

Dept I 8/2

COPY

Supreme Court No. 92998-0

Court of Appeals, Division I, No. 73735-0-I

**SUPREME COURT OF THE STATE OF WASHINGTON**

RECEIVED  
COURT OF APPEALS  
DIVISION ONE

APR 6 - 2016

---

POTELCO, INC.,

*Plaintiff/Petitioner,*

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

*Defendant/Respondent.*

---

**APPELLANT POTELCO, INC.'S PETITION FOR REVIEW**

---

RIDDELL WILLIAMS P.S.

Gena Bomotti, WSBA #39330

Josias Flynn, WSBA #44130

Attorneys for Appellant Potelco, Inc.

1001 Fourth Avenue, Suite 4500

Seattle, WA 98154-1192

Phone: (206) 624-3600

Facsimile: (206) 389-1708

## TABLE OF CONTENTS

	Page
I. IDENTITY OF PETITIONER .....	1
II. THE COURT OF APPEALS' DECISION .....	1
III. ISSUES PRESENTED FOR REVIEW .....	1
IV. STATEMENT OF THE CASE.....	2
A. STATEMENT OF FACTS .....	2
1. The Worksite.....	2
2. Potelco's Line Crews And Civil Crews .....	4
3. The Fly-In Operation.....	5
4. The Department's Inspection And The Citation.....	8
B. PROCEDURAL BACKGROUND.....	9
V. ARGUMENT .....	10
VI. CONCLUSION.....	11

## TABLE OF AUTHORITIES

Page

### STATE STATUTORY AUTHORITIES

RCW 49.17.....	1
WAC 296-45-035.....	10
WAC 296-45-055(5).....	8
WAC 296-45-065(1).....	8
WAC 296-45-325(1).....	1, 8
WAC 296-45-67507(2).....	1, 8, 11

## **I. IDENTITY OF PETITIONER**

The petitioner is Potelco, Inc., a Washington corporation that performs utility construction services.

## **II. THE COURT OF APPEALS' DECISION**

The Court of Appeals filed an unpublished decision in this matter on March 7, 2016. A copy of that decision is attached hereto as Exhibit A.

## **III. ISSUES PRESENTED FOR REVIEW**

1. Whether Potelco violated WAC 296-45-325(1), which provides that certain employees must be “qualified,” when Potelco’s employees at the relevant worksite were fully aware of and trained regarding the hazards connected to working near energized lines, but were ultimately exposed to unknown risks.
2. Whether Potelco violated WAC 296-45-67507(2), which requires a safety meeting to discuss changes in hazards at worksites using helicopters, when (a) Potelco held a safety meeting to discuss the helicopter operation before any work began, and when (b) there was no change in the hazards associated with the helicopter work, as the helicopter performed the same tasks for the duration of the project, with only minor variations.
3. Whether Potelco had knowledge of alleged WISHA<sup>1</sup> violations involving a helicopter, when (a) the cited WISHA provisions would apply only if the helicopter’s long-line was conductive, (b) the helicopter was

---

<sup>1</sup> WISHA refers to Washington’s Industrial Safety and Health Act, RCW 49.17.

owned and operated by a third-party, and (c) the third-party informed Potelco that the long-line was non-conductive.

4. Whether an employer has a duty to independently test the characteristics of equipment owned and operated by a third-party at the employer's worksite.

#### **IV. STATEMENT OF THE CASE**

##### **A. STATEMENT OF FACTS**

###### **1. The Worksite**

Potelco was hired to replace a 24-mile set of transmission lines in Sedro Woolley, WA, referred to as Baker-Sedro Line No. 2. (CP at 281-282.) Another set of transmission lines, Baker-Sedro No. 1, paralleled the Baker-Sedro No. 2 line. (CP at 282.) Generally, the two sets of lines were approximately 60 feet apart. *Id.* At several structures<sup>2</sup>, however, the two lines turned simultaneously at an angle. At these structures, line No. 1 and line No. 2 were closer to each other than 60 feet. (CP at 314.) There were several "angled" structures at the Baker-Sedro project. *Id.*

To replace Baker-Sedro Line No. 2, Potelco needed to remove the existing wire and the poles the wire was attached to. It would then set new poles and place new wire on those poles. (CP at 282.) The Baker-Sedro Line No. 2 line was de-energized so that Potelco could perform its work, but the Baker-Sedro No. 1 line remained energized at 115 KV.<sup>3</sup>

---

<sup>2</sup> A "structure" refers to a power pole. (CP at 347.)

<sup>3</sup> There was some confusion at hearing about the designation of the line being worked on – whether it was line Baker-Sedro Line No. 1 or Line No. 2. (See CP at 282, CP at 326, CP at 355.) Regardless of the exact designation, what is

After Potelco removed the existing wire and poles from the Baker-Sedro Line No. 2 line, it began preparing to set new poles. (CP at 282.) Potelco needed to dig holes where the pole-anchors would be placed, and needed to fill those holes with gravel and/or concrete so the new anchors could be properly set. *Id.* Potelco normally uses its own trucks to deliver materials to worksites, but several structures at the Baker-Sedro project were inaccessible by vehicle. *Id.* at 284. The only practical way to deliver materials to those structures was by helicopter. *Id.* at 288. Potelco does not own or operate helicopters, so it hired Salmon River Helicopters to assist with this phase of the job. *Id.* at 288. The previous year, Potelco had replaced Baker-Sedro Line No. 1, and Salmon River successfully delivered materials to every inaccessible structure during the Baker-Sedro No. 1 project. (CP at 319.) At that time, Salmon River’s publicly available website indicated that “Salmon River Helicopters has moved hundreds of yards of concrete by helicopter. We deliver concrete to cell tower, repeater, ski lift, power pole and building sites where roads are not available. We have experience setting the cell towers and power poles into position. *Aerial construction delivery work is a specialty of ours.*” (available at <http://web.archive.org/web/20120101093758/http://www.srhelicopters.com/construction.html>) (last accessed April 4, 2016) (emphasis added). It further stated that “[w]ith some of the best long line

---

important here is that all witnesses agreed that there were two sets of lines at the Baker-Sedro project, and that Potelco was replacing the de-energized line, which is referred to herein as Baker-Sedro Line No. 2 line.

pilots in the industry we provide long line training. The pilots that will be teaching you are the best in their field, with up to 25,000 hrs of actual long line experience.” (available at <http://web.archive.org/web/20120101093104/http://www.srhelicopters.com/long-line-school.html>) (last accessed April 4, 2016). Salmon River makes these same representations today. *See* <http://srhelicopters.com/services/construction/> and <http://srhelicopters.com/services/long-line-school/> (last accessed April 4, 2016).

## **2. Potelco’s Line Crews And Civil Crews**

Potelco employees generally fall into two classifications: line crews and civil crews. Potelco’s line crews are responsible for working directly on and with energized power lines, while its civil crews perform general labor to support the line crews. (CP at 166, 183.) Although civil crews never work directly on energized lines, they often work at jobsites where power lines are present. As a result, Potelco provides all civil crews with training on the foundations of electrical safety. (CP at 293, CP at 359.) One such training is an in-depth OSHA 10 training course, which spans over 10 hours and covers electrical safety topics in detail, including (a) personal protective clothing and equipment; (b) distinguishing live parts of electrical equipment; (c) minimum approach distance (“MAD”), which is the closest distance a worker can come to an energized line; and (d) determining nominal voltage of live parts of equipment. (CP at 293, CP at 356, CP at 389-520.)

Al Whitaker, Potelco's line crew manager (a certified lineman), and Gordon Anchetta, Potelco's line crew general foreman (a certified lineman), decided that civil crews should dig holes at the worksite where anchors would be placed. (CP at 286.) The civil crews were also asked to help Salmon River deliver materials to those holes. (CP at 286.) One such civil crew included foreman Shane Wheeler, equipment operator Randy Chapple, and underground tech Alan Jesmer. (CP at 171, CP at 324.)

Mr. Wheeler had been employed by Potelco for approximately six years. (CP at 164.) Prior to becoming a foreman, he worked as an underground tech and equipment operator. *Id.* at 165. He had completed the OSHA 10 class before beginning work on the Baker-Sedro project. (CP at 184, CP at 379.) Mr. Wheeler was fully aware of the general hazards of electricity as well as the specific MAD for working near an energized 115 KV line. (CP at 184-185.) He had over six years of first-hand experience working at jobsites that contained energized lines. *Id.* at 183.

### **3. The Fly-In Operation**

Salmon River was scheduled to begin transporting material to Potelco's worksite on June 25, 2012. (CP at 289.) That day, there was a safety meeting attended by Salmon River and every Potelco employee assigned to assist with the fly-in operation. (CP at 289, CP at 167.) At this meeting, Salmon River described the fly-in process. (CP at 289.) A rope, referred to as the "long-line," was attached to the helicopter. *Id.* at

290. According to Salmon River, the long-line was made entirely of non-conductive Kevlar, which, if true, would mean that electricity could not flow through the long-line. (CP at 290, 292.) Potelco would bring concrete and gravel bags to a central, accessible location at the worksite. *Id.* at 289. The gravel bags would be placed on a hook at the end of the long-line. (CP at 173.) When delivering concrete, a box known as a “hopper” would be filled with concrete and then attached to the long-line’s hook. (*Id.* at 173-174.) Salmon River would then fly materials to the worksite as needed. (CP at 290.)

A Potelco civil crew and a Salmon River spotter would be at each fly-in structure. (CP at 173, CP at 290.) Salmon River’s spotter had sole responsibility for guiding the helicopter to the structures, and he was the only person on the ground in direct contact with the helicopter pilot (also a Salmon River employee). (CP at 174-175, CP at 290-291.) Once the spotter guided the pilot to where materials were needed, a Potelco employee or Salmon River’s spotter would either remove the gravel bag or would pull a lever on the hopper to release concrete. (CP at 174.)

On June 25, following the safety meetings, Salmon River successfully delivered over 40 loads of material to the fly-in structures. (CP at 339.)

On June 26, Salmon River resumed the fly-in operation, using the exact same procedures from the previous day. (CP at 325-326.) As the end of the day approached, only one structure still needed concrete—

structure 4/3 (an “angled” structure)<sup>4</sup>. (CP at 327.) Mr. Wheeler and his crew were working at this structure. (CP at 326.)

There were three holes at structure 4/3 that needed to be filled with concrete on June 26—holes “A,” “B,” and “C.” (See, CP at 383.)<sup>5</sup> Salmon River successfully delivered concrete to hole C, then to hole B, and finally to hole A. (CP at 329.) Each hole needed additional concrete, and Salmon River made another series of successful deliveries to each hole. *Id.* at 55-56. Hole A still needed more concrete, so Salmon River made a third successful delivery to that hole. (CP at 330.) Salmon River had delivered all but a small amount of the available concrete. There was still space in hole A, so Salmon River prepared to make its fourth and final drop to that hole, which would be the final delivery of the day. *Id.* Salmon River loaded its hopper at the fly-yard and set out for the fly-in structure, as it had done several times before over the span of two days; Salmon River’s spotter directed the helicopter to the structure, as he had done several times before over the span of two days; and the employee closest to the hopper, Mr. Wheeler, steadied it, as he had been done several times before. *Id.* This time, however, Salmon River’s pilot brought the long-line too close to the energized Baker-Sedro Line No. 1, and when Mr. Wheeler grabbed the lever on the hopper to release the

---

<sup>4</sup> Structures are designated by number in reference to their position along the Baker-Sedro Line. (CP at 283.)

<sup>5</sup> These holes were not identified by letter during the project. This brief identifies the holes by letters for ease of reference, as did Mr. Chapple in his testimony. (See CP at 328, and 383.)

concrete, there was an electrical arc flash from the energized Baker-Sedro Line No. 1 to the long-line. (CP at 203.) The electricity traveled down the long-line and Mr. Wheeler suffered burn injuries as a result. (CP at 182.)

#### **4. The Department's Inspection And The Citation**

Department Inspector Dick Maxwell inspected Potelco's worksite, in response to Mr. Wheeler's injury, and the Department issued Potelco the Citation, which included the following alleged violations, all designated as "serious":

- Item 1-1(a) alleges a violation of WAC 296-45-055(5), which requires employers to appoint only competent workers to supervise other employees.
- Item 1-1(b) alleges a violation of WAC 296-45-065(1), which requires employees to be trained and proficient in the safety-related work practices, safety procedures, and other safety requirements that pertain to their respective job assignments.
- Item 1-2 alleges a violation of WAC 296-45-67507(2), which requires employers to hold a safety meeting when there is a change in the hazard, method of performing the job, signals to be used, or other operating conditions at a worksite where a helicopter is used.
- Item 1-3 alleges a violation of WAC 296-45-325(1), which provides that only qualified employees may work on or with exposed energized lines, and only qualified employees may work in areas containing unguarded, un-insulated energized lines.

**B. PROCEDURAL BACKGROUND**

Potelco appealed the Citation to the Board of Industrial Insurance Appeals, and on January 14-15, 2014, Industrial Appeals Judge Michael Metzger presided over the appeal hearing. Judge Metzger entered a proposed decision and order on April 9, 2014. (CP at 30.) He noted that Items 1-1(a), 1-1(b) and 1-3 are “in essence the same alleged violation,” so he vacated Items 1-1(a) and 1-1(b), but affirmed Items 1-2 and 1-3. *Id.* at 63, 73. The Board denied Potelco’s petition for review, and on May 15, 2014, it adopted Judge Metzger’s proposed decision as the Board’s Final Decision and Order. *Id.* at 1.<sup>6</sup>

On June 13, 2014, Potelco appealed the Board’s Decision and Order to the Skagit County Superior Court. (*Potelco, Inc. v. Dep’t of Labor and Indus.*, Skagit County Cause No. 14-2-01059-4, Notice of Appeal to Superior Court.) On June 9, 2015, Judge John M. Meyer entered an order affirming the Board’s final Decision and Order. CP 533-535. Potelco timely appealed to the Washington State Court of Appeals on July 10, 2015 (*Potelco, Inc. v. Dep’t of Labor and Indus.*, Skagit County Cause No. 14-2-01059-4, Notice of Appeal to Washington State Court of Appeals, Division I).

The Court of Appeals filed an unpublished decision in this matter on March 8, 2016, which affirmed the Board’s Decision. *See* Exhibit A.

---

<sup>6</sup> Potelco did not appeal the Board’s decision to vacate Items 1-1(a) and 1-1(b).

## V. ARGUMENT

Under RAP 13.4, a petition for review will be granted if it involves issues of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4). This Petition involves such issues.

Potelco occasionally hires outside contractors to perform work that is outside Potelco's expertise, such as delivering materials by helicopter. This appeal will clarify whether Potelco, or any other employer, may reasonably rely upon outside contractors to accurately describe their equipment and capabilities, and to perform work safely under WISHA standards, or whether such employers must independently verify outside contractors' representations about their own equipment. The answer to this question will have a substantial impact on how and whether employers choose to hire outside contractors for work that is beyond the employer's expertise.

In addition, this appeal will determine whether Potelco, or any other electrical contractor, may continue using trained civil workers for support tasks at worksites with power lines in the vicinity. This appeal will further determine whether the Department can interpret the term "qualified employee" to mean only linemen, when WAC 296-45-035 provides that any employee who understands the hazards concerning his or her individual position is "qualified." The answer to these questions will have a profound impact on civil workers, line workers, and the bargaining units that represent those employees.

Finally, this appeal will determine the meaning of “change in the hazards” under WAC 296-45-67507(2) and provide clarity to employers regarding their obligation to hold repeated safety meetings for minor variations in the work. The answer to this question will impact workplace productivity and safety procedures.

**VI. CONCLUSION**

Potelco respectfully requests that the Court accept Potelco’s Petition for Review, because it involves matters of substantial public interest.

DATED this 6<sup>th</sup> day of April, 2016.

RIDDELL WILLIAMS P.S.

By   
Gena Bomotti, WSBA #31896  
Josias Flynn, WSBA #44130  
Attorneys for Appellant Potelco, Inc.

RECEIVED  
COURT OF APPEALS  
DIVISION ONE  
APR 6 - 2016

## CERTIFICATE OF SERVICE

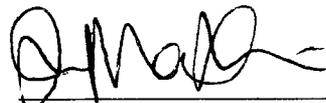
I, Jazmine Matautia, certify that:

1. I am an employee of Riddell Williams P.S., attorneys for Petitioner 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 April 6, 2016, I served a true and correct copy of the foregoing document on the following party, attorney for Respondent, via mail, and addressed as follows:

William F. Henry, Assistant Attorney General  
Washington Attorney General's Office  
Labor & Industries Division  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
willh@atg.wa.gov

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 6<sup>th</sup> day of April, 2016.



Jazmine Matautia

# **EXHIBIT A**

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

POTELCO, INC.,

Appellant,

v.

WASHINGTON STATE DEPARTMENT  
OF LABOR & INDUSTRIES,

Respondent.

No. 73735-0-1

DIVISION ONE

UNPUBLISHED OPINION

FILED: March 7, 2016

2016 MAR -7 AM 9:39

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON

LEACH, J. — Potelco Inc. challenges a Board of Industrial Insurance Appeals (Board) decision affirming its citation for two serious violations. After an employee was injured in a work site accident, the Department of Labor and Industries (Department) cited Potelco for allowing two unqualified employees to work near a high-voltage transmission line and failing to hold a safety meeting when work site hazards changed. The Board found facts supporting those citations, and the trial court found that substantial evidence supported the Board's findings. Because we agree, we affirm.

Background

Potelco Inc. appeals a trial court order affirming a Department citation. The Department cited Potelco after an accident that occurred in June 2012 as Potelco replaced a high-voltage transmission line for Puget Sound Energy. Potelco was dismantling an existing 115,000-volt transmission line, Baker line 2,

from the generating plant at Baker Dam to a substation 24 miles away in Sedro Woolley. This required taking down and rebuilding the structures that supported the line. A second line, Baker line 1, ran parallel to Baker line 2 and during the project remained energized with 115,000 volts. For most of their length, the lines ran parallel, about 60 feet apart. Where the lines turned, however, they came closer together.<sup>1</sup>

Before beginning work on the project, Potelco surveyed the area. It knew where to build each of the new structures because Puget Sound Energy had designated the locations of the structures and their anchor points. Some structures were inaccessible by road, so Potelco had to arrange for a helicopter to fly in materials for constructing the new structures. It used the services of Salmon River Helicopters on two days, June 25 and June 26, 2012.

On June 26, a Potelco civil crew was building "structure 4/3" at a point where Baker lines 1 and 2 turned. To do so, the crew had to build three anchors to support the structure. This required digging three anchor holes by hand and filling them with gravel and concrete. The helicopter flew these materials in at the end of a "long line." The long line carried concrete in an aluminum hopper. The last hole to be filled, anchor hole A, was so close to the energized Baker line 1 that the long line would come within five feet four inches of it. This was the

---

<sup>1</sup> The Board's unchallenged findings of fact are verities on appeal. See Robel v. Roundup Corp., 148 Wn.2d 35, 42, 59 P.3d 611 (2002).

closest to Baker line 1 that any Potelco worker had to work while a helicopter was in use.

The long line "was either made of, or wrapped in, Kevlar and had an extension cord inside of it" to allow the helicopter to drop the load in an emergency. Both the aluminum hopper and the long line were conductive.

When the helicopter approached for the last drop of the day on June 26, two Potelco civil employees, Shane Wheeler and Alan Jesmer, were there to receive it. As Wheeler went to unload the concrete, the long line touched Baker line 1. When Wheeler then touched the aluminum hopper, he received an electric shock. He suffered serious injuries and spent two weeks in a burn unit.

Because Potelco did not challenge the above findings, they are verities on appeal.<sup>2</sup>

After the Department investigated the accident, it cited Potelco for four violations of the Washington Industrial Safety and Health Act of 1973 (WISHA), chapter 49.17 RCW, regulations, with penalties totaling \$21,000.<sup>3</sup> This appeal involves two alleged serious violations: (1) failing to hold a conference when a

---

<sup>2</sup> Robel, 148 Wn.2d at 42.

<sup>3</sup> The citation described 4 violations:

- Item No. 1-1A: A serious violation of WAC 296-45-055(5) with a penalty of \$7,000;
- Item No. 1-1B: A serious violation of WAC 296-45-065(1) with no penalty;
- Item No. 1-2: A serious violation of WAC 296-45-67507(2) with a penalty of \$7,000; and
- Item No. 1-3: A serious violation of WAC 296-45-325(1) with a penalty of \$7,000.

change in hazards occurred and (2) failing to ensure that only qualified employees worked "on or near conductive objects brought into close proximity of high voltage lines."

Potelco appealed to the Board. The Board found the following facts:

Potelco has two classes of workers: journeymen linemen trained to work on and close to energized lines and civil workers who perform excavation and construction but have little knowledge of electrical work. Potelco gave civil workers training "of limited duration," which "basically trained the civil workers to stay away from energized lines." It did not teach them "how to work on energized lines or how to protect themselves from hazards posed by working in close proximity to energized electrical lines."

"Potelco either knew or, through the exercise of reasonable diligence, could have known that the long line" could conduct electricity.

"Potelco either knew or, through the exercise of reasonable diligence, could have known, that . . . neither Mr. Wheeler nor Mr. Jensen were . . . trained to be working where they were." In particular, neither was

trained in the skills and techniques necessary . . . to determine the nominal voltage of exposed live parts, the minimum approach distances corresponding to the voltages to which they were exposed, and the proper use of the special precautionary techniques, personal protective equipment, insulating and shielding materials, and insulated tools for working on or near exposed energized parts of electrical equipment.

The work at structure 4/3 was a change in hazards for Potelco's workers because that structure was so much closer to Baker line 1 than other locations

where Potelco had worked with a helicopter with a conductive long line. Potelco either knew or could have known this, and it should have held a conference before work started to make sure all workers understood the hazards they would face and precautions they needed to take.

Finally, Wheeler and Jesmer “did not have the training to appreciate the hazards, and were not utilizing personal protective equipment that could have reduced the hazards.”

The Board found two violations occurred, found two other alleged violations did not, and reduced the penalty to \$14,000.

Potelco appealed to the trial court, which found that substantial evidence supported all the challenged Board findings of fact. The trial court adopted the Board’s conclusions of law as its own and affirmed its order. Potelco appeals.

#### Analysis

WISHA governs judicial review of a Board decision.<sup>4</sup> This court directly reviews that decision based on the record before the Board.<sup>5</sup> 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.<sup>6</sup> Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the matter asserted.<sup>7</sup> We view this evidence in the light most favorable to the party that prevailed in

---

<sup>4</sup> RCW 49.17.150(1).

<sup>5</sup> Mowat Constr. Co. v. Dep’t of Labor & Indus., 148 Wn. App. 920, 925, 201 P.3d 407 (2009).

<sup>6</sup> RCW 49.17.150(1); Mowat Constr. Co., 148 Wn. App. at 925.

<sup>7</sup> Mowat Constr. Co., 148 Wn. App. at 925.

front of the Board—here, the Department.<sup>8</sup> If this court determines that substantial evidence supports the Board's findings, it then decides if those findings support the Board's conclusions of law.<sup>9</sup>

Potelco challenges nine findings of fact and five conclusions of law, asserting that the record lacks substantial evidence for these findings, making the conclusions of law wrong. Because the record contains substantial evidence to support each of the challenged findings of fact and those findings of fact support the conclusions of law, we affirm.<sup>10</sup>

#### Employee Qualifications

Potelco contends Wheeler and Jesmer were trained in electrical safety and understood the hazards they faced. It asserts, by implication, that substantial evidence does not support the Board's findings that Potelco's workers were inadequately trained to work and protect themselves from those hazards.

WAC 296-45-325(1) provides, “[o]nly qualified employees may work on or with exposed energized lines or parts of equipment” or “in areas containing unguarded, uninsulated energized lines or parts of equipment operating at 50 volts or more.” WAC 296-45-035 defines a “qualified employee” as one who, among other attributes, is “familiar with the construction of, or operation of such lines and/or equipment that concerns his/her position and . . . fully aware of the

---

<sup>8</sup> Frank Coluccio Constr. Co. v. Dep't of Labor & Indus., 181 Wn. App. 25, 35, 329 P.3d 91 (2014).

<sup>9</sup> J.E. Dunn Nw. Inc. v. Dep't of Labor & Indus., 139 Wn. App. 35, 42, 156 P.3d 250 (2007).

<sup>10</sup> Potelco has waived any argument that the Board's findings of fact, if true, do not support its conclusions of law. RAP 10.3(a)(6).

hazards connected therewith.”<sup>11</sup> And WAC 296-45-065(1) requires that a “qualified employee” must also “be trained and competent in” certain skills and techniques, including distinguishing exposed live parts from other parts of electrical equipment, determining those parts’ nominal voltage, determining minimum approach distances for particular voltages, and using “the special precautionary techniques, personal protective equipment, insulating and shielding materials, and insulated tools for working on or near exposed energized parts of electric equipment.”<sup>12</sup>

Potelco asserts that the Department cited it “solely because Wheeler was not a lineman.” It contends that not only a lineman but any employee who understands the hazards of his position satisfies the definition of a qualified employee under the circumstances. It points out that Wheeler knew line 1 was energized at 115,000 volts, knew the minimum approach distance for a 115,000-volt line, and understood that he should not work with any conductive object within that distance. Potelco asserts that Wheeler’s alleged lack of training did not prevent him from recognizing the hazard; Salmon River’s representation that the long line was nonconductive did.

Both the record and the text of the WISHA regulations contradict these assertions. Potelco incorrectly claims that any employee who understands the

---

<sup>11</sup> Potelco concedes that Wheeler and Jesmer did not satisfy the other way to be “qualified” under this regulation, to pass a journey status examination. WAC 296-45-035.

<sup>12</sup> See also WAC 296-45-035 (“An employee must have the training required by WAC 296-45-065(1) in order to be considered a qualified employee.”).

hazards of his position is a “qualified employee.” WAC 296-45-065(1) contains four specific training and competency requirements that Wheeler and Jesmer admitted they did not meet. Wheeler and Jesmer each admitted to a lack of awareness of the hazards posed by the long line coming near the energized Baker line 1. They admitted they did not know how to determine the nominal voltage of a live line. And they admitted they did not know how to use insulating and shielding materials or insulated tools when working near an exposed energized wire. Wheeler and Jesmer’s testimony thus shows they did not satisfy the regulatory definition of “qualified employee” and were not “fully aware of the hazards connected” with the energized transmission line they were working near. Thus, substantial evidence supports the Board’s finding that Wheeler and Jesmer “were not trained to be working where they were.”

#### Knowledge of Long Line’s Conductivity

Next, Potelco challenges the Board’s finding that it “either knew or, through the exercise of reasonable diligence, could have known that the long line . . . was conductive.” It contends that it reasonably relied on Salmon River’s “assurances” that its long line was not conductive.

Under WISHA, “a serious violation cannot exist if . . . the employer did not actually know of the presence of the violation or . . . the employer could not with the exercise of reasonable diligence have known of the presence of the

violation.”<sup>13</sup> “Reasonable diligence involves several factors, including an employer’s obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence.”<sup>14</sup>

Potelco’s challenge to the Board’s knowledge finding lacks merit. First, even if Potelco had a “valid reason” to think the long line was nonconductive, that would not by itself negate the Board’s finding that with reasonable diligence, Potelco could have discovered the truth. RCW 49.17.180(6) imposes a duty to inspect. Potelco cites no authority for its contention that its unquestioning reliance on a contractor’s statement meant it could not know of violative conditions. In effect, Potelco’s interpretation would “render[ ] the phrase ‘and could not with the exercise of reasonable diligence’ superfluous” in cases where an employer claims reliance on a third party’s statement.<sup>15</sup> This would conflict with our practice of “constru[ing] WISHA statutes and regulations liberally to achieve their purpose of providing safe working conditions.”<sup>16</sup>

Second, viewed in the light most favorable to the Department, the record does not support Potelco’s contentions that it reasonably relied on a statement by the Salmon River pilot. The “assurance[ ]” Potelco points to is the pilot’s alleged statement at a meeting on June 25 that the long line was made of Kevlar,

---

<sup>13</sup> BD Roofing, Inc. v. Dep’t of Labor & Indus., 139 Wn. App. 98, 108, 161 P.3d 387 (2007); RCW 49.17.180(6).

<sup>14</sup> Erection Co. v. Dep’t of Labor & Indus., 160 Wn. App. 194, 206-07, 248 P.3d 1085 (2011) (internal quotation marks omitted) (quoting Kokosing Constr. Co. v. Occupational Safety & Hazard Review Comm’n, 232 F. App’x 510, 512 (6th Cir. 2007)); see also RCW 49.17.180(6).

<sup>15</sup> BD Roofing, 139 Wn. App. at 108; see also RCW 49.17.180(6).

<sup>16</sup> Frank Coluccio Constr. Co., 181 Wn. App. at 36.

a nonconductive material. Neither Wheeler nor Jesmer heard this statement, and neither claimed to know the rope's material. And Potelco offered no evidence that it inquired into the conductivity of the long line. The manager of its civil division, Eric Holmgren, said he did not know if anyone tested the long line for conductivity. He also acknowledged that a lineman should make the determination of whether or not an object that will come near an energized power line conducts electricity. Yet Potelco offered no evidence that the pilot was a lineman or had any electrical safety training. Thus, even assuming that reasonable reliance on a subcontractor would negate the "reasonable diligence" requirement, the record does not indicate that Potelco's employees reasonably relied on the Salmon River pilot's statements.

Instead, the record shows Potelco could have known the long line was conductive had it made a reasonable inquiry. First, Potelco is in the business of installing electrical facilities; it is reasonable to assume that it knows how to tell if a line is conductive. Second, Holmgren acknowledged that a lineman should determine if an object that would be near an energized line conducts electricity. Third, Holmgren testified that he knew Kevlar becomes conductive when dirty. Even if dirtiness was not in fact the reason the long line was conductive, the likelihood of dirtiness "after two days of work delivering gravel and concrete in a

muddy location” was enough to render unreasonable Potelco’s assumption that the line was nonconductive.<sup>17</sup>

Potelco cites a decision by the Office of Safety Health Review Commission, Imperial Aluminum,<sup>18</sup> stating, “In many situations in the workplace, it is natural for an employer to rely upon the specialist to perform work related to that specialty safely in accordance with OSHA standards.” In that case, “[t]he cited hazard was the result of operator error on the part of the outside Contractor.”<sup>19</sup> The employer “reasonably relied” on the contractor to safely perform its contracted tasks.<sup>20</sup>

This federal administrative decision does not aid Potelco. Here, the cited hazards came not from the contractor’s performance but from circumstances Potelco knew of or should have known about the closeness of the work site and helicopter line to Baker line 1, the long line’s specifications, and Potelco workers’ lack of qualifications. Moreover, it was not “natural,” in this situation, to rely on the outside contractor’s expertise because Potelco had the expertise about electrical work.<sup>21</sup>

---

<sup>17</sup> The Board did not make a fact finding that the line was dirty or that dirtiness made it conductive. Rather, the Board found that the line had an extension cord inside of it, that it was conductive, and that Potelco knew or, with reasonable diligence, could have known it was conductive.

<sup>18</sup> 24 BNA OSHC 2081 (No. 12-1129, 2013) (ALJ), 2013 WL 6911242, at \*9 (emphasis added).

<sup>19</sup> Imperial Alum., 2013 WL 6911242, at \*7.

<sup>20</sup> Imperial Alum., 2013 WL 6911242, at \*8.

<sup>21</sup> Potelco also claims that no evidence supports the Board’s statement that Salmon River and Potelco had a contract describing the long line’s specifications. Though that statement does appear to be unsupported, the Board did not include it in its findings of fact. And the Board had other facts on which to

Change in Hazard

Potelco also challenges the Board's finding that the work on structure 4/3 was a change in hazard due to the structure's closeness to Baker line 1. Potelco asserts that the Board therefore erred in concluding that Potelco violated WAC 296-45-67507(2).

That regulation requires that whenever a "change in the hazards" of a job occurs, "a conference shall immediately be held at which time all affected employees . . . will be advised of such hazards or change of operation." Potelco held a meeting the day before the accident to address general safety issues in working with a helicopter, but that meeting did not discuss electrocution risks or any potential hazard from a long line coming close to or touching an energized line.

Potelco does not contend that it held a conference before working on structure 4/3. Instead, it contends that the work at structure 4/3 was not a change in hazard because Salmon River delivered materials to other angled structures before delivering to structure 4/3. It also points out that "every structure, whether straight or angled, was in the 'vicinity' of line No. 1."

While true, these facts miss an important point. The Board based its "change in hazards" finding not only on the angle of the turn but, more importantly, on the work site's closeness to Baker line 1.<sup>22</sup> Structure 4/3 was

---

base its conclusion that Potelco knew or could have known of its violations. To the extent the Board's statement was erroneous, that error was harmless.

<sup>22</sup> Finding of fact 5 provides in part:

closer to Baker line 1 than any other place Potelco worked while a helicopter was in use.<sup>23</sup> That fact alone provides substantial evidence of a change in hazard. We reject Potelco's challenges to the Board's "change in hazards" finding.

Potelco further contends that even if it faced a change in hazards, it did not know of that change and could not have known "through the exercise of reasonable diligence." Again, it supports its argument with its alleged reliance on Salmon River's statement that the long line was nonconductive. Since the energized line was high in the air, Potelco reasons, the horizontal closeness of that line to anchor hole A would not matter if the long line was actually nonconductive. But, as we said earlier, the record supports the Board's finding that with reasonable diligence Potelco could have known the long line conducted electricity. Since Potelco also knew the relative locations of anchor hole A and Baker line 1 before starting work, the record contains substantial evidence that Potelco knew or could have known of this change in hazards.

#### Remaining Assignments of Error

Finally, Potelco generally challenges several of the Board's findings of fact and conclusions of law because "substantial evidence shows that Potelco did not

---

The last anchor hole . . . was located at a point so that the aluminum hopper . . . could be as close as five feet four inches from Baker line 1 . . . , which was the closest point that any Potelco worker had to work to Baker line 1 while a helicopter was used.

<sup>23</sup> Potelco contests this fact only in a footnote in its reply brief, and the record does not support its argument. Potelco cites testimony by Holmgren that simply states Potelco worked at other angled structures during the project, a fact not in dispute. Moreover, Holmgren's testimony shows that he did not know how close structure 4/3 was to Baker line 1.

violate the cited standards.” Potelco’s only arguments in support of these assignments of error again relate to its knowledge of the long line’s conductivity. As we have said, the record contains substantial evidence that with reasonable diligence Potelco could have known that the long line was conductive. We therefore reject Potelco’s remaining assignments of error.<sup>24</sup>

#### Conclusion

The record contains substantial evidence of these findings. Potelco employees Wheeler and Jesmer lacked the competence and training that WISHA regulations require and so were not qualified to do the work they were doing when Wheeler was injured. With reasonable diligence, Potelco could have known the helicopter’s long line was conductive, contrary to the helicopter pilot’s alleged statement. The work site where the accident occurred was closer to an energized transmission line than any other project site where Potelco worked

---

<sup>24</sup> Potelco makes no argument that the circumstances surrounding the accident were not “likely to result in death, injuries involving permanent severe disability or chronic, irreversible illness.” Nor does it make an argument that the Board’s finding that Potelco did not cooperate with the inspection and showed poor good faith effort to comply with the regulations was unsupported. Potelco thus waived its challenges to findings of fact 13 and 15. RAP 10.3(a)(6); Lodis v. Corbis Holdings, Inc., 172 Wn. App. 835, 862, 292 P.3d 779 (2013) (declining to consider unsupported argument).

with a helicopter. Thus, that work at that site presented a change in hazards.

These findings, in turn, support the Board's conclusions of law. We affirm.

Leach, J.

WE CONCUR:

Speciman, C.J.

Appelweit, J.