involving permanent or severe disability could not be reasonably expected due to the use of the “Road Work Ahead” sign instead of the “Flagger Ahead” sign, or due to the advance warning sign sequences used by Potelco (negating the severity rating of 6).

Therefore, the Board’s Finding of Fact No. 5 and Conclusion of Law No. 2 are not supported by the evidence and the citation should be vacated. Absent vacation of the citation, the severity level should be reduced and the citation amended from a “serious” designation to a “general.”

V. CONCLUSION

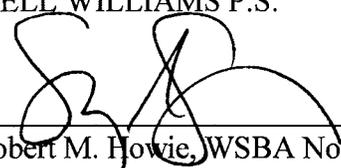
Potelco respectfully requests that the Court reverse the Board’s Decision and Order and vacate the citation and penalty because the Decision and Order is based on erroneous findings of fact that are not supported by substantial evidence that, in turn, prompted incorrect conclusions of law. The substantial evidence in the record shows that the relevant regulations did not require signage on Central Valley, nor did they require use of a “Flagger Ahead” sign on NE Paulson. The substantial evidence also shows that the flagger and crew were adequately protected by the signage that was used and that the serious designation and severity rating assigned were improper.

If the Court grants Potelco's requests above, Potelco also respectfully requests that the Court reverse the Superior Court's award of statutory attorneys' fees to the Department, as the Department would no longer be the prevailing party, and as such would no longer be entitled to such fees.

DATED this 3rd day of February, 2011.

Respectfully submitted,

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STATE OF WASHINGTON
BY [Signature]
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CERTIFICATE OF SERVICE

I, Janine Fader, hereby certify that on the 3rd day of February, 2011, I caused to be served via email and hand delivery, a copy of the foregoing addressed as follows:

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DATED this 3rd day of February, 2011.

Janine Fader
Janine Fader

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