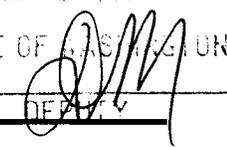


COURT OF APPEALS
DIVISION II

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NO. 41489-9-II

STATE OF WASHINGTON
BY 
DEPT. OF LABOR & INDUSTRIES

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

POTELCO, INC.,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE
STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This is an appeal under the Washington Industrial Safety and Health Act (WISHA), Chapter 49.17 RCW. The Department of Labor and Industries cited Potelco for violating WISHA rules and regulations regarding flagging operations at its work site. Both the Board of Industrial Insurance Appeals and the Kitsap County Superior Court affirmed the Department's citation, and this is Potelco's appeal from those decisions.

Based on the unchallenged findings of fact and the plain, unambiguous meaning of the regulations, Potelco violated WISHA in two, independent ways. First, it is undisputed that Potelco failed to place three advance warning signs on the west side of its work site to warn drivers approaching the site from that direction that a flagger was on the road directing traffic. Although the work site was near an intersection, Potelco failed to place any signs on the cross street so that drivers approaching the work site from the cross street would have adequate warning of the upcoming flagging operation. The relevant regulation requires a "three sign advance warning sequence on all roadways" when a flagging operation is used. WAC 296-155-305(8)(a).

Second, it is undisputed that Potelco failed to place a warning sign with a symbol of a flagger or the word "flagger" on the west side of its work site in advance of where the flagger was directing traffic. Taken

together, the relevant regulation and the federal guidelines specifically require that a “flagger” sign be used to protect the worker. WAC 296-155-305(1)(a) (citing the federal Manual on Uniform Traffic Control Devices, MUTCD). Potelco failed to comply with both of these rules.

The violation was serious under RCW 49.17.180(6) and properly rated at the highest severity level under WAC 296-900-14010 because the flagger and other workers were exposed to oncoming traffic, which could cause death or serious bodily injury. Uncontroverted case law establishes that even if the probability of an accident is low, a violation is “serious” if such an accident could cause death or serious bodily injury. *Lee Cook Trucking & Logging v. Dep’t of Labor & Indus.*, 109 Wn. App. 471, 482, 36 P.3d 558 (2001). Likewise, severity level is based upon the extent of injury that can potentially result if there is an accident. *Danzer v. Dep’t of Labor & Indus.*, 104 Wn. App. 307, 322, 16 P.3d 35 (2000).

After hearing the testimony and considering the evidence, the Board properly concluded that Potelco violated these regulations, that the violation was serious, and that the penalty of \$1,000 was appropriate. This Court should affirm the Board’s Decision and Order.

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II. COUNTERSTATEMENT OF THE ISSUES

1. It is a verity on appeal that Potelco failed to use three warning signs in advance of the flagger on the west side of the work site. When WAC 296-155-305(8)(a) explicitly requires employers to use three warning signs in advance of a flagging operation “on all roadways,” did Potelco violate that rule?
2. It is a verity on appeal that Potelco failed to use a sign with either a picture of a flagger or the word “flagger” on the west side of the work site. When WAC 296-155-305(1)(a) makes certain portions of the MUTCD mandatory, and those portions of the MUTCD specifically require the use of a “flagger” sign, did Potelco violate that rule?
3. A “serious” WISHA violation is one which, *if* an accident occurred, could result in death or serious bodily harm. RCW 49.17.180(6). Was Potelco’s violation “serious” when uncontroverted testimony in the record states that if a car were to strike the flagger, death or serious bodily harm would result?
4. A severity level of six is appropriate when death, permanent severe disability, or chronic irreversible illness is the most serious injury that could be reasonably expected to occur because of a WISHA violation. WAC 296-900-14010. Has Potelco failed to show that assigning a severity level of six to Potelco’s WISHA violation was an abuse of

discretion when uncontroverted testimony in the record states that if a car were to strike the flagger, death or serious bodily harm could be reasonably expected?¹

III. COUNTERSTATEMENT OF THE CASE

George Maxwell, a compliance safety and health officer for the Department of Labor and Industries, conducted an inspection of a job site where Potelco, Inc., was working on a utility pole on August 2, 2007.² CABR at 3 (Unchallenged Finding of Fact 1); CABR Tr. at 8-9.³ The job site was near the corner of Central Valley Road and Northeast Paulson Road near Silverdale, Washington. CABR at 3 (Unchallenged Finding of Fact 1). Appendix A is a drawing of the intersection and job site.⁴

Inspector Maxwell is a journeyman lineman and a certified flagger, and he is trained to perform inspections of high voltage power operations

¹ Among the other findings it challenges, Potelco assigns error to Finding of Fact 2 because Potelco asserts that the apprentice was skilled for the task at hand. App. Br. at 2. The Department will not address this assignment of error because it is not germane to the reasons for the citation and, in turn, the issues on appeal.

² The Board incorrectly stated in its Finding of Fact 1 that the inspection took place on August 13, when the record is uncontroverted that the inspection took place on August 2. In its brief, Potelco also cites August 2 as the correct date. App. Br. at 4.

³ The Certified Appeal Board Record (CABR, the record before the Board of Industrial Insurance Appeals) is paginated separately from the Clerk's Papers. Accordingly, citations to the CABR will be by its abbreviation and the large, stamped number in the lower right-hand corner of the page. Citations to the live hearing transcript will be indicated by "CABR Tr." and the page number.

⁴ Appendix A was not an admitted exhibit at the Board. It is attorney argument only. It is neither drawn to scale nor intended to prove any facts, but is solely for illustrating the Department's position in this case.

and to investigate whether a party has violated the WISHA rules and regulations. CABR Tr. at 5-7. During his inspection, he observed that Potelco was performing its work on the North side of Paulson Road adjacent to a mini-mart, which was located on the Northeast corner of Paulson and Central Valley Roads. CABR at 3 (Finding of Fact 2). Three warning signs had been placed to the east of the work site on Paulson Road, and the Department did not issue a citation for signage on the east side of the site. CABR at 3 (Finding of Fact 2).

An apprentice was acting as a flagger and directing traffic on the west side of the work site, on the road's edge and between the work site and the intersection of Paulson and Central Valley Roads. CABR at 3 (Finding of Fact 2); CABR Tr. at 15-16. The speed limit on Paulson Road was 35 miles per hour. CABR Tr. at 14. The foreman was present on the scene and aware of the flagging operation, and Inspector Maxwell conferred with him. *Id.*

To the west of the flagger, Inspector Maxwell observed one sign, a "Road Work Ahead" sign (as opposed to a "flagger" sign) that was situated between the flagger and the intersection. CABR at 3 (Unchallenged Finding of Fact 3). There were no additional signs anywhere to the west of the flagger and work site, including on Paulson or Central Valley Roads. CABR at 3 (Unchallenged Finding of Fact 3). To

the west of the intersection, Inspector Maxwell testified that Paulson Road became a dead-end driveway. CABR Tr. at 12-13, 34. But drivers could approach the work site from the west by driving either direction on the cross street, Central Valley Road, and turning eastward onto Paulson Road. *Id.* at 12.

Inspector Maxwell determined that Potelco did not have the legally required number of signs (three) to the west of the work site, and that the one sign that Potelco had placed to the west of the flagger was not a properly marked “flagger” sign. *Id.* at 17. He recommended citing Potelco for violating WAC 296-45-52530(1)(b), which requires employers to follow the rules in WAC 296-155-305 when flaggers are used. CABR at 3 (Unchallenged Finding of Fact 1). He concluded that Potelco had violated these regulations in two ways—by not having a three-sign advance warning to the west of the work site (by placing flagger signs on the cross street, Central Valley Road); and by using an improperly marked sign, rather than a “flagger” sign, to the west of the work site. CABR Tr. at 17. He also concluded that this was a serious, rather than general, violation because there was a risk of death or serious bodily harm by the worker getting struck by a vehicle. *Id.* at 22-23; *see* RCW 49.17.180(6).

Inspector Maxwell recommended a severity level of six, the highest on a scale of one to six (*see* WAC 296-900-14010), for the

violation because of the risk of death or serious bodily harm to the worker. *Id.* at 22-23. He recommended a probability of one, the lowest on a scale of one to six (*see* WAC 296-900-14010), for the violation because the probability of such an accident was low. *Id.* at 23. Applying the required formula in WAC 296-900-14010, Inspector Maxwell recommended a penalty of \$1,000. *Id.* The Department issued Citation and Notice No. 311278055 on August 27, 2007, alleging a serious violation of WAC 296-45-52530(1)(b) and assessing a penalty of \$1,000. CABR at 3 (Unchallenged Finding of Fact 1).

Potelco appealed the citation to the Board of Industrial Insurance Appeals. The Board received testimony from Inspector Maxwell and written exhibits. Potelco did not call any witnesses. The Board found that Potelco had only used one warning sign west of the work site, and the sign stated, "Road Work Ahead." CABR at 3 (Unchallenged Finding of Fact 3). The Board concluded that Potelco violated WAC 296-45-52530(1)(b) by permitting an employee to perform flagging activities without "appropriate advance signage" as required by WAC 296-155-305. CABR at 4 (Conclusion of Law 2).

The Board also found and concluded that the violation was "serious" under RCW 49.17.180(6) because the flagger and other workers were exposed to oncoming traffic and, therefore, the risk of death or

serious bodily injury. CABR at 3-4 (Findings of Fact 4, 5, Conclusion of Law 2). It found that the violation was appropriately assigned a severity level of six and a probability of one, leading to a penalty of \$1,000. CABR at 4 (Finding of Fact 5). The Board affirmed the Department's citation. CABR at 4 (Conclusion of Law 3).

Potelco appealed the Board's decision to Kitsap County Superior Court. After a bench trial in which the trial judge considered the evidence in the record and the parties' briefs and arguments, the superior court found that the Board's findings of fact were supported by substantial evidence, and it incorporated by reference the Board's conclusions of law. CP at 39-40. The superior court affirmed the Board's decision. CP at 40. Potelco appealed to this Court.

IV. STANDARD OF REVIEW

In a WISHA appeal, this Court directly reviews the Board's decision based on the record before the agency. *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 of fact are conclusive if they are supported by substantial evidence when viewed in light of the record as a whole. *Mowat Constr. Co. v. Dep't of Labor & Indus.*, 148 Wn. App. 920, 925, 201 P.3d 407 (2009) (citing RCW 49.17.150(1); RCW 34.05.570(3)(e)); *see also Wash.*

Cedar & Supply Co., Inc. v. Dep't of Labor & Indus., 119 Wn. App. 906, 914, 83 P.3d 1012 (2004) (*Wash. Cedar I*) (“Because we give deference to an agency’s factual findings in its area of expertise, we will uphold the Board’s findings unless they are clearly erroneous.”). Unchallenged findings of fact are verities on appeal. *Mid Mountain Contractors, Inc. v. Dep't of Labor & Indus.*, 136 Wn. App. 1, 4, 146 P.3d 1212 (2006).

This Court reviews whether the Board’s findings of fact support its conclusions of law. *Id.* WISHA statutory provisions and regulations must be interpreted in light of WISHA’s stated purpose of ensuring safe and healthful working conditions. *Elder Demolition, Inc. v. Dep't of Labor and Indus.*, 149 Wn. App. 799, 806, 207 P.3d 453 (2009). In interpreting WISHA, courts look for guidance to federal cases interpreting similar provisions of the federal Occupational Safety & Health Act (OSHA). *Id.* This Court gives great deference to the Department’s interpretation of WISHA. *See Lee Cook Trucking*, 109 Wn. App. at 478 n.7 (quoting *Udall v. Tallman*, 380 U.S. 1, 16-18, 85 S. Ct. 792, 13 L. Ed. 2d 616 (1965)).

The WISHA penalty amount is reviewed for an abuse of discretion.⁵ *Danzer*, 104 Wn. App. at 326.

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⁵ In this case, both the Department and the Board determined that a \$1,000 penalty was appropriate based on a severity rating of six and a probability rating of one.

V. ARGUMENT

A. **This Court Should Defer To The Department's Interpretation Of WISHA And Its Regulations When That Interpretation Furthers WISHA's Purpose Of Protecting Washington Workers**

The Washington Industrial Safety and Health Act was enacted in 1973 with the sweeping purpose of ensuring the safety of all Washington workers:

Therefore, in the public interest for the welfare of the people of the state of Washington and in order to assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington, the legislature . . . declares its purpose . . . to create, maintain, continue, and enhance the industrial safety and health program of the state

RCW 49.17.010.

The Department of Labor and Industries is charged with exercising all powers and performing all duties prescribed by law in relation to industrial safety and health, including enforcement of safety standards. RCW 43.22.050; *Supervalu, Inc. v. Dep't of Labor & Indus.*, 158 Wn.2d 422, 425, 144 P.3d 1160 (2006). Among those duties is the Department's duty to adopt rules and regulations governing safety and health standards for employment, RCW 49.17.040, as well as its duty to enforce those regulations, *e.g.*, RCW 49.17.070, 120, 130, 180.

Agency regulations are interpreted as statutes. *Cobra Roofing Servs., Inc. v. Dep't of Labor & Indus.*, 122 Wn. App. 402, 409, 97 P.3d 17 (2004), *aff'd*, 157 Wn.2d 90 (2006). Courts give substantial weight to the agency's interpretation of statutes and regulations within its area of expertise. *Wash. Cedar I*, 119 Wn. App. at 913. This Court, therefore, should uphold the Department's interpretation of a WISHA regulation if it reflects a plausible construction of the language and is not contrary to legislative intent. *Laser Underground & Earthworks, Inc. v. Dep't of Labor & Indus.*, 132 Wn. App. 274, 278, 153 P.3d 197 (2006). WISHA provisions should be liberally interpreted to carry out the statute's remedial purpose of assuring a safe and healthy workplace for all Washington workers. *Id.*; RCW 49.17.010.

B. Potelco Violated WAC 296-45-52530(1)(b) By Violating Two Independent Requirements In WAC 296-155-305

The Board's decision should be affirmed because Potelco violated two rules regarding the type and placement of signs meant to warn drivers that a flagger was present.

Employers are statutorily mandated to comply with all rules and regulations the Department promulgates under WISHA. *Superior Asphalt & Concrete Co., Inc. v. Dep't of Labor & Indus.*, 121 Wn. App. 601, 604, 89 P.3d 316 (2004) (citing RCW 49.17.060(2), the "specific duty clause").

Unlike under WISHA's general duty clause,⁶ citations under this specific duty clause do not require the Department to prove that a hazard exists. *Supervalu*, 158 Wn.2d at 433-34. Rather, the standards set forth in properly promulgated rules and regulations *presume* a hazard, and the Department must only show that the standard in question was violated. *Id.*; *Mowat Constr.*, 148 Wn. App. at 930.

Accordingly, to make a *prima facie* case of a serious violation of a specific rule under WISHA, the Department bears the initial burden of proving the following elements:

- (1) the cited standard applies;
- (2) the requirements of the standard were not met;
- (3) employees were exposed to, or had access to, the violative condition;
- (4) the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition; and
- (5) there is a substantial probability that death or serious physical harm could result from the violative condition.

J.E. Dunn Nw., 139 Wn. App. at 44-45 (internal quotation omitted).

Here, the Department cited Potelco for one violation of WAC 296-45-52530(1)(b), which states:

When flaggers are used, employers, responsible contractors and/or project owners *must* comply with the requirements of WAC 296-155-305.

⁶ The general duty clause obligates an employer to "furnish to each of his employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his employees." RCW 49.17.060(1). A violation of this clause requires proof that the employer failed to protect the workplace from a recognized hazard. *Supervalu*, 158 Wn.2d at 433.

(Emphasis added.) Generally when signaling and flaggers are implicated, WAC 296-155-305 requires employers to apply the standards in the regulation first *and* then set up traffic controls according to the guidelines set forth in the Federal Highway Administration's Manual on Uniform Traffic Control Devices (as modified and adopted by the Washington State Department of Transportation) (MUTCD):

(1) General requirements for signaling and flaggers.

(a) Employers **must** first apply the requirements in this section. Then **you must** set up and use temporary traffic controls according to the guidelines **and recommendations** in Part VI of the MUTCD.

WAC 296-155-305(1)(a) (emphasis added).

WAC 296-155-305 specifies how advance warning signs must be used:

(a) Employers **must** provide the following on all flagging operations:

A three sign advance warning sequence **on all roadways** with a speed limit below 45 mph.

.....

(c) Employers **must** make sure to follow Table 1 for spacing of advance warning sign placement.^[7]

WAC 296-155-305(8) (emphasis added).

The MUTCD, as modified and adopted by the Washington State Department of Transportation, states that a sign showing a flagger symbol

⁷ See Appendix B for the full text of Table 1.

should be used in advance of all flagging operations. MUTCD Figure 6F-4;⁸ MUTCD Section 6F.29 (“The Flagger . . . symbol sign . . . should be used in advance of any point where a flagger is stationed to control road users.”). Instead of using the flagger symbol sign, the employer may substitute a sign with the word “flagger” along with a distance legend. MUTCD Section 6F.29.

The purpose of these rules is to ensure the safety of flaggers. RCW 49.17.350(4); *Superior Asphalt*, 121 Wn. App. at 604 (The legislature enacted this statute in response to the increase of flagger fatalities in this state.).

Because Potelco violated WAC 296-155-305 in two different ways, either one alone will support the Board’s Conclusion of Law affirming the single citation issued in this case. *See* CABR Tr. at 17-18, 28 (listing two reasons for the single violation); CABR at 4 (Conclusion of Law 2).

1. Potelco violated WAC 296-155-305(8) when it did not use three warning signs in advance of the flagger

It is undisputed that Potelco did not use three advance warning signs on the west side of the flagger, either on Paulson or Central Valley

⁸ The MUTCD Part VI, as modified and adopted in Washington, is available both at <http://www.wsdot.wa.gov/Operations/Traffic/mutcd.htm> (last visited February 25, 2011), and relevant portions in the CABR at Exhibit 6 and in Appendix B to this brief. Citations to the MUTCD will be indicated by the section or figure number, and each citation is available on the website, in Exhibit 6, and in Appendix B.

Roads. CABR at 3 (Unchallenged Finding of Fact 3). This finding alone supports the Board's conclusions of law affirming the Department's citation. CABR at 4 (Conclusions of Law 2 and 3).

As quoted above, WAC 296-155-305(8)(a) explicitly requires employers to use three warning signs in advance of a flagging operation "on all roadways." (Emphasis added.) The regulation does not qualify or further define "all roadways." Inspector Maxwell testified that the regulation required three signs warning drivers of the upcoming flagging operation from all directions, including drivers approaching the flagger from cross streets. CABR Tr. at 35, 41. This interpretation is entitled to deference and furthers the statutory purpose of ensuring the flagger's safety by providing warning to drivers coming from all directions. *See Laser Underground*, 132 Wn. App. at 278 (deference should be given to the Department's interpretation of WISHA when it reflects legislative intent).

It is a verity on appeal that Potelco did not have three advance warning signs on the west side of the work site. CABR at 3 (Unchallenged Finding of Fact 3). The flagger was exposed to the violative condition because he was standing on the roadside unprotected by proper signage, CABR Tr. at 22, and Potelco knew or should have known because the foreperson was present and the activities were being

conducted in plain sight. CABR Tr. at 23-24; *see BD Roofing, Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 98, 108, 161 P.3d 387 (2007). Thus substantial evidence supports Finding of Fact 4, which in turn supports Conclusions of Law 2 and 3.

Table 1 of the regulation further supports Inspector Maxwell's testimony and anticipates that the three sign advance sequence may cross over an intersection. WAC 296-155-305(8)(c)(Table 1). It prescribes the distances between signs, depending on the road's speed limit. Specifically, it requires 350 feet between signs on roads with a speed limit of 35 miles per hour. It also states, "All spacing may be adjusted to accommodate interchange ramps, at-grade *intersections*, and driveways." *Id.* (emphasis added). Significantly, although the regulation allows the employer to adjust spacing as needed to accommodate intersections, it does not exempt an employer from complying with the rules when an intersection is involved. *Id.*

Here, in order to comply with the spacing requirements of Table 1, it was necessary for the series of three advance signs to cross over the intersection in some way. *See* CABR Tr. at 28 (flagger was only approximately 105 feet from the intersection); WAC 296-155-305(8)(c)(Table 1) (signs should be 350 feet apart). Since Paulson Road was apparently a private driveway once it crossed Central Valley Road,

CABR Tr. at 34, the only other road leading up to the work site from the west was the cross street, Central Valley, both from the north and from the south.

Thus, to comply with the plain language of the regulation as well as the spacing requirements of Table 1, Potelco was required to place two signs on Central Valley north of the intersection and two signs on Central Valley south of the intersection, in addition to the one sign that was already on Paulson between the intersection and the flagger. *See* CABR Tr. at 35, 41, 47; *see* Appendix A for a diagram of this argument. That way, a person driving north on Central Valley making a right turn on Paulson, and a person driving south on Central Valley making a left turn on Paulson would both encounter a series of three signs approaching the work site from the west. CABR Tr. at 46-47.

Potelco argues that it could not have set up a three-sign sequence west of the work site because the distance between the work site and the intersection was short. App. Br. at 10. But infeasibility is an affirmative defense, *Wash. Cedar & Supply Co., Inc. v. Dep't of Labor & Indus.*, 137 Wn. App. 592, 604, 154 P.3d 287 (2007) (*Wash. Cedar II*), which Potelco did not raise in this case, CABR Tr. at 38-39. Moreover, Inspector Maxwell testified that it *was* feasible to comply with the regulation under these facts. As discussed above, in order to place a three-sign advance

warning of the flagging operation and comply with the spacing requirements, Potelco should have placed four additional signs as shown in Appendix A and described by Inspector Maxwell. Appendix A; CABR Tr. at 47-48.

Potelco also argues that it had three signs east of the work site. App. Br. at 9. That fact is undisputed and irrelevant to the bases for the citation in this case. The regulation requires a “three sign advance warning sequence” “on all flagging operations.” WAC 296-155-305(8)(a). The Department cited Potelco for not having proper signage in “advance” of the work site on the west side, to provide the requisite advanced warning to drivers approaching from that direction. CABR Tr. at 18. The fact that Potelco partially complied with the regulations by having signs on the other side of the work site is not relevant to the issues raised in this appeal.

- 2. Potelco violated WAC 296-155-305(1)(a) when it did not use a properly marked “flagger” sign to the west of the flagging operation to warn drivers that a flagger was present**

It is also a verity on appeal that Potelco did not use a “flagger” sign to the west of the flagging operation. CABR at 3 (Unchallenged Finding of Fact 3). This, too, alone supports the Board’s conclusions of law. CABR at 4 (Conclusions of Law 2 and 3).

The relevant regulation incorporates by reference both the guidelines and recommendations of the MUTCD and makes them both mandatory:

(1) General requirements for signaling and flaggers.

(a) Employers **must** first apply the requirements in this section. Then **you must** set up and use temporary traffic controls according to the guidelines **and recommendations** in Part VI of the MUTCD.

WAC 296-155-305(1)(a) (emphasis added).⁹

The MUTCD states that a sign showing a flagger symbol should be used in advance of all flagging operations. MUTCD Figure 6F-4; MUTCD Section 6F.29 (“The Flagger . . . symbol sign . . . should be used in advance of any point where a flagger is stationed to control road users.”). Instead of using the flagger symbol sign, the employer may substitute a sign with the word “flagger” along with a distance legend. MUTCD Section 6F.29.

In implementing regulations regarding flagger safety and health contained in WAC 296-155-305, the Department made mandatory certain portions of the MUTCD. *In re Hawkeye Constr., Inc.*, BIIA Dec., 06

⁹ The federal government has also made Part VI of the MUTCD mandatory under the Occupational Safety and Health Act. 29 C.F.R. § 1926.200(g)(2).

W1072, 2007 WL 4986288, at *2-3 (2007) (significant decision).¹⁰ As the Board has reiterated, “Employers must first apply the requirements of the WAC, and then set up and use temporary traffic controls according to the **recommendations** in Part VI of the MUTCD.” *Id.* at *3 (emphasis in original). What is a recommendation or guideline in Part VI of the MUTCD is a mandate under WISHA. *Id.*

In this case, Potelco violated the regulation, and by reference the MUTCD, by not having a sign with either a picture of a flagger or the word “flagger.” CABR Tr. at 15, 17, 45-46. It is a verity on appeal that a “flagger” sign was not used. CABR at 3 (Unchallenged Finding of Fact 3). Though Potelco had a “road work ahead” sign, a “road work ahead” sign is not the same as a “flagger” sign. CABR Tr. at 30. This interpretation comports with the plain meaning of the regulation and the MUTCD. To the extent there is any ambiguity, the Department’s interpretation is entitled to deference. *Laser Underground*, 132 Wn. App. at 278. As with the three-signs basis for the citation, the flagger was exposed to this violative condition, CABR Tr. at 22, and Potelco knew or should have known because the foreperson was present and the activities

¹⁰ While the Board’s interpretation of the WISHA is not binding upon the courts, it is entitled to “substantial weight” if “it reflects a plausible construction of the language of the statute and is not contrary to the legislative intent.” *Cobra Roofing Servs.*, 122 Wn. App. at 409. The Board publishes its significant decisions on its website, accessible at: <http://www.bia.wa.gov/>.

were being conducted in plain sight, CABR Tr. at 23-24; *see BD Roofing*, 139 Wn. App. at 108.

Potelco cites *In re Asplundh Tree Expert Co.*, BIIA Dec., 03 W0136, 2004 WL 2359747 (2004) (significant decision), but misconstrues the meaning of that case. Contrary to Potelco's argument, that case does not require the Department to prove that "sound judgment" requires the use of particular signage in this case. *See App. Br.* at 12. In *Asplundh*, the Board interpreted WAC 296-155-305(2), which requires that flaggers or other appropriate traffic controls be used when signs, signals, and barricades "do not provide necessary protection from traffic."

However, once a flagger is used, different rules apply and the flagger must be protected by adequate warnings. At issue here are WAC 296-155-305(1)(a), MUTCD Section 6F.29, and MUTCD Figure 6F-4. As discussed above, these provisions are clear that a "flagger" sign *must* be used in advance of the flagger. *See* MUTCD Section 6F.29. There are no exceptions to this rule applicable to this case, and the rule neither allows nor requires the employer to determine, in its judgment, which controls to use. Potelco essentially asks this Court to read into this rule the phrase, "[when other methods] do not provide necessary protection from traffic." *See* WAC 296-155-305(2)(b). This Court should resist the invitation to read into the MUTCD language that is not there. In short,

Asplundh interprets different language from a different regulation, so its analysis is not applicable to this case.¹¹

Potelco argues that nothing in the WAC or MUTCD requires a particular type of sign under the facts in this case. App. Br. at 12. But this argument ignores both the plain language of WAC 296-155-305(1)(a), which explicitly requires employers to apply the guidelines *and* recommendations of the MUTCD adopted as a mandate in Washington, and the MUTCD, which requires the use of a specific flagger sign in advance of a flagging operation. Moreover, the Board has reaffirmed these unambiguous requirements and specifically rejected a similar argument by an employer:

We do not accept Hawkeye’s argument that the Department of Labor and Industries is without authority to regulate worker safety by referring to MUTCD *guidelines* and making certain of those *guidelines mandatory*.

Hawkeye, 2007 WL 4986288, at *3 (emphasis added). This Court should likewise reject Potelco’s argument.

Potelco also argues that the signage used adequately protected its workers. App. Br. at 13-14. Potelco seems to argue, without citing supporting authority, that the Department did not prove that a “flagger” sign was necessary to protect Potelco employees’ safety. App. Br. at 14-

¹¹ Potelco does not argue, and the record does not support, that a flagger was not necessary in the first instance. Thus, the issue presented in *Asplundh* is not present in this case.

15. The issue, however, is not whether a “flagger” sign would have been superior to a “road work ahead” sign, or whether the “road work ahead” sign was effective. Potelco failed to use a properly marked flagger sign as required by law. That is the end of the inquiry. *See Supervalu*, 158 Wn.2d at 434 (Department does not need to prove a hazard existed; the hazard is presupposed by the regulation); *see also Hawkeye*, 2007 WL 4986288, at *5 (“Each time that the Department enforces a specific safety standard, there is no requirement to prove what the Legislature has already determined by creating the standard . . . that the standard is a valid approach to making a hazardous situation less hazardous for workers.”).

Thus, rather than being required to prove that danger existed, the Department had to prove only that the regulation was violated and the flagger had access to the violative condition. *See Mowat*, 148 Wn. App. at 930. The Department proved this element because it showed that the flagger had access to, and was within close proximity of, the roadway lacking proper signage. CABR Tr. at 16 (flagger was on the road’s edge), 22; *see also Mid Mountain Contractors*, 136 Wn. App. at 7 (employee was exposed to the violative condition when he was working within close proximity of the unprotected excavation wall and could easily have walked there).

Although the Department does not need to prove that the “flagger” sign requirement addresses a specific hazard, the record adequately supports that it does. A “road work ahead” sign simply does not warn drivers that a flagger is on the side of the road directing traffic. *See* CABR Tr. at 30 (A “road work ahead” sign is not the same as a “flagger” sign.). A “flagger” sign provides added protection to the flagger by warning approaching drivers of his or her presence on the shoulder. *See* CABR Tr. at 41 (“They need to protect that flagger. . . . they should have had a flagger sign on Paulson.”). Through this rule, the Department adequately protects workers in a way not addressed by the use of other signs. Potelco failed to protect the worker in the way the rule requires.

C. Potelco’s Violation Was “Serious” Because Death Could Result And Uncontroverted Case Law Holds That The Probability That An Accident Will Occur Is Irrelevant

Potelco argues that the Department erred in categorizing the violation as “serious.” App. Br. at 15-16. The Court should reject that argument because it flies in the face of established Washington and federal case law. Findings of Fact 4 and 5 are supported by substantial evidence and should be affirmed.

WISHA defines a “serious violation”:

. . . a serious violation shall be deemed to exist in a work place 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 work place

RCW 49.17.180(6) (emphasis added). A serious violation warrants a civil penalty of no more than \$7,000 per violation. RCW 49.17.180(2). In calculating the appropriate penalty for a violation, the Department determines the “weight” or “gravity” of the violation by multiplying the violation’s severity by its probability. WAC 296-900-14010. Thus, the penalty takes into account the probability of harm, separate from its seriousness under RCW 49.17.180(6) or severity under WAC 296-900-14010 (see discussion of the violation’s severity in Part V.D., below).

This Division has squarely addressed the meaning of “substantial probability that death or serious physical harm could result” in RCW 49.17.180(6)’s definition of “serious violation.” *Lee Cook Trucking*, 109 Wn. App. 471. Finding ambiguity in the phrase, this Court relied on federal law and held that “substantial probability” means the likelihood that if harm resulted from the injury, that harm could be death or serious physical harm. *Id.* at 482. “Substantial probability” does *not* mean the likelihood that any harm will occur. *Id.* at 477. Other Washington appellate court and administrative decisions to have considered the issue have concluded the same. *Mowat*, 148 Wn. App. at 932; *Wash. Cedar I*, 119 Wn. App. at 917 (evidence that if accident happened, injury would

result, sufficient to sustain the violation); *Hawkeye Constr. Co.*, 2007 WL 4986288, at *5; *see also Danzer*, 104 Wn. App. at 322 (“The focus is on the extent of injury that can potentially result if an injury does occur.”).

Potelco urges this Court to hold that a violation is not “serious” if an accident is not likely. App. Br. at 15-16. Neither division of this Court that has considered the issue nor any circuit in the federal system has adopted Potelco’s suggested interpretation of a “serious” violation. *See Lee Cook Trucking*, 109 Wn. App. at 480 (Division II) (discussing federal cases interpreting the Occupational Safety & Health Act); *Mowat*, 148 Wn. App. at 932 (Division I). Potelco ignores this uncontroverted authority and cites nothing to support its contention that a violation is serious only if there is a substantial probability that an accident will actually occur.

This Court should continue to follow the *Lee Cook Trucking* line of cases because they were correctly decided. This long and widely held interpretation of RCW 49.17.180 is more protective of worker safety and properly defers to the Department’s interpretation of a statute within its area of expertise. Moreover, the interpretation accounts for the legislature’s use of the word “could” instead of “would.” *Lee Cook Trucking*, 109 Wn. App. at 480-81 & n.10 (comparing the probability that death or serious physical harm “could” result with the probability that

death or serious physical harm “would” result). Conversely, the definition suggested by Potelco and rejected by numerous state and federal courts would render meaningless part of RCW 49.17.180(7), which separately requires the Department to account for the probability of harm. *Lee Cook Trucking*, 109 Wn. App. at 481; *Danzer*, 104 Wn. App. at 320; RCW 49.17.180(7) (listing factors including “gravity”); WAC 296-900-14010 (“gravity” is “severity” times “probability”).

It is axiomatic that if a person is struck by a moving vehicle, death or serious bodily injury could result. CABR Tr. at 22-23, 45. This is true even if the vehicle slows down to turn a corner. *Id.* at 45. Based on *Lee Cook Trucking* and its progeny, a violation that could result in such injury must be classified as “serious.” *See also Cal. Stevedore & Ballast Co. v. Occupational Safety & Health Rev. Comm’n*, 517 F.2d 986, 988 (9th Cir. 1975) (“When human life or limb is at stake, any violation of a regulation is ‘serious.’”), *cited in Lee Cook Trucking*, 109 Wn. App. at 479. Here, Inspector Maxwell properly classified this violation as serious based on the risk that the worker could have been hit by a vehicle because he was standing near the edge of the road. CABR Tr. at 22.

Moreover, as discussed in *Lee Cook Trucking*, the penalty assessed in this case already took into account the low level of probability that the worker would have been struck by a vehicle. *See* 109 Wn. App. at 481.

Inspector Maxwell assigned a probability level of one, the lowest on a scale of one to six. CABR Tr. at 23. To classify this violation as general, rather than serious, based on the low probability of an accident would render meaningless the Department's probability rating.

Potelco cites *In re Olympia Glass Co.* (App. Br. at 16), but that Board decision supports the Department's case. *In re Richard A. Castle, dba Olympia Glass Co.*, BIIA Dec., 95 W445, 1996 WL 769650 (1996) (significant decision). In that case, the employer appealed a \$1,000 penalty for failure to adopt a written accident prevention program. Applying the factors in RCW 49.17.180(7), the Board determined that \$500 was an appropriate penalty. *Id.* at *4-5. Notably, the violation was general, not serious, because the violation did not pose a risk of serious bodily harm to its employees. *Id.* Conversely in this case, failure to adequately protect the flagger's safety by using appropriate sign placement poses a direct risk of serious bodily harm to the flagger. *See Hawkeye*, 2007 WL 4986288, at *5. Thus, the reasoning in *Olympia Glass Co.* supports the \$1,000 penalty assessed in this case.

In re Hawkeye Construction, Inc., cited by Potelco for other purposes (App. Br. at 12), supports that the violation in this case was properly deemed "serious." *Hawkeye*, 2007 WL 4986288. There, the employer argued that the improper sign placement was not a serious

violation because the circumstances made it unlikely that the flaggers would be hit by a car. Citing *Lee Cook Trucking*, the Board rejected that argument, finding that “the potential of workers being struck by vehicles approaching at 35 mph would undeniably result in serious physical harm or death to the workers.” *Id.* at *5. Similarly here, being struck by a moving vehicle, even if the vehicle had slowed for the turn, would result in serious physical harm or death, even though the probability of being struck may be low.

D. Assigning A Severity Level Of Six To The Violation Was Not An Abuse Of Discretion Because Death Was The Most Serious Injury Reasonably Expected To Occur

The Department and Board assigned a severity level of six for Potelco’s violation, leading to a penalty of \$1,000. This was not an abuse of discretion, and Finding of Fact 5 is supported by substantial evidence. *See Danzer*, 104 Wn. App. at 326 (penalty amount is reviewed for an abuse of discretion).

The Department applied the formula in WAC 296-900-14010 to determine the penalty amount in this case. That regulation provides that the weight, or “gravity” of a violation is determined by multiplying the violation’s severity by its probability. *Id.* Both the severity and probability scales range from one to six, with one being the lowest. *Id.* A probability rating describes the likelihood of an injury, illness, or disease

occurring. *Id.* The severity rating describes “the most serious injury, illness, or disease that could be reasonably expected to occur because of the hazardous condition.” *Id.* A severity rating of six corresponds with the following “most serious” such injury, illness, or disease:

- * Death
- * Injuries involving permanent severe disability
- * Chronic, irreversible illness

WAC 296-900-14010 (Table 3).

Here, the Department assigned a severity level of six, the highest, and a probability of one, the lowest. Multiplied together, the severity and probability led to a gravity score of six, which corresponds to a \$1,000 penalty. WAC 296-900-14010 (Table 4).

Potelco again argues that factors affecting the probability of an accident should lead to a reduced severity rating. App. Br. at 17. This argument ignores that the Department already assessed a low probability in determining the penalty amount. Moreover, in assessing severity, “[t]he focus is on the extent of injury that can potentially result if an injury does occur.” *Danzer*, 104 Wn. App. at 322 (applying the prior WAC rule on “severity,” since recodified without material change in WAC 296-900-14010). Potelco does not negate the fact that death or serious injury could be expected to occur based on the violation in this case.

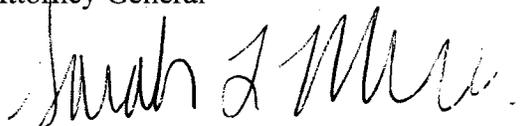
Hawkeye also supports the Department's position that the severity level should be six. 2007 WL 4986288. In that case, the Department assigned a severity level of six for the same reason the violation was deemed serious, namely, that "any injury resulting from being run into by a motorist could result in death or permanent injury." *Id.* at *6 (citing WAC 296-900-14010). The Board affirmed the severity level of six and assigned a probability of one. *Id.* at *6-7. Based on the strikingly similar facts in this case, this Court should find that the Department properly rated the severity as six. The \$1,000 penalty was not an abuse of discretion.

VI. CONCLUSION

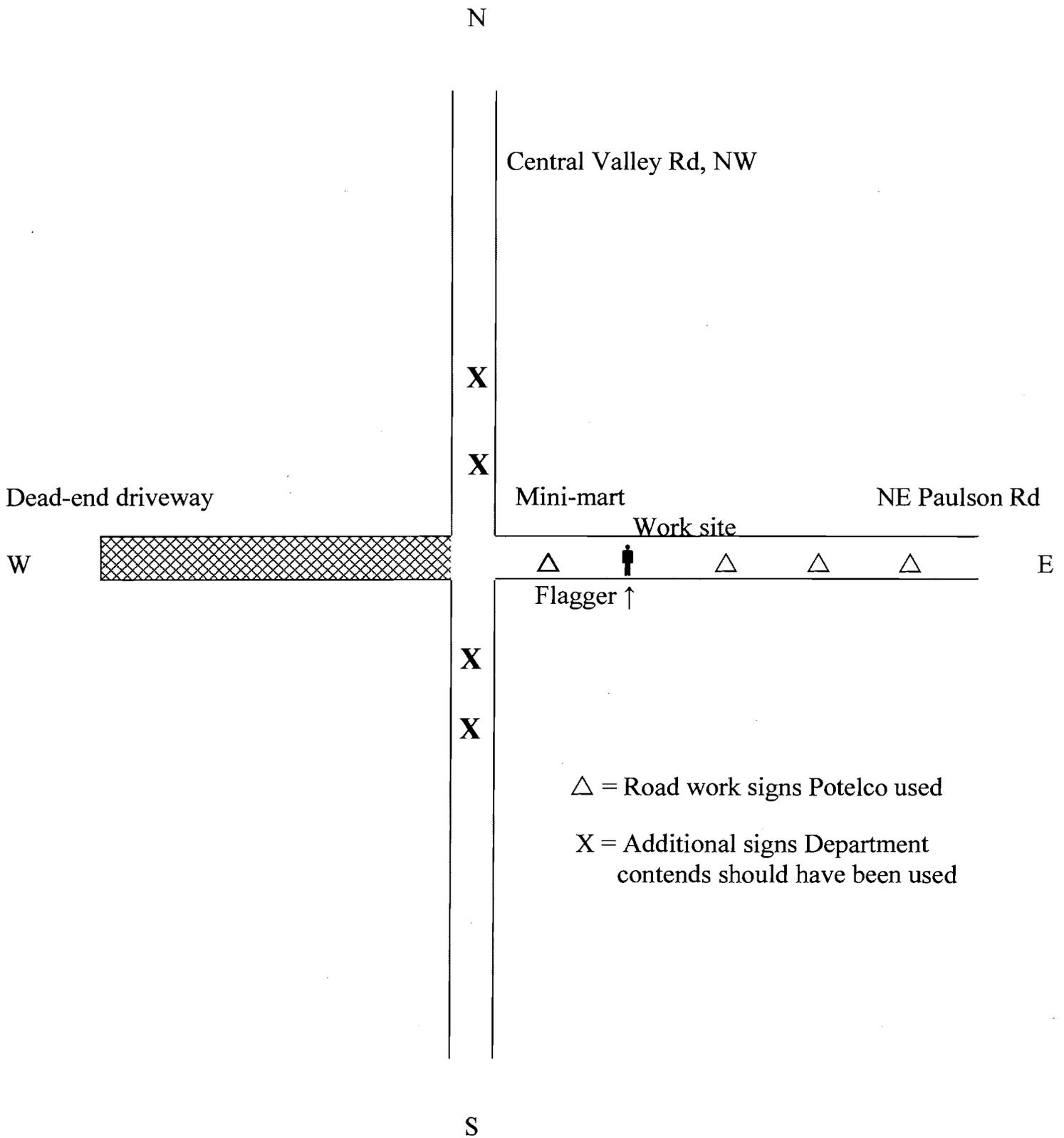
For the foregoing reasons, the Department respectfully requests that this Court affirm the January 13, 2009 Decision and Order of the Board of Industrial Insurance Appeals, and thereby sustain the Department's Citation and Notice No. 311278055 dated August 27, 2007.

RESPECTFULLY SUBMITTED this 7 day of March, 2011.

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Appendix A



This map was not an admitted exhibit at the Board. It is attorney argument only. It is neither drawn to scale nor intended to prove any facts, but is solely for illustrating the Department's position in this case.

ORIGINAL

Appendix B

WAC 296-155-305

Signaling and flaggers

Definition:

Flagger means a person who provides temporary traffic control.

For the purposes of this chapter, MUTCD means the Federal Highway Administration's Manual on Uniform Traffic Control as currently modified and adopted by the Washington state department of transportation.

Link: For the current version of the MUTCD, see the department of transportation's website at <http://www.wsdot.wa.gov/biz/trafficoperations/mutcd.htm>.

(1) General requirements for signaling and flaggers.

(a) Employers must first apply the requirements in this section. Then you must set up and use temporary traffic controls according to the guidelines and recommendations in Part VI of the MUTCD.

.....

(8) Advance warning signs.

(a) Employers must provide the following on all flagging operations:

· A three sign advance warning sequence on all roadways with a speed limit below 45 mph.

· A four sign advance warning sequence on all roadways with a 45 mph or higher speed limit.

(b) Warning signs must reflect the actual condition of the work zone. When not in use, warning signs must either be taken down or covered.

(c) Employers must make sure to follow Table 1 for spacing of advance warning sign placement.

Table 1. Advanced Warning Sign Spacing

Road Type	Speed	Distances Between Advance Warning Signs*			
		A**	B**	C**	D**
Freeways & Expressways	70 55	1,500 ft.+/- or per the MUTCD.	1,500 ft.+/- or per the MUTCD.	1,500 ft.+/- or per the MUTCD.	1,500 ft.+/- or per the MUTCD.
Rural Highways	65 60	800 ft.+/-	800 ft.+/-	800 ft.+/-	800 ft.+/-
Rural Roads	55 45	500 ft.+/-	500 ft.+/-	500 ft.+/-	500 ft.+/-
Rural Roads and Urban Arterials	40 35	350 ft.+/-	350 ft.+/-	350 ft.+/-	N/A
Rural Roads, Urban Streets, Residential Business Districts	30 25	200 ft.***	200 ft.***	200 ft.***	N/A
Urban Streets	25 or less	100 ft.***	100 ft.***	100 ft.***	N/A

*All spacing may be adjusted to accommodate interchange ramps, at-grade intersections, and driveways.

**This refers to the distance between advance warning signs. See Figure 1, Typical Lane Closure on Two-Lane Road. This situation is typical for roadways with speed limits less than 45 mph.

***This spacing may be reduced in urban areas to fit roadway conditions.

RCW 49.17.180

Violations – Civil Penalties

....

(6) For the purposes of this section, a serious violation shall be deemed to exist in a work place 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 work place, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

(7) The director, or his or her authorized representatives, shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the number of affected employees of the employer being charged, the gravity of the violation, the size of the employer's business, the good faith of the employer, and the history of previous violations.

....

WAC 296-900-14010

Base Penalties

· WISHA calculates the base penalty for a violation by considering the following:

- Specific amounts that are dictated by statute;

OR

- By assigning a weight to a violation, called "gravity." Gravity is calculated by multiplying a violation's severity rate by its probability rate. Expressed as a formula:

$$\text{Gravity} = \text{Severity} \times \text{Probability}$$

Note: Most base penalties are calculated by the gravity method.

· Severity and probability are established in the following ways:

Severity:

- Severity rates are based on the most serious injury, illness, or disease that could be reasonably expected to occur because of a hazardous condition.
- Severity rates are expressed in whole numbers and range from 1 (lowest) to 6 (highest). Violations with a severity rating of 4, 5, or 6 are considered serious.
- WISHA uses Table 3, Severity Rates, to determine the severity rate for a violation.

Table 3
Severity Rates

Severity	Most serious injury, illness, or disease from the violation is likely to be:
6	<ul style="list-style-type: none">* Death* Injuries involving permanent severe disability* Chronic, irreversible illness
5	<ul style="list-style-type: none">* Permanent disability of a limited or less severe nature* Injuries or reversible illnesses resulting in hospitalization
4	<ul style="list-style-type: none">* Injuries or temporary, reversible illnesses resulting in serious physical harm* May require removal from exposure or supportive treatment without hospitalization for recovery
3	<ul style="list-style-type: none">* Would probably not cause death or serious physical harm, but have at least a major impact on and indirect relationship to serious injury, illness, or disease* Could have direct and immediate relationship to safety and health of employees* First aid is the only medical treatment needed
2	<ul style="list-style-type: none">* Indirect relationship to nonserious injury, illness, or disease* No injury, illness, or disease without additional violations
1	<ul style="list-style-type: none">* No injury, illness, disease* Not likely to result in injury even in the presence of other violations

Probability:

Definition:

A probability rate is a number that describes the likelihood of an injury, illness, or disease occurring, ranging from 1 (lowest) to 6 (highest).

- When determining probability, WISHA considers a variety of factors, depending on the situation, such as:

- Frequency and amount of exposure.
- Number of employees exposed.
- Instances, or number of times the hazard is identified in the workplace.
- How close an employee is to the hazard, i.e., the proximity of the employee to the hazard.
- Weather and other working conditions.
- Employee skill level and training.
- Employee awareness of the hazard.
- The pace, speed, and nature of the task or work.
- Use of personal protective equipment.
- Other mitigating or contributing circumstances.

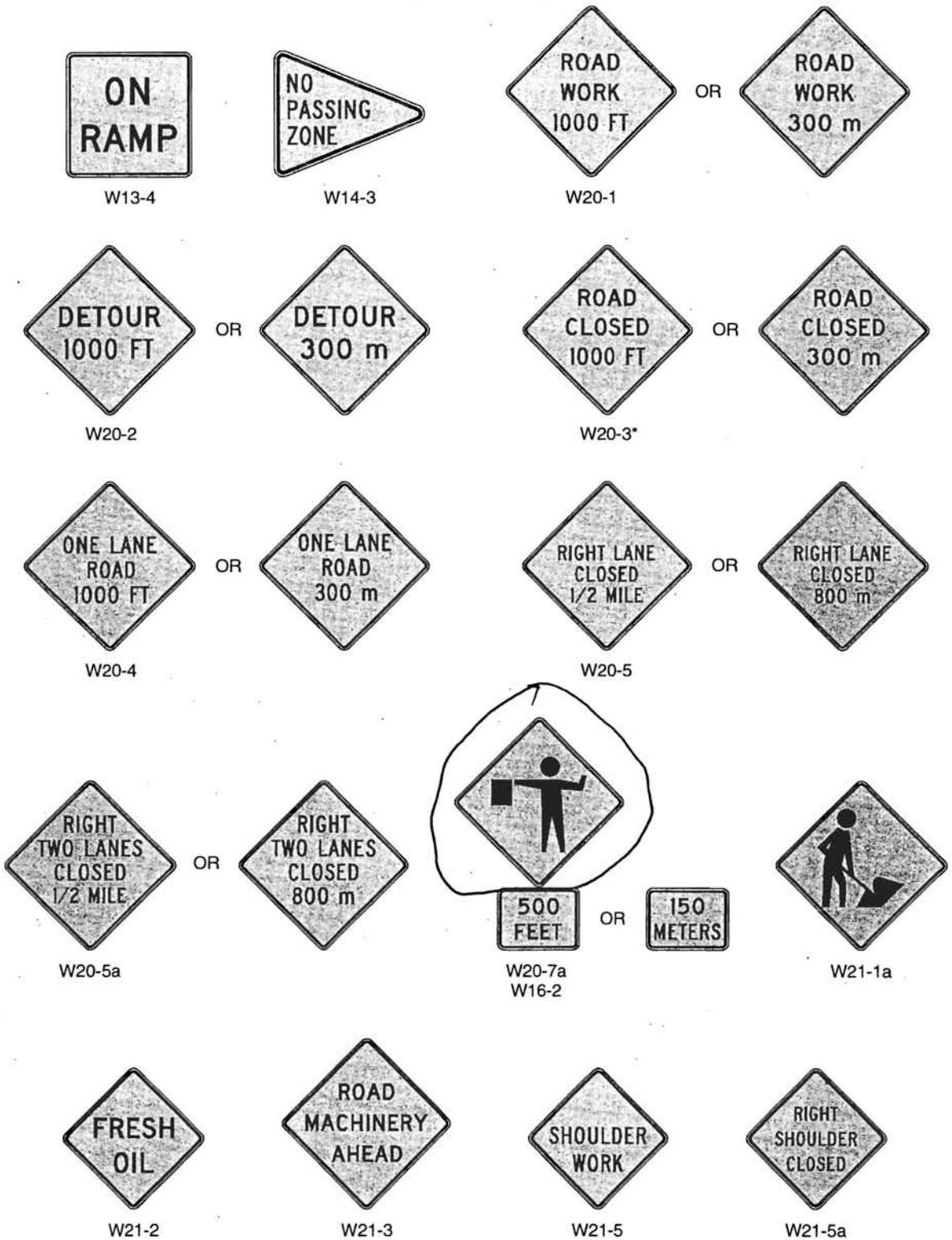
- WISHA uses Table 4, Gravity Based Penalty, to determine the dollar amount for each gravity-based penalty, unless otherwise specified by statute.

Table 4
Gravity Based Penalty

Gravity	Base Penalty
1	\$100
2	\$200
3	\$300
4	\$400
5	\$500
6	\$1000
8	\$1500
9	\$2000
10	\$2500
12	\$3000
15	\$3500
16	\$4000

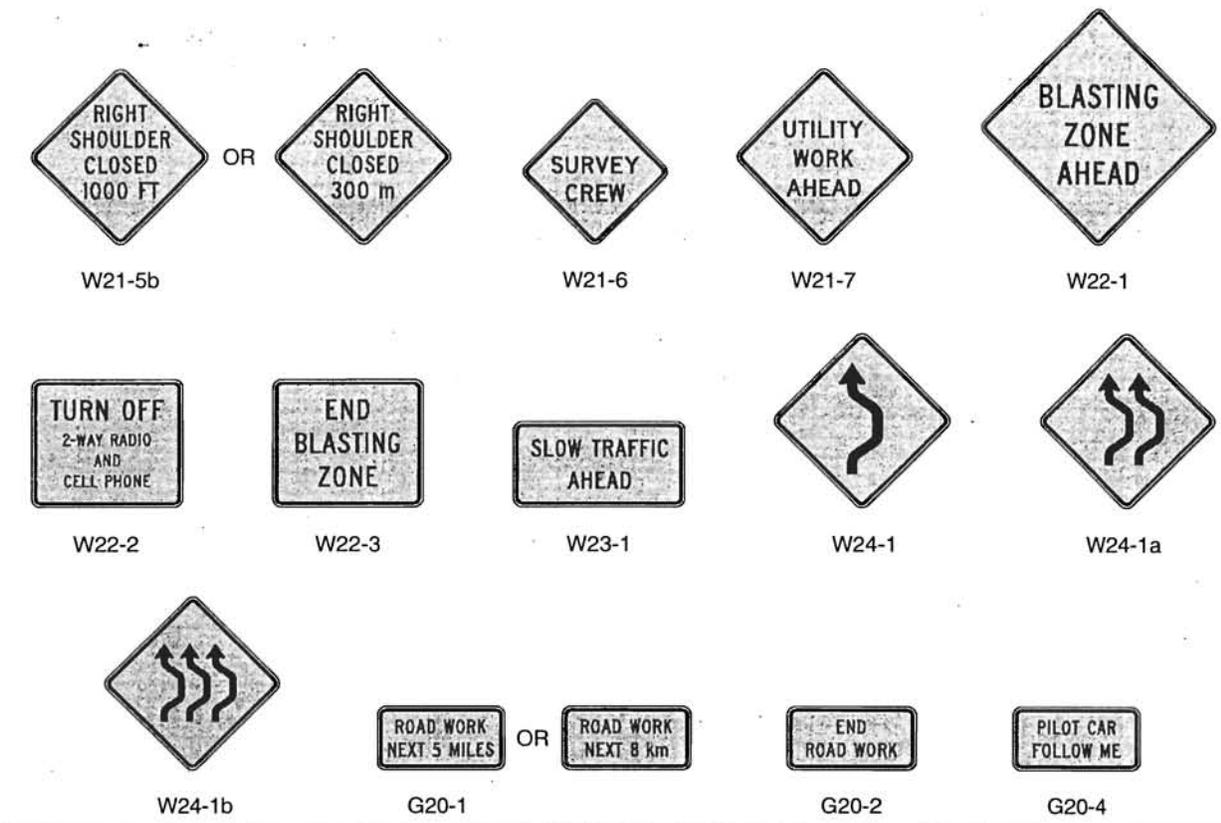
18	\$4500
20	\$5000
24	\$5500
25	\$6000
30	\$6500
36	\$7000

Figure 6F-4. Warning Signs in Temporary Traffic Control Zones
 (Sheet 3 of 4)



* An optional STREET CLOSED word message sign is shown in the "Standard Highway Signs" book.

Figure 6F-4. Warning Signs in Temporary Traffic Control Zones
(Sheet 4 of 4)



Section 6F.21 Lane(s) Closed Signs (W20-5, W20-5a)

Standard:

The Lane(s) Closed sign (see Figure 6F-4, Sheet 3 of 4) shall be used in advance of that point where one or more through lanes of a multi-lane roadway are closed.

For a single lane closure, the Lane Closed (W20-5) sign (see Figure 6F-4, Sheet 3 of 4) shall have the legend RIGHT (LEFT) LANE CLOSED, XX m (FT), XX km (MILES), or AHEAD. Where two adjacent lanes are closed, the W20-5a sign (see Figure 6F-4, Sheet 3 of 4) shall have the legend RIGHT (LEFT) TWO LANES CLOSED, XX m (FT), XX km (MILES), or AHEAD.

Section 6F.22 CENTER LANE CLOSED AHEAD Signs (W9-3, W9-3a)

Guidance:

The CENTER LANE CLOSED AHEAD (W9-3) sign (see Figure 6F-4, Sheet 2 of 4) should be used in advance of that point where work occupies the center lane(s) and approaching motor vehicle traffic is directed to the right or left of the work zone in the center lane.

Option:

The Center Lane Closed Ahead (W9-3a) symbol sign (see Figure 6H-38) may be substituted for the CENTER LANE CLOSED AHEAD (W9-3) word message sign.

Section 6F.23 THRU TRAFFIC MERGE LEFT (RIGHT) Sign (W4-7)

Guidance:

The THRU TRAFFIC MERGE LEFT (RIGHT) (W4-7) sign (see Figure 6F-4, Sheet 1 of 4) should be used in advance of an intersection where one or more lane closures on the far side of a multi-lane intersection require through vehicular traffic on the approach to the intersection to use the left (right) lane to proceed through the intersection.

Section 6F.24 Lane Ends Sign (W4-2)

Option:

The Lane Ends (W4-2) symbol sign (see Figure 6F-4, Sheet 1 of 4) may be used to warn drivers of the reduction in the number of lanes for moving motor vehicle traffic in the direction of travel on a multi-lane roadway.

Section 6F.25 ON RAMP Plaque (W13-4)

Guidance:

When work is being done on a ramp, but the ramp remains open, the ON RAMP (W13-4) plaque (see Figure 6F-4, Sheet 3 of 4) should be used to supplement the advance ROAD WORK sign.

Section 6F.26 RAMP NARROWS Sign (W5-4)

Guidance:

The RAMP NARROWS (W5-4) sign (see Figure 6F-4, Sheet 1 of 4) should be used in advance of the point where work on a ramp reduces the normal width of the ramp along a part or all of the ramp.

Section 6F.27 SLOW TRAFFIC AHEAD Sign (W23-1)

Option:

The SLOW TRAFFIC AHEAD (W23-1) sign (see Figure 6F-4, Sheet 4 of 4) may be used on a shadow vehicle, usually mounted on the rear of the most upstream shadow vehicle, along with other appropriate signs for mobile operations to warn of slow moving work vehicles. A ROAD WORK (W20-1) sign may also be used with the SLOW TRAFFIC AHEAD sign.

Section 6F.28 EXIT OPEN, EXIT CLOSED, EXIT ONLY Signs (E5-2, E5-2a, E5-3)

Option:

An EXIT OPEN (E5-2), EXIT CLOSED (E5-2a), or EXIT ONLY (E5-3) sign (see Figure 6F-5) may be used to supplement other warning signs where work is being conducted in the vicinity of an exit ramp and where the exit maneuver for motor vehicle traffic using the ramp is different from the normal condition.

Guidance:

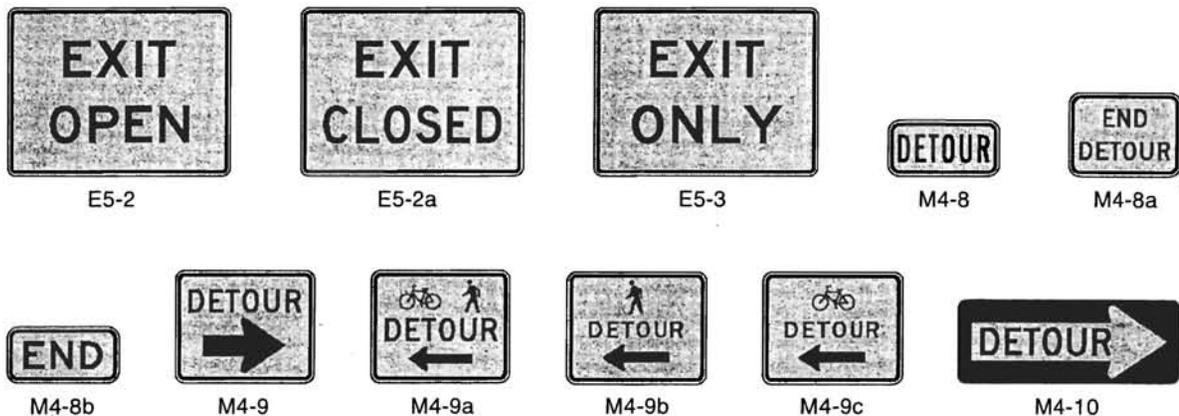
When an exit ramp is closed, an EXIT CLOSED panel with a black legend and border on an orange background should be placed diagonally across the interchange/intersection guide signs.

Section 6F.29 Flagger Sign (W20-7a, W20-7)

Guidance:

The 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.

Figure 6F-5. Exit Open and Closed and Detour Signs



Option:

A distance legend may be displayed on a supplemental plaque below the Flagger sign. The sign may be used with appropriate legends or in conjunction with other warning signs, such as the BE PREPARED TO STOP (W3-4) sign (see Figure 6F-4, Sheet 1 of 4).

The FLAGGER (W20-7) word message sign with distance legends may be substituted for the Flagger (W20-7a) symbol sign.

Standard:

The Flagger sign shall be removed, covered, or turned away from road users when the flagging operations are not occurring.

Section 6F.30 Two-Way Traffic Sign (W6-3)**Guidance:**

When one roadway of a normally divided highway is closed, with two-way vehicular traffic maintained on the other roadway, the Two-Way Traffic (W6-3) sign (see Figure 6F-4, Sheet 2 of 4) should be used at the beginning of the two-way vehicular traffic section and at intervals to remind road users of opposing vehicular traffic.

Section 6F.31 Workers Sign (W21-1, W21-1a)**Option:**

A Workers (W21-1a) symbol sign (see Figure 6F-4, Sheet 3 of 4) may be used to alert road users of workers in or near the roadway.

Guidance:

In the absence of other warning devices, a Workers symbol sign should be used when workers are in the roadway.

Option:

The WORKERS (W21-1) word message sign may be used as an alternate to the Workers (W21-1a) symbol sign.

Section 6F.32 FRESH OIL (TAR) Sign (W21-2)**Guidance:**

The FRESH OIL (TAR) (W21-2) sign (see Figure 6F-4, Sheet 3 of 4) should be used to warn road users of the surface treatment.

Section 6F.33 ROAD MACHINERY AHEAD Sign (W21-3)**Option:**

The ROAD MACHINERY AHEAD (W21-3) sign (see Figure 6F-4, Sheet 3 of 4) may be used to warn of machinery operating in or adjacent to the roadway.

Section 6F.34 Motorized Traffic Signs (W8-6, W11-10)**Option:**

Motorized Traffic (W8-6, W11-10) signs may be used to alert road users to locations where unexpected travel on the roadway or entries into or departures from the roadway by construction vehicles might occur. The TRUCK CROSSING (W8-6) word message sign may be used as an alternate to the Truck Crossing symbol (W11-10) sign (see Figure 6F-4, Sheet 2 of 4) where there is an established construction vehicle crossing of the roadway.

Support:

These locations might be relatively confined or might occur randomly over a segment of roadway.

Section 6F.35 Shoulder Work Signs (W21-5, W21-5a, W21-5b)**Support:**

Shoulder Work signs (see Figure 6F-4, Sheets 3 and 4 of 4) warn of maintenance, reconstruction, or utility operations on the highway shoulder where the roadway is unobstructed.

Standard:

The Shoulder Work sign shall have the legend SHOULDER WORK (W21-5), RIGHT (LEFT) SHOULDER CLOSED (W21-5a), or RIGHT (LEFT) SHOULDER CLOSED XXX m (FT) or AHEAD (W21-5b).

Appendix C

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: POTELCO, INC.) DOCKET NO. 07 W2015
2 CITATION & NOTICE NO. 311278055) DECISION AND ORDER
3

4 APPEARANCES:

5 Employer, Potelco, Inc., by
6 Riddell Williams P.S., per
7 Robert M. Howie

8 Employees of Potelco, Inc., by
9 IBEW Local #77, per
10 Rick Strait

11 Department of Labor and Industries, by
12 The Office of the Attorney General, per
13 Richard Becker, Assistant

14 This is an appeal filed by the employer, Potelco, Inc., on September 19, 2007, from Citation
15 and Notice No. 311278055, of the Department of Labor and Industries dated August 27, 2007. In
16 this citation and notice, the Department alleged a serious violation of WAC 296-45-52530(1)(b), and
assessed a penalty in the amount of \$1,000. The Department citation and notice is **AFFIRMED**.

18 **DECISION**

19 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
20 and decision on a timely Petition for Review filed by the employer to a Proposed Decision and
21 Order issued on October 15, 2008, in which the industrial appeals judge affirmed the citation and
22 notice of the Department dated August 27, 2007.

23 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
24 no prejudicial error was committed. The rulings are affirmed.

25 The issue presented by this appeal and the evidence presented by the parties are
26 adequately set forth in the Proposed Decision and Order.

27 After consideration of the Proposed Decision and Order, the employer's Petition for Review
28 filed thereto, the Department's response to Petition for Review, and a careful review of the entire
29 record before us, we are persuaded that the Proposed Decision and Order is supported by the
30 preponderance of the evidence and is correct as a matter of law.

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1/13/09

ORIGINAL

FINDINGS OF FACT

1. On August 13, 2007, George Maxwell, a compliance safety and health officer from the Department of Labor and Industries, conducted an inspection of a Potelco, Inc., job site located at the intersection of Central Valley Road and N.E. Paulson Road, near Silverdale, Washington. On August 27, 2007, the Department issued Citation and Notice No. 311278055, in which it alleged the following violation: Item No. 1-1, a serious violation of WAC 296-45-52350(1)(b), with a penalty of \$1,000.

On September 17, 2007, Potelco, Inc., filed its appeal from Citation and Notice No. 311278055 with the Safety Division of the Department of Labor and Industries. The Department elected to not reassume jurisdiction and, on September 19, 2007, Potelco, Inc.'s appeal was transmitted to the Board of Industrial Insurance Appeals. Potelco, Inc.'s Notice of Appeal was forwarded to the Board on September 19, 2007, as a direct appeal. On September 20, 2007, the Board issued a Notice of Filing of Appeal for the appeal, which had been assigned Docket No. 07 W2015.
2. On August 13, 2007, Potelco, Inc., was engaged in an overhead line project on N.E. Paulson Road and its intersection with Central Valley Road. The project took place on the north side of N.E. Paulson at, or adjacent to the entrance/exit of a "mini-mart" located on the northeast corner of the intersection. An apprentice was designated by the on-site foreman to place warning signage to the east and west of the work site, and to act as a flagger to control traffic at the western edge of the work site. No evidence was presented that the apprentice had been trained in the placement of such signage, or in flagging activities. No citation was issued for the placement of warning signage on the east side of the work site.
3. On the west side of the work site only one warning sign was posted—a "Road Work Ahead" sign placed on the south side of N.E. Paulson near the location of the flagger who was holding a reversible "Stop/Slow" placard. There was no other warning signage to the west of the work site, either on N.W. Paulson Road to the west of the Central Valley/Paulson intersection, or on Central Valley Road from either the north or south approaching the intersection.
4. On August 13, 2007, the flagger, and other workers working for Potelco, Inc., at the Central Valley/Paulson Road intersection job site near Silverdale, were exposed to oncoming traffic from N.W. Paulson Road traffic turning from either direction of Central Valley Road eastbound onto N.E. Paulson Road, and from traffic exiting eastbound onto N.E. Paulson from a "mini-mart" located on the northeast corner of the intersection. This violation (Item 1-1), exposed the flagger and other workers to the risk of being struck by traffic and suffering death or serious injury.

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5. Relative to Item 1-1, the flagger and other workers at the site were exposed to the risk of serious injury or death if a vehicle were to contact them. This risk of serious injury or death results in a severity of 6 on a scale of 1 to 6, with 1 being the lowest and 6 the highest. The probability of this happening is 1, on the same scale, the lowest level of probability that can be assigned. Multiplying severity times probability, a gravity rating of 6 was established. The company has a faith rating of average, and also an average history rating (based on prior history of the company). The assessed penalty, utilizing those factors, is \$1,000.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.
2. On August 13, 2007, Potelco, Inc., committed a serious violation of WAC 296-45-52530(1)(b) when it permitted a worker to perform flagging activities while exposed to oncoming traffic and without appropriate advance signage as contemplated by WAC 296-155-305.
3. Citation and Notice No. 311278055, issued by the Department on August 27, 2007, is correct and is affirmed.

Dated: January 13, 2009.

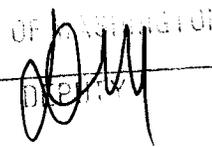
BOARD OF INDUSTRIAL INSURANCE APPEALS



 THOMAS E. EGAN Chairperson



 FRANK E. FENNERTY, JR. Member

COURT OF APPEALS
DIVISION II
11 MAR -8 AM 11:25
STATE OF WASHINGTON
BY 

NO. 41489-9-II
**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

POTELCO, INC.,

Plaintiff,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF
WASHINGTON,

Defendant.

**CERTIFICATE OF
SERVICE**

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on March 7, 2011, she caused to be served the Brief of Respondent, Appendices A-C and this Certificate of Service in the below-described manner.

Original + 1 Copy via First Class United States Mail, Postage Prepaid to:

Mr. David Ponzoha
Court Administrator/Clerk
Court of Appeals, Division Two
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Tacoma, WA 98402

Via First Class United States Mail, Postage Prepaid and via Facsimile to:

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ORIGINAL

Signed this 7th day of March, 2011, in Seattle, Washington by:



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