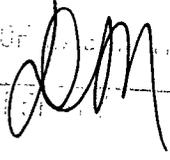


COURT OF APPEALS

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STATE OF WASHINGTON
BY 

No. 42452-5-II

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

POTELCO, INC.,
Plaintiff/Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,
Defendant/Respondent.

APPELLANT'S OPENING BRIEF

RIDDELL WILLIAMS P.S.
Skylar A. Sherwood, WSBA #31896
Gena M. Bomotti, WSBA #39330
Attorneys for Appellant Potelco, Inc.
1001 Fourth Avenue
Suite 4500
Seattle, WA 98154-1192
(206) 624-3600
Facsimile: (206) 389-1708

ORIGINAL

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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 Potelco allowed its employees to enter a trench that was not adequately protected from cave-ins and that this conduct constituted a serious violation of WAC 296-155-657(1)(a). 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 Board applied the wrong standard of proof, and (2) the record lacks substantial evidence to establish that WAC 296-155-657(1)(a) applied to the trench at issue or that Potelco failed to meet the standard imposed by WAC 296-155-657(1)(a). Alternatively, Potelco respectfully requests that the penalty be reduced from a "serious" violation to a "general" violation because the record lacks substantial evidence showing that any exposed employees risked death or serious bodily harm.

II. ASSIGNMENTS OF ERROR

Potelco respectfully asserts that the Superior Court erred in affirming the Board's Decision and Order because the Board applied the wrong standard of proof. Potelco also respectfully asserts that the Superior Court also erred in granting statutory attorneys' fees to the Department as the prevailing party. Potelco also respectfully asserts that the Superior Court erred in affirming Findings of Fact Nos. 2, 3, and 4, 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.¹ Specifically:

Assignment of Error No. 1: The Board erred by applying the wrong standard of proof.

Statement of Issues Pertaining to Assignment of Error No. 1:
Did the Board err by viewing all the evidence in the light most favorable to the Department and failing to apply the preponderance-of-the-evidence standard?

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

¹ Pursuant to RAP 10.4(c), the Board's Decision and Order—including the Findings of Fact and Conclusions of Law—is attached as Appendix A.

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

Did the Board err by concluding that Finding of Fact No. 2 is supported by substantial evidence where the Department failed to establish that an employee of Potelco entered the trench in question, that the trench was more than four feet deep, and that the trench was not adequately sloped, shored, benched, or otherwise protected from cave-ins?

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

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

Did the Board err by concluding that Finding of Fact No. 3 is supported by substantial evidence where the Department failed to establish that the alleged violation exposed any employees to a substantial probability of death or serious physical harm?

Assignment of Error No. 4: 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. 4:

Did the Board err in concluding that Finding of Fact No. 4 is supported by substantial evidence where the Department failed to establish that “death, injuries involving permanent, severe disability, or chronic, irreversible illness” could result from the alleged violation and that the penalty was

properly calculated?

Assignment of Error No. 5: The Board erred in adopting Conclusion of Law No. 2.

Statement of Issues Pertaining to Assignment of Error No. 5:

Did the Board err in adopting Conclusion of Law No. 2 where the Department failed to establish that Potelco permitted an employee to enter a trench that was subject to regulation and not adequately protected from cave-ins, and that the employee risked death or substantial bodily harm as a result?

Assignment of Error No. 6: The Board erred in adopting Conclusion of Law No. 3.

Statement of Issues Pertaining to Assignment of Error No. 6:

Did the Board err in adopting Conclusion of Law No. 3 because Citation and Notice No. 311630081 was incorrectly issued and the penalty was incorrectly assessed? In the alternative, should the alleged violation be reduced from a serious to a general violation, with a corresponding penalty reduction?

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

On January 17, 2008, Potelco answered an emergency call to

restore power to an apartment construction site at 1409 N.W. Santa Fe Lane in Silverdale, Washington (“the Silverdale Site” or “jobsite”). (CP 90:24 – 91:1.) As a part of Potelco’s emergency response activities, a Potelco employee allegedly entered an underground trench that was not properly secured against cave-ins, in violation of WAC 296-155-657(1)(a). (CP at 37-38) No accident or injury resulted from Potelco’s alleged actions. (*See id.*) The Citation and penalty that are the subject of this appeal are based solely upon the Department’s after-the-fact assessment that Potelco violated WAC 296-155-657(1)(a) by entering the trench. (CP 91:15-18, 93:5-6; 93:10-12.)

1. The Bedrock Construction Incident

The Silverdale Site is an apartment construction project in Silverdale, Washington. The general contractor for the Silverdale Site was Silverdale Ridge Apartments LLC (“Silverdale Ridge”), and the Silverdale Ridge superintendent on site on the day of the incident was Richard T. Harris. (CP 78:6-15.) Silverdale Ridge had retained Bedrock Construction (“Bedrock”), an excavation company, to dig trenches and install utilities at the jobsite. (CP 84:12-21.)

On January 17, 2008, Bedrock broke an electrical conduit working in a trench that it had created at the jobsite (the “Bedrock Construction

Incident”). (CP 79:6-10.) Superintendent Harris contacted Puget Sound Energy’s emergency response line, and a Potelco crew responded to that call. (CP 79:20-80:3.)²

2. Although Potelco Was Not Responsible for Digging the Trench, the Department Used a Single Photograph From the Bedrock Construction Incident to Initiate an Inspection of Potelco

After the Potelco crew arrived at the Silverdale Site to restore power, Superintendent Harris attempted to investigate the Bedrock Construction Incident on his own. (CP 80:9-12.) During his investigation, Superintendent Harris photographed a worker in the trench.³

Superintendent Harris did not speak to the person he photographed and he is unable to identify the person in the photograph. (CP 18:16-18; 84:4-5.)

Superintendent Harris did not measure the depth of the trench at issue. (CP 80:5-6.) Although he acknowledged that Bedrock Construction was responsible for digging the trench, there is no evidence that he ever asked anyone at Bedrock to verify the depth of the trench. (CP 82:22-23). Instead, Superintendent Harris “estimated it to be about ten feet” deep.

² Potelco contracts with PSE to provide services, such as electrical repair and emergency restoration, for PSE.

³ The photograph was entered into evidence at the November 5, 2008 hearing as Hearing Exhibit 1 (CP at 80:18-26; CP at 110).

(CP 81:12-21.)⁴

Approximately two weeks after the incident, Department Inspector John Fening met with Superintendent Harris at the Silverdale Ridge construction site to investigate the Bedrock Construction Incident. (CP 99:24 – 100:6.) By then, the work in the trench was complete, and the trench had been filled in. (CP 91:15-20.) Inspector Fening never saw the trench. (CP 101:22-23.)

Superintendent Harris provided Inspector Fening with the photograph that he had taken of a person in the trench. (Hearing Ex. 1 at CP 110.) Based on that photograph alone, Inspector Fening initiated an inspection of Potelco, and conducted an opening conference with Potelco's Director of Safety and Risk Management, Bryan Sabari. (CP 91:2-5; 91:21-25; 92:13-17; 93:4-6.)

3. The Department Issued a Citation and Penalty Against Potelco Based Upon an Inconclusive Photograph and Unverified Assumptions

Inspector Fening testified that he interviewed Potelco foreman Ron Torres as part of the Department's investigation of Potelco, and that Mr. Torres had identified himself as the person in the photograph. (CP 104:15-22.) But Inspector Fening admitted that he did not actually show

⁴ Potelco did not dig the trench nor did it change the dimensions of the trench in any significant way. (CP 82:24-83:1.)

the photograph to Mr. Torres; he simply told Mr. Torres that he had a photograph of a person in the trench. (CP 106:4-13.)

Although Mr. Torres specifically explained to Inspector Fening that Bedrock—the company responsible for digging the trench—had assured Mr. Torres that the trench was adequately benched and safe to enter, there is no evidence that Inspector Fening ever followed up with Bedrock to confirm either the depth of the trench or the safeguards that had been taken to ensure that the trench was safe to enter. (CP 105:2-11.)

Instead, Inspector Fening chose to rely solely on the information in a photograph that he admits is inconclusive. (CP 99:1-6.) Inspector Fening admitted that:

- The photograph does not show the entire trench, nor does it show the trench from more than one angle (*Id.*);
- The walls of the trench might appear to be different heights when viewed from different angles (CP 99:11-14);
- He estimated the depth of the trench in the photograph based upon the presence of a shovel, which he claims to be of “standard” size, which he describes as “five foot from toe to head.” (CP 101:2-12). But Inspector Fening did not measure or even see the shovel in person, and there is no evidence that he confirmed with anyone the length of the shovel or even his assumption that it was of “standard” size.

Based upon this limited information, the Department issued a citation to Potelco, alleging that Potelco committed a serious violation of

WAC 296-155-657(1)(a). Specifically, the Citation alleges that Potelco:

[D]id not assure his three-man emergency crew employees were adequately protected from cave-ins while repairing a recently dug-up and cut underground electrical utility line in an unshielded, unshored, and poorly sloped/benched trench excavation in class B soil that was over 10 feet deep. Failure to adequately protect these three employees from cave-ins when working inside this excavation could have resulted in a fatality or serious injuries.

(See CP at 38, Citation No. 311630081.) But at no time during his investigation did Inspector Fening actually see, measure, or confirm the depth of the trench to *determine if the trench was indeed ten feet deep and thus required the protections specified by the regulation.* (CP 99:15-17; 101:2-12.) And at no time during his investigation did Inspector Fening actually see, measure, or confirm the safeguards that had been taken to prevent against a cave-in. (CP 99:15-17.) And there is no evidence that Inspector Fening sought that information from anyone with direct knowledge of the trench conditions. Instead of relying on actual measurements of the trench, quantitative data relating to the soil type present on site, or factual information relating to cave-in protections in use in the trench, the Department issued this Citation based only on a single

photograph taken by Superintendent Harris, who also failed to measure the trench or collect any other relevant data. (CP 103:10-24.)

4. The Department Assessed the Violation as Serious, Despite the Investigator’s Lack of Personal Knowledge and Relevant Experience

No one was injured during Potelco’s emergency response activities. (*See* Citation No. 311630081 at CP 38.) Nevertheless, Inspector Fening classified Potelco’s alleged violation as “serious,” based solely on the photograph provided by Superintendent Harris. (CP 93:7-10; 103:10-12.) Inspector Fening reasoned that if the sides of the trench in the photograph had caved in, there could have been a fatal accident. (CP 93:12-15.) He assessed the severity of the alleged violation as a “6”—the highest possible severity rating. (CP at 93:21-94:1.) Although Inspector Fening based his assessment solely on his “background and skills,” Inspector Fening admitted that he has never investigated a fatality from a trench cave-in during his Department career, and his prior experience with cave-ins was limited to trenches that were not even occupied at the time of collapse. (CP at 94:3-13.)

In contrast with the extreme severity rating that Inspector Fening assigned to the alleged violation, he acknowledged that the probability of a cave-in incident occurring was extremely low, and rated the likelihood of

such an event as 2 out of a possible 6, noting the intermittent exposure to the alleged risk, and the fact that there were no outlying indications of trench failure or of any other “imminent type danger” that would put an employee at risk of death or serious permanent injuries. (CP 94:14-24.)

Inspector Fening also determined that Potelco had acted in good faith, and that Potelco’s safety training and accident prevention programs are well-written. In fact, he commended Potelco for being “very cooperative,” and for discussing hazards with its employees and working to correct any issues. (CP 95:9-21.) Inspector Fening also assessed Potelco’s history as “good,” noting that Potelco is inspected “quite regularly,” but that most of its inspections do not result in violations. (CP 96:12-20.) He further noted that Potelco has a “great industrial insurance experience factor.” (CP 97:8-14.) Nevertheless, the Department issued a citation to Potelco for a “serious” violation and issued a final penalty of \$2,100.00. (CP 97:22-25.)

B. PROCEDURAL BACKGROUND

Potelco appealed this Citation and Notice of Assessment to the Department of Labor and Industries’ Safety Division on March 31, 2008. (CP at 28-33, 34-38.) The Department transmitted the appeal to the Board of Industrial Insurance Appeals on April 9, 2008. (CP at 44-46.) A

hearing was held in Seattle at the Board before Judge Hickman on November 5, 2008. (CP at 72.) At the conclusion of the Department's case, Potelco moved for an order of dismissal on the basis that the Department had failed to establish its prima facie case. (CP 107:4-7.) Potelco's motion was denied, and the Proposed Decision and Order was issued on January 16, 2009, affirming the Citation and penalty (CP at 28-33.) The Board, however, did not apply a preponderance-of-the-evidence standard. Rather it accepted all the Department's evidence as true and determined that the Department's evidence was sufficient when construed "in a light most favorable to the Department." (CP at 29:8-11.)

Potelco filed a Petition for Review on February 10, 2009. (CP at 9-23.) The Board issued its Decision and Order denying Potelco's Petition for Review and affirming the Citation and penalty on February 18, 2009. (CP at 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. 09-2-00677-8, Notice of Appeal (filed 3/18/2009 at CP at 1-4).)

Following a hearing on April 4, 2011, the Honorable Theodore Spearman affirmed the Board's Decision and Order, and also ordered Potelco to pay a penalty of \$2,100.00 and statutory attorneys' fees in the

amount of \$200.00. (CP at 142-44). Potelco timely appealed to this Court. (*Potelco, Inc. v. Dep't of Labor and Indus.*, Kitsap County Cause No. 09-2-00677-8, Notice of Appeal to Washington State Court of Appeals, Division II (filed 8/04/2011)).

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). Substantial evidence is sufficient evidence that would persuade a fair-minded, rational person that a finding is true. *Martinez Melgoza & Assoc., Inc. v. Dep't of Labor & Indus.*, 125 Wn. App. 843, 847-48, 106 P.3d 776 (2005), *review denied*, 155 Wn.2d 1015 (2005). 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 BOARD APPLIED THE WRONG STANDARD OF PROOF

It is well established that the Department must prove each element of a WISHA violation by a preponderance of the evidence. *Washington Cedar & Supply Co., Inc. v. Department of Labor & Industries*, 119 Wn. App. 906, 914, 83 P.3d 1012 (Div. 2 2004).⁵ The Board, however, failed to apply this standard in determining whether Potelco violated WAC 296-155-657(1)(a).

Instead, the Board ruled on Potelco's appeal as if it were a motion for judgment as a matter of law. *See* CR 50(a)(1) ("If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim . . .").

The Board accepted all of the Department's evidence as true and determined that, "[v]iewing the record in the light most favorable to the Department, the Department's evidence is sufficient to withstand Potelco, Inc.'s motion." (CP at 29:10-11.) In concluding its decision, the Board

⁵ In construing WISHA, the Board and courts may also consider the federal counterpart, OSHA, and its judicial interpretation. *Washington Cedar*, 119 Wn. App. at 914, citing *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 147, 750 P.2d 1257 (1988). Thus, this brief will discuss OSHA decisions where appropriate.

stated, “[l]ooking at the evidence in the light most favorable to the non-moving party, the Department has at least made out it’s [sic] prima facie case for violation and an appropriate penalty assessment.” (CP at 30:27-28.)

In effect, the Board held that a fact finder *could* hold that Potelco violated WAC 296-155-657(1)(a). But the Board failed to assume the role of fact finder, assess the credibility and weight of the evidence, and determine whether a preponderance of the evidence demonstrated that Potelco committed the violation.

It is unclear why the Board treated Potelco’s appeal as a motion for judgment as a matter of law. The Board may have inferred from Potelco’s decision not to present any evidence at the hearing that Potelco believed the Department’s evidence was insufficient as a matter of law. Indeed, as demonstrated by the sections below, Potelco does believe that the evidence is insufficient as a matter of law and would have welcomed a vacation of the citation on that basis. But, in the absence of such a ruling, Potelco was entitled to have the Board determine the credibility and weight of the evidence and find the facts under the applicable standard of proof—a preponderance-of-the-evidence standard. *Cf. In re David Gerlach*, BIIA Dec., 852156 (1986) (noting that a party making a motion to dismiss for

failure to make a prima facie case does not waive the right to present evidence in the event the motion is denied); CR 50 (“A motion for judgment as a matter of law which is not granted is not a waiver of trial by jury even though all parties to the action have moved for judgment as a matter of law.”).

Given the weak evidence in this case, Potelco was substantially prejudiced by the Board’s failure to apply the correct standard of proof. Accordingly, the Board’s decision should be reversed.

C. THE RECORD LACKS SUBSTANTIAL EVIDENCE TO ESTABLISH THAT POTELCO VIOLATED WAC 296-155-657(1)(A)

In WISHA cases, the Department has the burden of proving the existence of the cited violation and the appropriateness of the resulting penalty. *In re Olympia Glass Co.*, BIIA Dec., 95 W455 (1996); *see also* WAC 263-12-115(2)(b). If the Department fails to meet its burden, the alleged violation must be vacated. *In re Cascade Utilities, Inc.*, BIIA Dec., 04 W1392 (2006) (vacating citation).

To establish a serious violation, the Department must prove that: (1) a cited standard applies; (2) the requirements of the standard were not met; (3) employees were exposed to, or had access to, the violative condition; and (4) the employer knew, or with reasonable diligence could

have known of the violation. *Washington Cedar & Supply Co., Inc. v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 914, 83 P.3d 1012 (Div. 2 2004). The Department has the burden to prove each element by a preponderance of the evidence. *Id.*, see also *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). In other words, the Department must produce a “quantum of evidence that is sufficient to convince the trier of fact that the facts asserted by a proponent are more probably true than false.” *Astra Pharm. Prods., Inc.*, 9 O.S.H.C. 2126, 2129 (1981).

The Citation at issue in the present case concerns violations of WAC 296-155-657. This regulatory provision imposes very specific requirements for installing protective systems at excavations that are more than four feet deep. *Id.*

More specifically, WAC 296-155-657 requires the installation of either a “sloping and benching system” under subdivision two or a “support system, shield system, or other protective system” under subdivision three. WAC 296-155-657. Subdivisions two and three set forth several options for compliance. *Id.* Several of the options include specific technical requirements. *Id.* But two of the options for compliance involve relying on registered professional engineers to design a protective system. WAC 296-155-657(2)(d) & (3)(d). The regulations indicate that,

if a registered professional engineer designs and approves the system, then the physical characteristics of the excavation site are irrelevant to the issue of the employer's compliance. *Id.*

Because of the highly technical requirements of WAC 296-155-657, the Board of Industrial Insurance Appeals has been unwilling to affirm violations based on "sparse" evidence that is not confirmed by actual measurements. *See In re Cascade Utilities, Inc.*, BIIA Dec., 04 W1392 (2006). In *Cascade Utilities*, the Board vacated a citation where an inspector observed an employee in a trench and measured "a 7-foot depth in one part of the trench, but said the trench was graded and he did not measure the shallowest part." *Id.* Because the "evidence regarding the depth of the trench at the point where [the employee] was located . . . was sparse, at best" and the employee "could have been in the portion of the trench that was less than four feet deep," the Board refused to affirm the violation. *Id.*

Similarly, in cases concerning violations of federal regulations addressing protective systems at excavation sites, the federal OSHA Review Commission has held that the government must present measurements in order to meet its burden of proof:

In sum, the cited standard requires that reliable measurements be made, preserved and made part of the Secretary's case in

chief. Fulfilling the Secretary's obligation to prove the existence of a violative condition by a preponderance of reliable evidence of record requires more than assumptions and inferences where the violation alleged is that of a standard with specific distances as an integral part of its requirements. The Secretary has not fulfilled that burden on this record.

Sec'y of Labor v. Scafar Contracting, Inc., 18 O.S.H. Cas. (BNA) 1540, 1998 WL 597441, *10 (1998).

The OSHA decisions demonstrate that, except when a particular aspect of the violation is undisputed, the government is required to present measurements of the depth of the trench and the slope of the trench walls; to establish the soil classification for the surrounding soil through soil test results or specific observations; to identify the compliance option that was selected by the party who excavated the trench; and to establish that the trench did not comply with the specific compliance option. *See, e.g., Sec'y of Labor v. Garney Constr., Inc.*, 2002 O.S.H.D. (CCH) P 32670, 2003 WL 21693001, *4-5 (July 18, 2003) (noting measurements of trench and analyzing whether requirements of specific option were satisfied); *Sec'y of Labor v. Allen Howe & Son, Inc.*, 19 O.S.H. Cas. (BNA) 1765, 2001 WL 1673742, *1-3 (2001) (noting specific angle and trench measurements and soil analysis).

As discussed more thoroughly below, the Department's evidence in the instant case fell well below these standards. The Department failed to meet its burden of proof on at least two of the four required elements. Specifically, the record does not contain substantial evidence showing that the trench is subject to WAC 296-155-657(1)(a) or that Potelco failed to meet the standard imposed by WAC 296-155-657(1)(a).

1. The Record Lacks Substantial Evidence Establishing that the Cited Standard Applies

Because the Department failed to present evidence from which the Board could reasonably infer the depth of the trench or the identity of the person in the trench, the Department has failed to establish whether the cited standard, WAC 296-155-657(1)(a), even applies here. According to the regulation, an employer must design a sloping and benching system designed in accordance with provisions in the regulation unless, among other things, the excavation is "less than four feet in depth." WAC 296-155-657(1)(a)(ii). Moreover, the regulatory provision only applies to "employees in an excavation." WAC 296-155-657(1)(a).

Although Inspector Fening believed that the trench was more than four feet deep, he based his belief on mere hunches and estimations, and on the unverified hunches and estimations of Superintendent Harris—not on a single, actual measurement, even though that information would have

been readily available from Bedrock. Further, Inspector Fening's hunches and estimations are based upon the assumed height of a worker who was crouched down in the photo, and from the assumed length of a shovel that was never measured or confirmed to be of standard size. (CP at 100:23-101:12.)

The Department also presented very little evidence concerning whether the person photographed in the trench was a Potelco employee. On this issue, the Department presented only Superintendent Harris's speculation about who would have been in the trench and hearsay presented through Inspector Fening. Inspector Fening stated that Mr. Torres identified himself as the person in the photograph, but Inspector Fening admitted that he never actually showed the photograph to Mr. Torres.

Simply put, without taking a single measurement, the Department Investigator looked at an admittedly inconclusive photograph of an unidentified individual and surmised that there must be a violation because it looked like the trench was probably ten feet deep. Inspector Fening's cursory investigation is insufficient to establish that the cited standard even applies in this case.

2. The Record Lacks Substantial Evidence Establishing that Potelco Did Not Meet the Requirements of the Standard

Even if the Department could prove that the requirements of WAC 296-155-657 applied to the trench, it again failed to offer sufficient evidence to support its claim that Potelco failed to meet the specific requirements of this regulation. As noted above, the relevant regulation outlines several different options for employers to follow in order to design appropriate sloping, benching, shielding, and other systems to protect employees in excavations from potential cave-ins. *See* WAC 296-155-657 (2), (3). Different requirements are imposed depending on the classification of the soil at issue. WAC 296-155-657.

The Department never presented any evidence regarding which compliance option Bedrock selected and how the trench failed to comply with the requirements of that particular option. Because two of the options for compliance require only reliance on a registered professional engineer, the Department could not establish a violation based on the physical characteristics of the trench without ruling out these options. *See* WAC 296-155-657(2)(d) & (3)(d).

Similarly, Inspector Fening did not testify as to how he determined the classification of the soil surrounding the trench. He merely declared that the “soil was classified as Class B.” (CP at 94:22.)

Most importantly, Inspector Fening never took any measurements of the trench. In fact, he never saw the trench in person. He claimed that he could tell from the photograph that the trench was not properly trenched, sloped, shielded, or shored. But he admitted that the photograph showed only a portion of the trench and that the trench may have looked different from different angles. Furthermore, there is no evidence that Inspector Fening sought to corroborate his assessment with Bedrock, despite the fact that Mr. Torres had specifically told him that Bedrock has assured him that the trench was safe to enter. The Department has not presented any reliable evidence of the protections that were or were not inside the trench, and cannot reasonably claim that any exposed employees were not adequately protected.

In summary, the Department performed, at best, a cursory investigation of the protective system and failed to take any measurements of the trench. Consequently, the record is insufficient to establish by a preponderance of the evidence that (a) the trench was greater than four feet deep, or (b) that the trench was not adequately benched, shored, or

shielded. See *In re Cascade Utilities, Inc.*, BIIA Dec., 04 W1392 (2006); *Sec'y of Labor v. Scafar Contracting, Inc.*, 18 O.S.H. Cas. (BNA) 1540, 1998 WL 597441, *10 (1998). The Citation and resulting penalty should be vacated on these grounds.

D. THE RECORD LACKS SUBSTANTIAL EVIDENCE TO ESTABLISH THAT THE ALLEGED VIOLATION WAS A "SERIOUS" VIOLATION

Even if the Department had met its burden of proof in establishing a violation, the Department did not introduce sufficient evidence to support its conclusion that exposed employees risked death or serious bodily harm. If the Court does not vacate the citation in its entirety, the violation should be reduced from a serious to a general citation, with a corresponding penalty reduction.

To support a serious violation the Department must prove, by a preponderance of the evidence, that there is a substantial probability that death or serious physical harm could result from the violative condition. RCW 49.17.180 (6); *Washington Cedar & Supply*, 119 Wn. App. at 914. On the other hand, a general violation is appropriate when the Department determines the employer has violated WISHA, but the alleged violation does not pose a risk of serious bodily harm to employees. RCW 49.17.130 (3); *In re: Olympia Glass Co.*, BIIA Dec., 95 W445 (1996). Further,

WISHA does not mandate that the Department impose a civil penalty for general violations. RCW 49.17.180(2).

WISHA calculates the base penalty for a violation by assigning a weight to a violation, called gravity. Gravity is calculated by multiplying a violation's severity rate by its probability rate. WAC 296-900-14010.

Severity rates 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. Severity rates are expressed in whole numbers, ranging from one (1), the lowest, to six (6), the highest. *Id.* Violations with a severity rating of 4, 5, or 6 are considered serious. *Id.* In this case, the \$2,100 penalty has been improperly calculated because the alleged violation does not meet the criteria for a serious designation.

Inspector Fening assigned the alleged violation a severity level of 6, a rating reserved for violations in which "death, injuries involving permanent, severe disability, or chronic, irreversible illness" could be reasonably expected to occur because of a hazardous condition. WAC 296-900-14010. Inspector Fening based that assessment solely on his "background," but he admitted that he has never investigated a fatality from a cave-in of a trench excavation in his Department career, and his only other cave-in experience related to unoccupied trenches that, by

definition, could not have involved any injury. So, it is unclear how or why the Department concluded that death or serious physical harm was a substantially probable result of exposure to the allegedly violative condition. The Department provided no other basis for its assessment of a “serious” violation. Consequently, the record lacks substantial evidence supporting the conclusion that there is a substantial probability that death or serious physical harm could result from the violative condition. Accordingly, the Court should find that this Citation was improperly deemed serious, and that the corresponding penalty was improperly calculated.

V. CONCLUSION

Potelco respectfully requests that the Court reverse the Board’s Decision and Order and vacate the citation and penalty because the Department applied the wrong standard of proof. Alternatively, the citation and penalty should be vacated because, based on the sparse evidence presented by the Department, no fair-minded person could conclude that it is more likely true than not true that WAC 296-155-657 applied to the trench at issue, or that proper safeguards had not been taken to prevent a cave-in. Finally, if the citation is not vacated, Potelco respectfully requests that penalty be reduced from a “serious” violation to

a “general” violation because the record lacks substantial evidence showing that any exposed employees risked death or serious bodily harm.

If the Court grants Potelco’s requests to vacate the citation and penalty, Potelco also respectfully asks 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 21st day of October, 2011.

RIDDELL WILLIAMS P.S.

By 
Skylar A. Sherwood, WSBA #31896
Gena M. Bomotti, WSBA #39330
Attorneys for Appellant Potelco, Inc.

CERTIFICATE OF SERVICE

I, Janine Fader, certify that:

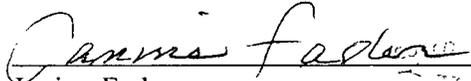
1. I am an employee of Riddell Williams P.S., attorneys for Appellant Potelco, Inc. in this matter. I am over 18 years of age, not a party hereto, and competent to testify if called upon.

2. On October 21, 2011, I served a true and correct copy of the foregoing document on the following party, attorney for Respondent, via hand delivery, and addressed as follows:

Sarah Martin
Washington Attorney General's Office
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Seattle, Washington, this 21st day of October, 2011.


Janine Fader


OCT 25 8:11:55
COURT REPORTERS
1000 4th Ave
Seattle, WA 98101

APPENDIX A

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: POTELCO, INC.) DOCKET NO. 08 W1088
2 CITATION & NOTICE NO. 311630081) PROPOSED DECISION AND ORDER

3 INDUSTRIAL APPEALS JUDGE: James R. Hickman

4 APPEARANCES:

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

8 Department of Labor and Industries, by
9 The Office of the Attorney General, per
10 James S. Johnson, Assistant

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RIDDELL-WILLIAMS P.S.

11
12 The employer, Potelco, Inc., filed an appeal with the Department of Labor and Industries'
13 Safety Division on March 31, 2008. The Department transmitted the appeal to the Board of
14 Industrial Insurance Appeals on April 9, 2008. The employer appeals Citation and Notice
15 No. 311630081 issued by the Department on March 12, 2008. The Department order is
16 **AFFIRMED.**

17 **PROCEDURAL AND EVIDENTIARY MATTERS**

18 On May 20, 2008, the parties agreed to include the Jurisdictional History in the Board's
19 record. That history, as amended, establishes the Board's jurisdiction in this appeal.

20 At the conclusion of the Department's case, on November 5, 2008, the employer moved for
21 an order of dismissal for failure of the Department to make out a prima facie case of violation.
22 The employer also determined to not call witnesses, and rested. The ultimate determination of this
23 case, thus, rests solely upon whether the Department made its prima facie case.

24 **RELIEF SOUGHT**

25 Vacation of Citation and Notice No. 311630081 in its entirety.

26 **DECISION**

27 In appeals filed under the Washington Industrial Safety and Health Act, the Department of
28 Labor and Industries bears the initial burden of proving the existence of the cited violation and the
29 appropriateness of the resulting penalty. *In re Olympia Glass Co.*, BIIA Dec., 95 W455 (1996); see
30 also WAC 263-12-115. In support of the Citation and Notice, the Department presented two
31 witnesses, Richard T. Harris, and Department safety compliance officer, Mr. John Fening. After the
32

1 Department rested its case, Potelco, Inc.'s attorney moved for an order of dismissal, contending
2 that the Department had failed to present sufficient evidence that a violation occurred.

3 In an appeal from a Citation and Notice the Department must present its evidence first and
4 the evidence must be sufficient to make a prima facie case that the Citation and Notice is correct.
5 If the Department fails to make a prima facie case, the alleged violation must be vacated.
6 A dismissal is not appropriate because it would have the effect of affirming the violation.
7 In ruling on Potelco, Inc.'s motion to dismiss the Department's evidence as true must be accepted
8 as true. *Spring v. Department of Labor & Indus.*, 96 Wn.2d 914 (1982). All reasonable inferences
9 from the evidence must be construed favorably to the Department. *Willis v. Simpson Inv. Co.*, 79
10 Wn. App. 405 (1995). Viewing the record in a light most favorable to the Department, the
11 Department's evidence is sufficient to withstand Potelco, Inc.'s motion.

12 Richard T. Harris, an employee of Silverdale Ridge Apartments, located at 1409 N.W. Santa
13 Fe Lane, in Silverdale, Washnigton, was the superintendent of a construction project taking place
14 on the apartment grounds on January 17, 2008. He said that on that day, a construction crew from
15 Bedrock Construction was engaged in a trenching project and came into contact with an
16 underground electric line. He said that he called a Puget Sound Energy emergency line, and it is
17 his belief that a crew from Potelco, Inc., responded (based upon the responding vehicles).
18 Mr. Harris identified Exhibit No. 1 as a picture he took that day, and said it showed the trench.
19 He could not positively identify the person shown in the picture, but believes it to be someone from
20 Potelco, Inc., though he did not actually see the person shown in the picture go into the trench.
21 He estimated the trench to be 10 feet deep on the highest (right) side.

22 Some time after January 17, 2008, John Fening, compliance safety and health officer,
23 opened an investigation with Bedrock Construction. He was not on-site at any time on January 17,
24 2008. As a result of that investigation, he received the photo admitted as Exhibit No. 1.
25 Based upon that photo, Mr. Fening then opened an investigation with Potelco, Inc., regarding a
26 potential violation of WAC 296-155-657(1)(a). That regulation provides:

27 **Requirements for protective systems.**

28 (1) Protection of employees in excavations.

29 (a) Each employee in an excavation shall be protected from cave-ins by an
adequate protective system...

30 It is Mr. Fening's belief that the picture shows an employee in an improperly shored, unshielded
31 trench excavation greater than four feet in depth. He regarded this as a serious violation, as a
32 cave-in "would have been fatal." 11/05/08 Tr. at 19. In calculating a penalty, he determined the

1 severity of the violation to be a 6, with a probability of 2. He determined the probability factor
2 based upon "while the soil was classified as Class B, and there was no shielding/shoring
3 present . . . there was no outlying indications of a failure, of imminent-type danger." 11/05/08 Tr. at
4 20. He assigned Potelco, Inc., a "good" good faith rating, as well as a rating of "good" for history.
5 There was no reduction in penalty due to company size. Based upon those factors, Mr. Fening
6 assessed a penalty on the violation of \$2,100.

7 Many of Mr. Fening's conclusions, regarding a rule violation, were based upon observations
8 and inferences to be drawn from those observations. For example, while he never entered the
9 trench, he estimated the depth by the shovel shown in the picture. That is "standard shovel
10 handle, five foot from toe to point . . . midway point up. Again, you can't tell when its' the person,
11 but midway point up is five foot. And then up - - extrapolating, this appears to be about ten foot. I
12 had no reason to doubt what I was told by the general contractor: that the trench depth was about
13 ten foot." 11/05/08 Tr. at 27. Nor did Mr. Fening have any doubts, again based upon the
14 photograph, that there was no shoring, or anything like adequate sloping, in the trench where the
15 person is standing. And finally, Mr. Fening said that he interviewed a Ron Torres by telephone.
16 Mr. Torres, a Potelco, Inc., employee on January 17, 2008, identified himself as the person in the
17 trench in the photograph. He was engaged in work in the trench in his capacity as a Potelco, Inc.,
18 employee.

19 When I told him I had a photo - - he said, "Yeah, that was me. I'm the
20 only one that went in the trench." Because he knew the trench was not
21 shoring [sic] or shield [sic], and he felt sorry for the general - - for the
22 subcontractor that he was talking to, Bedrock Excavation. And since he
23 was concerned for the trench not being adequately protected, he didn't
24 want to put his guys in there, so he went in himself.

25 11/05/08 Tr. at 30-31.

26 The evidence from the Department is entirely circumstantial, but such evidence need not be
27 considered to have any less evidentiary value than direct evidence. In fact, had this case been
28 tried to a jury, the Department would have been entitled to an instruction precisely to that effect.
29 As a result, looking at that evidence in a light most favorable to the non-moving party, the
30 Department has at least made out it's prima facie case for violation and an appropriate penalty
31 assessment. That being said, Citation and Notice No. 311630081, is correct and is affirmed.
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FINDINGS OF FACT

1. On February 5, 2008, John Fening, a compliance safety and health officer for the Department of Labor and Industries, opened a conference with Potelco, Inc., regarding an alleged violation of the Washington Industrial Safety and Health Act occurring at a job-site located at 1409 N.W. Santa Fe Lane, in Silverdale, Washington. On March 12, 2008, the Department issued Citation and Notice No. 311630081, alleging the following violation: Item No. 1-1, a serious violation of WAC 296-155-657(1)(a), with a penalty of \$2,100.

On March 31, 2008, Potelco, Inc., filed its appeal from Citation and Notice No. 311630081 with the Safety Division of the Department of Labor and Industries. The Department elected to not reassume jurisdiction and, on April 9, 2008, Potelco, Inc.'s, appeal was transmitted to the Board of Industrial Insurance Appeals. On April 10, 2008, the Board issued a Notice of Filing of Appeal for the appeal, which had been assigned Docket No. 08 W1088.

2. On January 17, 2008, the employer, Potelco, Inc., was called on an emergency basis to a trenching site at 1409 N.W. Santa Fe Lane, in Silverdale, Washington. On arrival at this site, a Potelco, Inc., employee entered into a trench that had been dug by Bedrock Construction. This trench was more than four feet deep, and was not protected from cave-ins by any type of shoring device or devices, or adequate sloping.
3. On January 17, 2008, the Potelco, Inc., employee in the trench, and any other employee or employees who may have entered the trench at 1409 N.W. Santa Fe Lane, in Silverdale, Washington, were exposed to the danger of the trench caving in. This violation (Item 1-1), exposed the employee and other workers to the risk of being buried and suffering death or serious injury.
4. Relative to Item 1-1, the employee and potentially other workers at the site were exposed to the risk of serious injury or death if the trench were to cave in. 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 2, on the same scale, the second lowest level of probability that can be assigned. Multiplying severity time's probability, a gravity rating of 12 was established. The company has a faith rating of good, and also a good history rating (based upon prior history of the company). No reduction in penalty is made, due to the company size. The assessed penalty, utilizing those factors, is \$2,100.
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CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

