701428-8

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NO. 701428

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

BNBUILDERS INC., a Washington Corporation;

Appellant,

v.

WASHINGTON STATE DEPARTMENT
OF LABOR & INDUSTRIES,

Respondent,

Appeal from Superior Court of King County

APPELLANT'S AMENDED OPENING BRIEF

Aaron K. Owada, WSBA #13869
Jennifer L. Truong, WSBA #40004
Attorneys for Appellant

AMS LAW, P.C.
975 Carpenter Road NE #201
Lacey, WA 98516
Tel: (360) 459-0751
Fax: (360) 459-3923

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

STATE CASES

STATE STATUTES

WASHINGTON ADMINISTATIVE CODE

I. INTRODUCTION

BNBuilders ("BNB"), appellant, seeks review of the Superior Court decision affirming a Washington Industrial Safety and Health ("WISHA") Decision and Order of the Board of Industrial Insurance Appeals (the "Board") involving the Department of Labor and Industries (the "Department") citations for asbestos workplace violations. At issue here are two projects BNB undertook as general contractor on a renovation project: carpet removal and "soft wall demolition."

As required by law, before beginning any work BNB obtained a Good Faith Asbestos Survey ("GFS") from Earth Consulting Inc. ("ECI"), an accredited, independent testing company. The purpose of a GFS is to identify and test all suspect asbestos-containing materials (PACMs) and issue a written report confirming the presence, location and condition of any asbestos containing materials (ACMs). The property owner ordered and provided the GFS to BNB. In accord with industry practices and good construction principles, BNB carefully reviewed and relied upon the experts and the GFS. BNB planned to remove carpet only in the areas where the GFS indicated no asbestos was present. Relying on the GFS, BNB did not plan an asbestos project for carpet removal because no asbestos would be disturbed. For the "soft wall demolition" the GFS did

not test "behind walls", so BNB followed appropriate safety protocols to avoid contact with, or disturbance of, asbestos within the walls.

During carpet removal some tiles underneath the carpet stuck to the carpet and were removed with the carpet. The Department inspected later and tested the tile beneath the carpet. Their tests concluded the GFS was inaccurate; the tile contained asbestos. The Department cited BNB with asbestos violations because BNB had not followed required work practice regulations for a Class II Asbestos project, and other citations.

Although BNB had obtained a GFS in accordance with law, the Board, and later the Superior Court, affirmed all asbestos violations despite BNB's reasonable reliance on the GFS, because they allege that BNB "should have known" the GFS was inaccurate.

BNB did not know and could not reasonably have known asbestos was present in the tile beneath the carpet because it reasonably relied on the GFS. Moreover, it is standard operating procedures in the construction industry to rely on the GFS, and per statute, BNB must rely on the GFS.

The Board inappropriately applied a strict liability standard to BNB by holding BNB should have known asbestos was present in the tile beneath the carpet, and BNB should have ignored the accredited testing agency whose express job it was to identify asbestos in the GFS. The Board's decision defies common sense and construction industry practice.

BNB acted in good faith and reasonably relied on the GFS. If the Board's decision is upheld, all contractors must, in addition to obtaining and relying reasonably on a GFS as required by law, maintain asbestos experts on site to second-guess the GFS, or face penalties and fines if the GFS is later found to have been inaccurate. This invalidates the laws requiring contractors to obtain a GFS in the first place. The Court should, therefore reverse the Board's decision and should vacate the citations against BNB.

II. ASSIGNMENTS OF ERROR

Petitioner respectfully assigns error to the Decision & Order of the Board of Industrial Insurance Appeals dated October 4, 2011 as follows:

A. The Board erred in Findings of Fact Numbers: 4 – 18, 20 – 24; and Conclusions of Law Numbers: 2, 4 and 5[1].

B. BNB takes exception to the Board's Decision & Order at Page 2, lines 16 – 19, wherein the Board declared:

   "The record is not clear as to whether Earth Consulting Inc., sampled flooring material underneath installed carpeting."

C. BNB takes exception to the Board's Decision & Order at Page 3, lines 12 – 14, wherein the Board declared:

   "The employer's actions in working with asbestos-containing materials once the employer had reason to believe such materials were present are more properly addressed by the other items cited."

D. BNB takes exception to the Board's Decision & Order at Page 3, lines 25 – 27, wherein the Board declared:

   "The record is clear that the employer stopped work when thermal system insulation was encountered. *Nevertheless, the employer was*

[1] See Appendix A for a detailed description of each Assignment of Error for the Findings of Fact and Conclusions of Law.

engaged in Class II asbestos work." (emphasis added).

E. In Findings of Fact Numbers 5, 7, 9, 11, 13,15, 18, and 21, the Board respectfully erred by finding that,

"The employer did not take measures to protect employees as soon as it had ***reason to suspect employees were working with asbestos-containing material.***" (Emphasis added).

F. BNB respectfully asserts that the Board erred when it declared at Page 2, lines 20 - 27 of the Decision & Order that:

"During the removal of the carpeting in certain areas, the firm found that some of the floor tiles underneath the carpet were being lifted with the carpet. The labor supervisor, Robert Voss, became concerned that some of the tile and mastic could contain asbestos. He instructed employees to cut the carpet around the tile and discard it in the dumpster. Any tiles that came loose were double-bagged and placed in a room reserved for hazardous waste removal. Mr. Voss did not instruct or require the employees to take any specific measures to avoid exposure to asbestos. Later sampling by the Compliance Safety and Health Officer (CSHO) revealed that the tiles and mastic under the carpet was asbestos-containing material."

III. ISSUES

1. **Where BNB obtained and reasonably relied on the GFS, the legal standard of reasonable diligence, does BNB's reasonable diligence require, as a matter of law, a finding that BNB did not, and could not with the exercise of reasonable diligence, know of the presence of the violation even though the survey was later found to be inaccurate?**
2. **Where there was no objective data to support the finding, does the record substantially support a finding that BNB's should have known it could no longer reasonably rely on the GFS when BNB encountered tiles, which the GFS said were not ACM, coming up with the carpet they were removing?**
3. **Is citing BNB for violations after they had conducted and followed the GFS amount to an imposition of strict-liability contrary to RCW 49.17.180(6), the law and the purpose of WISHA?**

4. **Is it error to affirm Item 1-9 citing BNB for failure to properly clean up asbestos debris when BNB is not a certified asbestos abatement contractor, there was no evidence BNB was caused the debris, and such clean up was beyond their scope of work?**
5. **Is it error to affirm Item 2-3 when it is not support by substantial facts?**
6. **Is it error to affirm the increased penalties stemming from a "poor" rating for good faith when there was no factual basis for such a rating?**

IV. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

BNB was a general contractor that was hired by the property owner, Menachem Mendel SC ("MMSC"), to renovate an old abandoned building formerly known as the Waldo Hospital into a school. The property owner provided an asbestos GFS. See Exhibit 35.

BNB engaged in carpet removal and removal of lathe and plaster from walls or "soft wall demolition" and before beginning work, as required by law, BNB used the GFS to plan these projects. BNB did not treat the carpet removal as an asbestos project because the GFS said no asbestos would be disturbed. For the "soft wall demolition" the GFS did not test "behind walls", so BNB followed appropriate safety protocols to avoid contact with, or disturbance of, asbestos within the walls.

During the carpet removal some of the tiles underneath the carpet stuck to the carpet and were removed with the carpet. BNB was aware of

the tile under the carpet because the GFS indicated it had been tested and contained no asbestos. Later, the Department conducted a WISHA inspection testing the tile beneath the carpet. L&I's laboratory concluded the GFS was inaccurate, and the tile contained asbestos. The Department then concluded BNB's project was a Class II asbestos project and cited BNB with asbestos violations because BNB did not follow the work practice regulations needed for asbestos removal. Citation No. 313918351; See Appendix A for a listing of the citations and brief description.

The Department also alleged that BNB did not clean up asbestos debris resulting from the "soft wall demolition", and BNB did not have a respiratory protection program. Citation No. 313918351 Item 1-9, 2-3.

The Department originally cited BNB for failing to obtain a GFS that accurately identified the tiles beneath the carpet. Citation No. 313918351 Item 1-8. However, the Board found BNB had obtained a GFS and vacated that violation. The Board, and later the Superior Court, then affirmed all of the asbestos violations despite this finding.

1. **At the time of the inspection, BNB was hired to perform a soft demolition project, not a Class II Asbestos Project.**

BNB specifically advised the property owner that it would hire asbestos abatement contractors to remove asbestos and that BNB itself would not engage in the removal of hazardous materials for the project. As

set forth in the exclusions section of the contract, admitted as Exhibit 38, page 3 under "Exclusions", "Abatement/Removal of hazardous materials." was specifically excluded from the contract between MMSC and BNB. Because asbestos had been identified by the GFS, BNB was aware that asbestos needed to be removed. BNB did not perform any work in the areas where the GFS indicated the presence of asbestos. For example, BNB did not remove carpet in the basement where the GFS identified asbestos in the tiles under the carpet.

Steve Carling, BNB's Project Engineer for the MMSC project received bids from certified asbestos abatement contractor, including PAS, a certified asbestos abatement contractor. Id at page 157, lines 7 – 11. BNB hired PAS to remove asbestos at MMSC project. Carling at page 160, lines 11 – 13. Not only did BNB recognize asbestos was present in certain locations, BNB also recognized asbestos could only be removed by a certified asbestos abatement contractor. This establishes BNB followed reasonable industry practice in addressing asbestos identified by the GFS.

It is undisputed BNB hired PAS, a certified asbestos abatement contractor, before WISHA began its inspection. As testified by Janine Rees, the WISHA Compliance Officer, PAS was present at the jobsite when the Department first started its WISHA inspection. In fact, PAS had begun removing asbestos before the WISHA inspection began. Ms. Rees

specifically precluded PAS from removing Asbestos Containing Material (ACM) on the day of the inspection. Rees at page 24, lines 21 - 24.

The project called for "soft demolition". That is, removal of non structural portions of the building. As shown in Exhibit 30, BNB workers removed base board, carpet, cabinets, shelving, doors, and wall plaster. None of these items were reported to contain asbestos in the ECI Survey.

2. The ECI good faith asbestos survey specifically addressed the areas where BNB was working at the time of the inspection.

On February 15 and 16, 2007, Earth Consulting Incorporated (hereinafter "ECI") conducted a good faith inspection of the property for Prescott Homes, Inc, the prior owner. MMSC provided this report to BNB as part of the initial bid process. ECI stated the following:

> "At the time of our site visits on February 15 and 16, 2007, an AHERA Certified Building Inspector observed building materials with the main building and outbuildings for suspected ACMs. ECI collected random bulk samples of suspect ACM. (Certification documentation is attached to this report as Appendix A.). Our approach followed ECI's understanding of what constitutes the responsibilities of a 'prudent person' and 'state of the art' practice for these types of activities. This was achieved by the implementation of bulk sampling methods." Section 2.0 of Exhibit 35.

and

> "A total of 87 bulk samples of the 9-inch and 12-inch vinyl floor tiles and mastic, vinyl flooring and mastics, cement asbestos wallboard, thermal insulation, and asphaltic roofing materials were collected." Section 2.2 of Exhibit 35

ECI followed proper required protocols.

> "Bulk samples of suspect ACM were analyzed by Materials Testing Inc., (NVLAP lab No. 101571) of Boise, Idaho. ACM samples were analyzed using the PLM method. Examination of these samples was conducted for the presence of identifiable asbestos fibers in accordance with EPA method 600/R-93/116. Detection limits for ACM ranged from an upper detection limit of 100 percent to a lower detection limit of less than 1 percent. Laboratory quality assurance and internal precision values were assessed by performing duplicate and replicate sample analyses." Exhibit 35, Section 2.3

The ECI Survey clearly covered the tiles underneath the carpet in the hallways. Mr. Campbell reiterated he fully relied on the survey and had no reason to question ECI (Tr. 2/15/11, p. 148, lines 18-25):

Q. And was there anything that would have prompted you to come to this conclusion that the good faith survey that you're relying on was inadequate?

A. No. And I mean, based on the other samples I took out there, if I would have thought the floor tile was suspect I would have sampled it. There was no reason for me not to sample it if there was any indication I needed to. I did other areas so why wouldn't I do this.

Mr. Mark Hamper an employee with Performance Abatement Services (hereinafter "PAS") became familiar with the building when BNB subcontracted with PAS to engage in asbestos abatement. (Tr. 1/14/11, p. 131-132). Mr. Hamper agreed that if a GFS indicates tile does not have asbestos, PAS would rely on the survey and would not have any reason to re-test. (Tr. 1/14/11, p. 161). Mr. Hamper testified to the review

of the bulk sample results and recognized the ability of the general contractor for reliance (Tr. 1/14/11, p. 166, lines 8-2 & p. 167-168):

> Q. Okay. And so looking at those bulk sample results, where it says ND, that would stand for non-detect? Is that what ND stands for?
>
> A. Yes.
>
> Q. So the table section would indicate to the reader of this exhibit that vinyl tile at this MMSC location was, in fact, sampled to determine if it contained asbestos or not; isn't that true?
>
> A. Yes.
>
> Q. And so you would look at that table to determine whether or not tile was in fact tested; correct?
>
> A. Yes.
>
> Q. And based on looking at this table, you would agree that the report would tell the reader that the tile in fact at this school was tested; correct?
>
> A. Yes.
>
> Q. Your training is that the good-faith survey is performed by an AHERA accredited building inspector?
>
> A. Yes.

Furthermore, Mr. Casey Blake as the general superintendent for BNB, testified if they had received any complaints about the tile or bulk sample in the GFS they would have stopped work. (Tr. 3/3/11, p. 10, lines 7-15). There was nothing that occurred to give reason for doubting the GFS. Safety consultant, Mr. Herb Heinold, supported the industry practice

that general contractors rely on good faith surveys (Tr. 3/3/11, p. 34, lines 4-21):

> Q. In the construction industry, do general contractors rely on good faith surveys?
>
> A. Yes, we do.
>
> Q. Why do you do that?
>
> A. Because the expertise of the contractor that's doing the good faith survey tells us what to be aware of and what areas satisfactory to work in.
>
> Q. You mentioned there's a difference between general contractors and sub-contractors?
>
> A. Correct.
>
> Q. Why do general contractors hire sub-contractors?
>
> A. Well, one they have the expertise and then they have the actual materials and equipment to do the job that you need to be done.
>
> Q. And so in your opinion – or do you have an opinion as to whether or not general contractors will rely on a good faith survey?
>
> A. In my experience we do rely on the good faith survey.

Mr. Lee worked with BNB since 2005 and opined that BNB made efforts to comply with WISHA and asbestos regulations. (Tr. 3/3/11, p. 57-58). In review of the GFS, Mr. Lee agreed it was sufficient. When asked whether the GFS indicated it was okay to remove the carpet, Mr. Lee answered as follows (Tr. 3/3/11 p. 71-72, lines 23-26 & 1-5):

A. For a general contractor being a lay person they would see it as sufficient. It has the basic elements that they're supposed to look for: That it was done by an AHERA certified or accredited inspector; that they took samples they talked about; the materials that they took they have sample results; sample results based on materials. Some material have it, some materials don't. At that level, at that basic level, they would certainly assume this was a fine inspection.

3. **The ECI sample showed that areas underneath the carpet did not contain asbestos.**

The Board found "the record is not clear as to whether Earth Consulting Inc., sampled flooring material underneath installed carpeting. BNB believed such sampling had been completed down to the subfloor." Pg 2 D&O. The Board found the GFS was incomplete. Pg 3. The Board found BNB failed to take appropriate measures, and BNB "had reason to believe [asbestos-containing materials] were present", when encountering the vinyl flooring which came up with the carpet. Pg 3. D&O.

Close examination of Table 1 of Exhibit 35 indicates that ECI took 87 bulk samples, 35 of which were specifically for vinyl tile and/or mastic. Mr. Mark Hamper testified the scope of the GFS included the hallway where carpet was removed by BNB employees.

The GFS showed testing of vinyl tile under the carpet at: 1) MA-B15-1 (photograph 3) – 5%, Basement; 2) MA-B17-1 (photograph 4) – 5%, Basement; 3) MA-B23-1 (photograph 5) – >1%, Basement; 4) VT-B2-1 (photograph 14) – 5%, Basement; and 5) VT-B4-1 (photograph 15) –

5%, Basement.

Samples M3, U3 and U5 of Exhibit 35 (main and upper floors), specifically included samples from underneath the carpet in the hallway where BNB workers later removed carpet. These samples indicated that there was no asbestos containing material under the carpet.

ECI specifically tested the main hallways at VT6-M3-1 (on the main floor); MA-U3-1 and MG-U3-1 (on the upper floor); and VT-B3-1 (in the basement). Only the tile in the basement was shown as ACM. Additionally ECI tested tile under the carpet in an upper floor room at VT9-U5-1. Except for the tile in the basement, each of the above samples results indicated, "NAD" or "No Asbestos Detected". BNB limited carpet removal to those areas where the GFS indicated no ACM existed.

As is standard with all Good Faith Inspections, there was a "limitations" section. In relevant part, this section stated as follows:

> "This report does not address the potential presence of ACM located behind walls and/or columns, beneath flooring, above non-removable ceilings, underground, or in any inaccessible areas. Should suspect ACM be uncovered during demolition activities, it should be sampled, tested, and characterized at that time." Exhibit 35, Section 3.0.

Mr. Larry Lee, a Certified Industrial Hygienist, further testified that the ECI asbestos survey was limited, but nevertheless addressed all areas within the scope of work intended to be performed by BNB. Section

3.0 provided standard limitations. The ECI survey, consistent with industry practice, advised that its report did not address areas that were inaccessible, and BNB planned accordingly to avoid disturbing any asbestos containing materials.

The Board found BNB believed the GFS included sampling and testing down to the subfloor. D&O p 3.

4. Large holes in the carpet indicated that ECI had sampled the tile beneath the carpet and the GFS was carefully read and relied on by BNB.

Before any carpet was removed, Mr. Carling and Mr. Bob Voss both observed large areas of carpet that had been cut out. (Tr. 2/15/11, p. 38-39, Tr. 2/15/11, p. 168, lines 6-18). In fact, the building owner was upset because that carpet could not be salvaged.

Both Mr. Voss and Mr. Peter Campbell reviewed the GFS and planned their work based on the representations made by the survey. Specifically, Mr. Voss referred to the survey as the jobsite "Bible" due to the extensive and continual reference back to the document. (Tr. 2/15/11, p. 35, lines 4-20).

The tile in the hallways appeared to BNB to be homogenous to the tile in the rooms where the ECI survey indicated that the vinyl tile, both 9x9 and 12x12, did not contain asbestos and the mastic was free of asbestos. Based on the survey, and site observations, Bob Voss concluded

that neither the tile under the carpet nor the mastic contained asbestos. At no point in time did Ms. Rees speak with Earth Consulting, the individuals that actually performed the GFS. (Tr. 1/14/11, p. 69, lines 1-8).

5. NVL and ECI, experts and accredited asbestos testers, did not agree about suspected asbestos containing materials, but the Board found BNB had reason to believe asbestos-containing materials were present.

The NVL Limited Asbestos Survey test included 26 separate tests of tile compared with 35 such tests by ECI. ECI tested in 22 rooms and the main hallways on each floor. NVL tested only in 16 rooms and did not make any tests in any of the main hallways of any floor. The surveys overlapped (i.e. tested in the same areas), six times:

1. Room R6 and the hallway between R6 and R7 (M9 in ECI's survey) on the main floor. In this room NVL found and tested 4 types of tile: 1) "Black rectangular vinyl tile"; 2)"9x9 light beige vinyl tile with brown streaks" ; 3) "9x9 beige vinyl tile with red streaks"; and in the hallway 4) "9x9 Brown vinyl tile with beige streaks". ECI found and tested 1 type of tile: 9" "vinyl tile-grey hard compact."
2. Room R31 (U5 in ECI's survey) on the upper floor. In this room NVL found and tested 1 type of tile: "9x9 Off-white vinyl tile with green streaks." ECI found and tested 1 type of tile: 9" "vinyl tile-white hard compact with fibers."

3. Room R49 (U22 in ECI's survey) on the upper floor. In this room NVL found and tested 1 type of tile: "9x9 Brown vinyl tile with dark brown streaks." ECI found and tested 1 type of tile: 9" "vinyl tile-brown hard compact granular with fibers."
4. Room R77 (B22 in ECI's survey) in the basement. In this room NVL found and tested 2 types of tile: 1) "9x9 Red vinyl tile with straight consistent pattern"; and 2) "9x9 Dark Brown vinyl tile." ECI found and tested 1 type of tile: "Vinyl tile-red hard compact granular with fibers."
5. Room R69 (B13 in ECI's survey) in the basement. In this room NVL found and tested 2 types of tile: 1) "9x9 Plain Dark Brown vinyl tile" and 2) "9x9 Red vinyl tile with beige streaks." ECI found 1 type of tile: "Vinyl tile-reddish-brown hard compact granular with fibers."
6. Room R61 (B1 in ECI's survey) in the basement. In this room NVL found and tested 1 type of tile: "9x9 Dark Brown vinyl tile with beige wavy pattern." ECI found and tested 1 type of tile: "vinyl tile-red hard compact granular with fibers."

To summarize, in no room did the experts conducting the two surveys describe the tiles exactly the same way. Often NVL found multiple types of tile where ECI only found one. Although BNB was not an expert like ECI or NVL the Board found BNB had "reason to suspect"

the tiles under the carpet despite the fact experts in those same rooms testing the same materials came to different conclusions about the tiles.

6. Carpet Removal and Bagging of Tile.

The Daily Reports, (Exhibit 30), maintained by Bob Voss, recorded the daily events that occurred at the MMSC site. As indicated by the Daily Reports for December 28 and 29, Bob Voss observed that the owner had removed large amounts of carpet from the rooms and left it in piles throughout the building. Mr. Voss directed his crew to carefully cut the carpet around the tiles that were stuck to the carpet so that the carpet and tiles (with carpet still attached to the tiles) could be separated. Additionally, Mr. Voss testified that he directed his crew to cover the areas with plastic where the carpet removed tiles. L&I claims Mr. Voss knew the tiles contained asbestos because he directed the tile be bagged separately. However, Mr. Voss specifically testified he read the GFS and, did NOT believe that the tiles under the carpet contained asbestos. He explained why he ordered the tiles to be bagged separately as follows at page 9, line 11 – page 10, line 3:

> A. Well, we did it for two reasons. First reason that we did it is because I had read an article about a general contractor who had been cited for having asbestos-containing material go into a public landfill. ***And even though what we're removing was not,*** I just didn't feel comfortable about the fact that something might weird happen down the road. (Emphasis added).

Q. So that is why you bagged the materials?

A. Yes. Then the second reason that we – that we bagged the materials is because our recycling program it is called comingling. And everything that goes – that leaves the job site has to be separated in the big dumpster because when it goes down to the receiving station down here there is a whole bunch of arms that take and separate all of this material. It goes into certain different areas. And so to get credit, the maximum amount of credit for recycling that is, everything has to be separated. And carpet and the stuck together wasn't part of the recycling program. So since they were stuck together, that was the other reason I had them bagged and separated, because I would not be getting credit for them.

7. Wall demolition

As part of the "soft" demolition that BNB employees performed, the interior walls of both the "old" section and the "new" section were removed. Ms. Rees agreed that there was no thermal system insulation in the older section. TSI (Thermal System Insulation) is a suspect asbestos material. BNB had two plans for demolition because there was no TSI in the older section. As they were trained in Asbestos Awareness, BNB workers were instructed on how to identify suspect ACM or PACM. They were directed to not disturb any suspect ACM or PACM, and if ACM or PACM were found, it was to be sampled, tested and characterized at that point in time because the GFS indicated it did not test potential ACM behind walls or in other inaccessible places.

BNB employees cut peep holes before demolition in the new

section where there was potentially TSI to see if there were any pipes or TSI. Once a peep hole was cut, the worker carefully removed pieces of the drywall by hand in a "surgical" manner. In addition to looking for TSI, the workers were also concerned about coming into contact with the non-insulated electrical wiring that had the potential of being energized.

The same concerns did not exist in the older section of the MMSC, consequently, BNB employees used hammers, pry-bars and other tools to remove the plaster board walls in a more aggressive manner.

Moreover, the Board correctly found that once TSI was encountered behind the walls, work was stopped. See Decision & Order at page 3, lines 25 – 26. The record shows that work was stopped and demarcated with red danger tape so that testing could be performed and to prevent anyone from disturbing to the area. See Exhibit 15. The Board correctly found that there was no evidence of improper conduct involving the wall demolition itself.

8. BNB's Respirator Program.

BNB had a written Respirator Program. See Exhibit 25. For the MMSC project, BNBBuilders performed a "Pre-Activity Hazard Analysis" on December 23, 2009. This analysis specifically identified that lead was identified on painted surfaces. See Exhibit 40. As noted in Exhibit 40, BNB followed the hierarchy of controls by using engineering

controls. See Section on "Lungs/Respirator" wherein negative air machines, fans, ventilation and HEPA vacuums would be used in lieu of respirator protection for "irritating dust or particulate. Additionally, Respirator training was provided to the employees on February 14, 2008. See Exhibit 44. Asbestos and Lead Awareness Training was provided on June 6, 2008, July 24, 2008, November 5, 2009 and December 28, 2009. See Exhibits 46, 47, 48 and 49. Respirator fit tests were performed in the first week of January, 2010. See Exhibit 26 .

9. BNB has an excellent safety record and has been recognized for its safety program.

As shown in Exhibit 50, BNB has received significant state and national recognition for safety. These awards include, but are not limited to:

- 2006 AGC WA Award for midsize contractor
- CEA Award for Incident Rates 25% below average
- WAC CEO Best Places to Work 2nd Place Midsize Employer
- AGC WA 2007 Award for midsize contractor
- MT Governors Award for Safety and Health
- CEA Award for Incident Rates 25% below average
- AGC WA 2008 Award for midsize contractor
- AGC WA 2008 Grand Award for Safety Excellence

- 2009 AGC National Safety Excellence Award Finalist for midsize contractor
- 2009 CEA President's Safety Award
- 2009 CEA Excellence in Safety Award

As noted in a news article, See Exhibit 50, BNB was recognized by CEO Magazine for cutting its incidence rate for injuries in half, despite doubling in size for the past five years. BNB's "Freedom from Danger" safety program empowers each employee to fully participate in the overall safety program. Under this program, all employees must attend safety meetings, perform weekly safety meetings, complete safety audits and promote safety.

V. ARGUMENT

A. STANDARD OF REVIEW.

WISHA governs judicial review of decisions issued by the Board of Industrial Insurance Appeals. RCW 49.17.140-150(1).

In a WISHA appeal to the court of appeals, the BIIA findings of fact are conclusive if supported by substantial evidence. RCW 49.17.150; RCW 34.05.570(3)(e); *Inland Foundry Co., Inc. v. Dep't of Labor and Indus.*, 106 Wash.App. 333, 340, 24 P.3d 424 (2001). Substantial evidence is evidence that would persuade a fair-minded person of the truth or correctness of the matter. *King County v. Cent. Puget Sound Growth*

Mgmt. Hearings Bd., 142 Wash.2d 543, 553, 14 P.3d 133 (2000); *Danzer v. Dep't of Labor & Indus.,* 104 Wash.App. 307, 319, 16 P.3d 35 (2000), *review denied,* 143 Wash.2d 1020, 25 P.3d 1019 (2001). The court views the evidence as found by the finder of fact and its reasonable inferences in the light most favorable to the prevailing party. *Johnson v. Dep't of Health,* 133 Wash.App. 403, 411, 136 P.3d 760 (2006). This Court then considers the findings to determine if they support the conclusions of law. RCW 49.17.150; *Mid Mountain Contractors, Inc. v. Dep't of Labor & Indus.,* 136 Wash.App. 1, 4, 146 P.3d 1212 (2006). The Board's conclusions must also be based on its findings of fact. *Martinez Melgoza & Associates v. Department of Labor & Industries*, 125 Wn. App 1004.

Legal decisions by the board are reviewed directly, based upon the record before the board. *Legacy Roofing, Inc. v. Dep't of Labor & Indus.,* 129 Wash.App. 356, 363, 119 P.3d 366 (2005). The Board's interpretations of statutes and regulations are reviewed de novo, *Prezant Assocs., Inc. v. Dep't of Labor & Indus.,* 141 Wash.App. 1, 7, 165 P.3d 12 (2007), giving substantial weight to an agency's interpretation of a regulation within its area of expertise, *Wash. Cedar & Supply Co. v. Dep't of Labor & Indus.,*119 Wash.App. 906, 913, 83 P.3d 1012 (2004). WISHA statutes and regulations are to be interpreted liberally in order to achieve

their purpose of providing safe working conditions for every worker in Washington. *Inland Foundry Co. v. Dep't of Labor & Indus.*, 106 Wash.App. 333, 336, 24 P.3d 424 (2001).

1. Where BNB obtained and reasonably relied on a GFS, the legal standard of reasonable diligence, BNB's reasonable diligence requires, as a matter of law, a finding that BNB did not, and could not with the exercise of reasonable diligence, know of the presence of the violation even though the survey was later found to be inaccurate, and so no citation may be issued.

When Washington statutes or regulations have the same purpose as their federal counterparts, the court will also look to federal decisions to determine the appropriate construction. *Fahn v. Cowlitz Cy.*, 93 Wash.2d 368, 376, 610 P.2d 857, 621 P.2d 1293 (1980). *Clarke v. Shoreline Sch. Dist. 412*, 106 Wash.2d 102, 118, 720 P.2d 793 (1986). *Adkins v. Aluminum Co. of America*, 750 P.2d 1257, 1268, 110 Wn.2d 128 (1988). In WISHA appeals, the court will consider decisions construing the federal counterpart to WISHA, Occupational Health and Safety Act of 1970, 29 U.S.C. §§ 651-678 (OSHA), including decisions by the Occupational Safety and Health Review Commission. *Id.*

The purpose of WISHA is to create a program to "assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington...." and such "program shall equal or exceed the standards prescribed by the

Occupational Safety and Health Act of 1970 (Public Law 91-596, 84 Stat. 1590)." RCW 49.17.010. Regulations promulgated pursuant to WISHA must be construed in light of its stated purpose. *Adkins v. Aluminum Co. of America,* 110 Wn.2d 128, 146, 750 P.2d 1257 (1988).

Similarly, OSHA was never designed, nor could it have been, to eliminate all occupational accidents. Rather, it is designed to require "a good faith effort to balance the need of workers to have a sale (sic) and healthy work environment against the requirement of industry to function without undue interference." *Titanium Metals Corp. of America v. Usery*, 579 F.2d 536 (9th Cir. 1978) (citing *Anning-Johnson Co. v. OSHRC*, 516 F.2d 1081, 1088 (7th Cir. 1975) (quoting Legislative History of the Occupational Safety and Health Act of 1970, Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92nd Cong., 1st Sess. (Comm. Print 1971) at 435 (Remarks of Senator Williams).

To find a WISHA violation of a specific health and safety standard it must be proven: "(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; [and] (4) the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition." *Wash. Cedar & Supply Co. v. Dep't of Labor & Indus.,* 119 Wash.App. 906, 914, 83 P.3d 1012 (2004) (quoting *D.A. Collins Constr.*

Co. v. Sec'y of Labor, 117 F.3d 691, 694 (2d Cir. 1997). The same elements apply to a violation of OSHA standards. *Gary Concrete Prods., Inc.*, 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD.

Washington State Law and Federal law require establishing actual knowledge, or a failure to exercise reasonable diligence to discover, a violative condition in order to issue a violation.

> 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.** RCW 49.17.180(6).

> For purposes of this section, a serious violation shall be deemed to exist in a place of employment 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 place of employment **unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.** 29 USC 666(k).

A "serious violation" is one with a "substantial probability that death or serious physical harm could result" from the violation. RCW 49.17.180(6). *Lee Cook Trucking & Logging v. Dep't of Labor & Indus.,* 109 Wash.App. 471, 482, 36 P.3d 558 (2001). Specifically it must be proved to establish "a prima facie case" the "employer knew or,

through the exercise of reasonable diligence, could have known of the violative condition." RCW 49.17.180(6); *SuperValu, Inc. v. Dep't of Labor & Indus.,* 158 Wash.2d 422, 433, 144 P.3d 1160 (2006).

"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." *Erection Co., Inc. v. Department of Labor and Industries*, 160 Wn.App. 194, 206-07, 248 P.3d 1085, 1091, (Wash.App. Div. 3 2011). (quoting *Kokosing Constr. Co. v. Occupational Safety & Hazard Review Comm'n,* 232 Fed.Appx. 510, 512 (6th Cir.2007) (internal quotation marks omitted) (quoting *Sec'y of Labor v. Pride Oil Well Serv.,* 15 O.S.H. Cas. (BNA) 1809, 1820, 1992 O.S.H. Dec. (CCH) ¶ 29807)).

Employers' prior scientific monitoring efforts may constitute reasonable diligence even though subsequent testing shows, contrary to the prior testing, employees had been exposed to violative levels of hazardous substances. *Milliken & Co.*, 14 BNA OSHC 2079 (No. 87-0767, 1991), *aff'd*, 947 F.2d 1483 [15 BNA OSHC 1373] (11th Cir. 1993) (cotton dust); *General Electric Co.*, 9 BNA OSHC 1722, 1727-28 (No. 13732, 1981) (asbestos tubing being cut with table saws); *Dunlop v. North Int'l*, 540 F.2d 1283 (6th Cir. 1976) (Asbestos dust generated by brake

grinding operation).

Where the employer had conducted earlier tests showing the employees were not exposed to excessive levels of airborne contaminants, the employer did not have "knowledge" requisite to be cited for a violation although later tests showed employees had been exposed. *Odyssey Capital Group*, 19 BNA OSHC 1252 (No. 98-1745, 2000); *North American Rockwell Corp.*, 2 BNA OSHC 1710 (No.'s 2692 and 2875, 1975), *affirmed sub nom Dunlop v. Rockwell International*, 540 F.2d 1283 (6th Cir. 1976); *Milliken & Co.*, 14 BNA OSHC 2079, 2083 (No. 87-0767, 1991). Prior testing cannot, however, rise to the level of a defense unless the data is reliable. *Id.* Even if the data is reliable, prior testing cannot be a defense unless the employer's reliance on the data is reasonable. *Id.*

The Department of Labor and Industries promulgated standards regarding asbestos. RCW 49.26.010 - 050; WAC 296-62-077; WAC 296-62-07701 through 296-62-07753. Therein employers and building and facility owners, prior to starting any construction, renovation, remodeling, maintenance, repair, or demolition project, must perform or obtain: a good faith inspection to determine whether materials to be worked on or removed contain asbestos; such inspection must be documented by a written report maintained on file and made available upon request to the director; and such inspection must be conducted by an accredited inspector

and "using practices approved by the department." RCW 49.26.013; WAC 296-62-07721 (1) (c) (ii). Alternatively, "[s]uch good faith inspection is not required if the owner or owner's agent is reasonably certain that asbestos will not be disturbed by the project or the owner or owner's agent assumes that the suspect material contains asbestos and handles the material in accordance with WAC 296-62-07701 through 296-62-07753." RCW 49.26.013; WAC 296-62-07721 (1) (c) (ii) (B).

If an accredited inspector tests vinyl flooring material only on the first floor and not on the second floor, and the inspector concedes the vinyl flooring on the second floor was different from that on the first floor, the resulting good faith survey does not constitute reasonable diligence regarding removal of the vinyl flooring on the second floor. Although the inspection data may be reliable, it is not reasonable to rely upon a test of the first floor only when the inspector concedes the vinyl flooring on the second floor was different from that on the first floor. *Prezant Assocs., Inc. v. Dep't of Labor & Indus.*, 141 Wash.App. 1, 7, 165 P.3d 12 (2007).

If the building owner performs maintenance work on its building including scraping undisputed PACMs relying on surveys conducted 3 and 7 years prior which are "atypical", not AHERA-compliant and rely on only three samples although at least seven were necessary under federal regulations, such reliance does not constitute reasonable diligence when

subsequent tests reveal violative levels of asbestos. Such inspection data is not reliable because the regulation defines what constitutes reasonable diligence. "The standard requires the employer to take precautions *unless* specific testing, done in a way that was *not* done here, shows that the material involved contains no more than one percent asbestos." *Odyssey Capital Group*, 19 BNA OSHC 1252 (No. 98-1745, 2000).

If an employer regularly monitored the air in the employee's breathing zone, and all such monitoring showed the concentration of asbestos was within permissible limits, reliance on that monitoring was reasonable diligence although a later inspection revealed a concentration in excess of permissible limits. The employer's citations were vacated because the employer "did not and could not with the exercise of reasonably diligence have known [of the violative circumstances]." The purpose of OSHA is aimed at providing working men and women safe and healthful working conditions insofar as may reasonably be possible, not to make an employer the insurer of the safety of his employees. So issuing citations when the employer could not have reasonably known to avoid the violation is contrary to the purpose of the Act. The Act asks employers to make a reasonable and a diligent effort to comply with safety standards, neither the Secretary, the Commission, nor the Court can hold an employer to a higher standard. *North American Rockwell Corp.*, 2 BNA

OSHC 1710 (No.'s. 2692 and 2875, 1975), *affirmed sub nom Dunlop v. Rockwell International*, 540 F.2d 1283 (6th Cir. 1976).

If the Secretary alleges that a contaminant is present in impermissible levels, but the employer shows that it had made measurements and determined the concentration was not excessive, and the Secretary does not dispute the accuracy of the testing, the burden is on the Secretary to show that the employer's failure to discover the excessive concentrations resulted from a failure to exercise reasonable diligence. Merely asserting the employer had a duty to anticipate hazards to which its employees may be exposed is not sufficient. *Milliken & Co.*, 14 BNA OSHC 2079, 2083 (No. 87-0767, 1991).

After a citation, if the employer regularly monitors and takes the equipment it believes to be the cause out of service, merely demonstrating the existence of subsequent violative circumstances along with a feasible option to reduce asbestos levels is not sufficient to find the employer in violation of a standard. The burden is on the Secretary to show that the employer's failure to discover the excessive concentrations **resulted from a failure to exercise reasonable diligence.** It is not enough to find that a condition contravening that standard existed in the employer's workplace; the Secretary must also prove that the employer either knew or could have known with the exercise of reasonable diligence of the noncomplying

condition. When the record demonstrates that the employer took the table saw which it considered to be responsible for excessive concentrations of asbestos out of service, monitored the air in its tube-cutting area for asbestos, using a technique recommended by NIOSH, all of the samples obtained between the original citation and the inspection that resulted in this case showed asbestos concentrations within permitted limits, and the samples taken were representative of the operations occurring in that area, by merely showing the employer's efforts did not work and alternative methods could have worked, the Secretary has failed to meet its burden. *General Electric Co.*, 9 BNA OSHC 1722, 1727-28 (No. 13732, 1981).

In this case, the GFS was conducted on March 14, 2007. BNB began work in December 2009. There is no testimony the GFS was inadequate. In fact, by vacating Item 1-8, the Board concluded that an adequate GFS had been obtained.

BNB is unlike *Prezant*, because BNB's GFS specifically and expressly included the floor where carpet was being removed as well as the tile under the carpet. Furthermore, in this case, there is no testimony where ECI concedes the tiles which were removed with the carpet were not included in the GFS. The investigator failed to consult with ECI.

BNB is unlike *Odyssey* because the ECI GFS was conducted recently, was not "atypical", and was AHERA compliant. More

importantly, as in *Odyssey*, there is an applicable standard promulgated by the Department, but unlike *Odyssey* BNB precisely followed that standard.

BNB is like *North American Rockwell*, *Milliken* and *General Electric* because BNB took reasonable and diligent efforts to comply with the safety standards. Like them, despite BNB's efforts a violation occurred. BNB has demonstrated that it had and followed a GFS which is the standard promulgated by the Department. Therefore the Department has the burden to prove that BNB's reliance on the GFS was not reasonable. Merely asserting BNB had a duty to anticipate hazards to which its employees may be exposed is not sufficient. Also, merely demonstrating there was a violation despite all of BNB's reasonable actions is not sufficient to meet that burden. Nor is it sufficient to prove that some other method could have worked better. The Board found BNB believed the GFS indicated the tiles did not contain asbestos. The Board did not find such belief was unreasonable; the Board never found the reliance on the GFS was unreasonable. The Board's conclusion that BNB had reason to suspect the GFS was inadequate is also inconsistent with the Board's finding that BNB had complied with law requiring a GFS.

As a matter of law, when BNB is reasonably diligent and follows the promulgated regulations by obtaining a GFS and is found to have reasonably believed and followed the GFS, even if a violative

circumstance arises due to inaccuracies in the GFS, there can be no violation. Such a finding would render meaningless the requirement to obtain a GFS and require the employer to become the expert and to have the requisite expertise to know when a GFS is inaccurate.

The purpose of WISHA, like OSHA, is aimed at providing working men and women safe and healthful working conditions insofar as may reasonably be possible, not to make an employer the insurer of the safety of his employees. Therefore, issuing citations when BNB could not have reasonably known to avoid the violation is contrary to that purpose. When employers make a reasonable and a diligent effort to comply with safety standards, neither the Secretary, the Commission, nor the Court should hold that employer to a higher standard.

RCW 49.26.013 supports such a ruling because further inspections are not required when "the owner or owner's agent is reasonably certain that asbestos will not be disturbed or assumes that asbestos will be disturbed by a project which involves construction, renovation, remodeling, maintenance, repair, or demolition and takes the maximum precautions as specified by all applicable federal and state requirements." BNB had a GFS and so was reasonably certain no asbestos would be disturbed by the removal of carpet.

The correct legal standard is "knowledge", not "suspicion". RCW

49.17.180(6). Nowhere in RCW 49.17.180(6), or any case law, is an employer cited for violation because they "had reason to suspect" a violation occurred. Yet, in Findings of Fact Numbers 5, 7, 9, 11, 13,15, 18, and 21, the Board found that, "The employer did not take measures to protect employees as soon as it had ***reason to suspect*** employees were working with asbestos-containing material." (Emphasis added).

The Department's regulations further support such a ruling. WAC 296-62-07703 defines ACM as any material containing more than 1% asbestos. PACM means that the material is presumed to contain asbestos unless tested and shown not to contain asbestos. "**The designation** of a material as 'PACM' ***may be rebutted pursuant*** to WAC 296-62-07721." WAC 296-62-07703 (*Emphasis added*).

Thus a designation of PACM can be rebutted by an inspection as set forth in WAC 296-62-07721. Any PACM can be designated as "non asbestos" by having it tested by an accredited AHERA building inspector and sampled in a manner prescribed by the Department. That is exactly what happened in our present case. BNB was provided with the GFS, reviewed it and relied on Samples M3, U3 and U5 indicating tile beneath the carpet and its mastic did not contain asbestos. Any presumption the tile beneath the carpet contained asbestos was thus rebutted.

The Board's finding that BNB had "reason to suspect" that the tiles

contained asbestos is in direct contravention of WAC 296-62-07703 which clearly indicates a designation of PACM may be rebutted by a good faith survey. When the GFS rebutted the presumption that the material beneath the carpet did not contain asbestos, as a matter of law, the tile was no longer PACM. The Board erred by finding that Mr. Voss suspected that the tile contained asbestos and that BNB then "knew" that they had to treat the carpet removal as a Class II asbestos project.

In this case the Board found BNB had complied and obtained a GFS; the Board found BNB had been reasonably diligent and reasonably believed it was following the GFS and the promulgated standard; and the Board found the GFS was inaccurate, and so as a matter of law no citation may be issued. With such a finding of reasonable diligence with established standards, this Court must conclude that BNB had no knowledge, and could not with reasonable diligence have discovered, the existence of a violative condition and could not have known that the asbestos regulations set forth in Items 1-1, 1-2, 1-3, 1-4, 1-5, 1-6, 1-7a and 1-9 must be followed, and those citations must be vacated.

2. The record does not substantially support a finding that BNB should have known it could no longer reasonably rely on the GFS when BNB encountered tiles, which the GFS said were not ACM, coming up with the carpet they were removing.

The Board found "the record is not clear as to whether ECI

sampled flooring material underneath installed carpeting." However, the record was quite clear, including photographic evidence, that ECI did sample flooring material underneath installed carpeting. It is very clear from the photographs that ECI cut through installed carpeting to remove tile samples underneath. Despite this the Board concluded the GFS was "incomplete" and "did not cover all of the materials."

The Board found BNB believed the GFS said no asbestos containing materials existed under the carpet they were removing; i.e. BNB believed ECI sampled to the subfloor. There was no finding this belief was unreasonable. Despite such contrary evidence, the Board concluded BNB should have known it had found ACM when the tiles, the same tiles which BNB reasonably believed had been tested by ECI and found not to contain asbestos, came loose with the carpet being removed.

There was some testimony that BNB should have known they were encountering a new type or different color of tile, and that should have indicated to them that these tiles were PACM that had not been tested by ECI. However, there was no testimony that the tiles BNB did encounter were actually of a different color or type. Furthermore, even if we assume the tiles being removed with the carpet were somehow different, how can a "fair-minded person" conclude that BNB should have known the tiles were different when even experts can disagree about whether two tiles are

the same or different as is evidenced by comparing the limited survey conducted by NVL with the GFS.

Also, BNB was diligent in following the GFS and avoiding ACM. BNB took appropriate steps and reasonable precautions to hire PAS, a certified asbestos abatement contractor to remove asbestos in the areas identified by ECI. BNB only performed work where the GFS indicated no asbestos would be disturbed, for example, not removing carpet from the basement. The citations focus only on the areas incorrectly sampled by the ECI survey. It is undisputed that the ECI Survey did not identify that asbestos was present in those tiles beneath the carpet. It is further undisputed that BNB did not know this until after they had already removed the carpet and the loose tiles.

Despite all of the foregoing, the Department, the Board and the Superior Court found BNB "suspected" the tile contained asbestos, and was therefore required to follow the asbestos work practice regulations set forth in Citation Items 1-1 through 1-9.

> "During the removal of the carpeting in certain areas, the firm found that some of the floor tiles underneath the carpet were being lifted with the carpet. The labor supervisor, Robert Voss, became concerned that some of the tile and mastic could contain asbestos. He instructed employees to cut the carpet around the tile and discard it in the dumpster. Any tiles that came loose were double-bagged and placed in a room reserved for hazardous waste removal. Mr. Voss did not instruct or require the employees to take any

> specific measures to avoid exposure to asbestos. Later sampling by the Compliance Safety and Health Officer (CSHO) revealed that the tiles and mastic under the carpet was asbestos-containing material." page 2, lines 20 - 27 of the Decision & Order.

Mr. Voss' testimony contradicts this finding. He **did not believe the tile and mastic actually contained asbestos**. Rather, in an effort to get maximum credit for the recycling program and to avoid problems with the landfill accepting the load, he had the tiles separated from the carpet. Additionally, because he had read an article that a contractor had put actual asbestos containing material in a public landfill, he simply wanted to take no chances even though the GFS indicated the material under the carpet did not contain asbestos. Thus, he directly testified that he did not actually believe that the tiles contained asbestos. The basis of the Board's decision is not supported by the evidence.

Before removing carpet, Mr. Voss consulted the GFS. He knew therefrom that the tile beneath the carpet did not contain asbestos. Based on the nature of asbestos, there was nothing that would indicate to a reasonable non-expert person that the GFS was in error. One cannot see asbestos fibers with the unaided eye. Asbestos can cause disabling respiratory disease and various types of cancers if the fibers are inhaled. Asbestos fibers are measured in microns and is defined as a fiber longer

than 5 microns.[2] WAC 296-62-07747(2).

Because asbestos fibers cannot be seen, general contractors must rely on laboratory testing set forth in Good Faith Surveys. Because the hazards of asbestos cannot be readily observed, contractors must either assume that the material contains asbestos, or have the material tested through a Good Faith Survey. Once a survey performed by an accredited AHERA building inspector, then the presumption of asbestos is rebutted.[3]

BNB did not believe that the GFS was inadequate for the work to be performed in the soft demolition. Mr. Campbell reiterated that he fully relied on the survey and had no reason to question ECI.

Mr. Mark Hamper an employee with PAS familiar with the building agreed and the GFS indicated PAS would have relied upon the GFS. Mr. Casey Blake, general superintendent for BNB, said there was nothing that occurred to give reason for doubting the GFS.

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[2] A micron is defined by the Webster Dictionary as follows: "micron |ˈmīˌkrän| noun a unit of length equal to one millionth of a meter, used in many technological and scientific fields." WAC 296-62-07747(2)

[3] WAC 296-62-07703 defines "PACM" as: Presumed asbestos-containing material means thermal system insulation and surfacing material found in buildings, vessels, and vessel sections constructed no later than 1980. The designation of a material as "PACM" may be rebutted pursuant to WAC 296-62-07721. WAC 296-62-07721 requires the Good Faith Survey.

Based on the foregoing there was not substantial evidence in the record to support the Board's finding that BNB should have known, could have known, or "suspected" the tiles being removed with the carpet could have contained asbestos. There was not substantial evidence in the record to support the Board's finding that the GFS conducted by ECI was incomplete. There was not substantial evidence in the record to support the Board's finding that BNB should have known they could no longer reasonably rely upon the GFS.

3. **Yes. Citing BNB for violations after they had conducted and followed a Good Faith Survey amount to an imposition of strict-liability contrary to RCW 49.17.180(6), the law, and the purpose of WISHA.**

> 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.** RCW 49.17.180(6) *emphasis added.*

Proving employer knowledge is a strict obligation of the Department as part of its *prima facie* case. *Brock v. L.E. Myers Co.*, 818 F.2d 1270 (6th Cir.) cert. denied, 484 U.S. 989 (1987). See, also, *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067, 2000 CCH OSHD ¶ 32, 053, p.48,003 (No. 96-1719, 2000) (Secretary bears burden of proof on

actual or constructive knowledge). The Review Commission and courts have consistently held that knowledge is an essential element of the Secretary's burden of proof. See *Secretary of Labor v. Milliken & Co.*, 14 BNA OSHC 2079, 2080, 2082-2084 (Rev. Comm. 1991) *affirmed sub nom, Secretary of Labor v. OSHRC* and *Milliken & Co., 947* F.2d 1483, 1484 (11th Cir. 1991*), Secretary of Labor v. General Electric Company*, 9 BNA OSHC 1722, 1728 (Rev. Comm. 1981). This obligation cannot be ignored or shifted away from the Department. WAC 263-12-115(2)(b).

The Supreme Court has explicitly stated that the OSEA "is a fault-based system." *Don Whitaker Logging, Inc.,* 329 Or. at 263, 985 P.2d 1272. Also, addressing the reasonable diligence inquiry, the federal courts have repeatedly clarified that "Congress quite clearly did not intend ... to impose strict liability[,]" reaffirming that, "[i]n keeping with this purpose of eschewing a strict liability standard, ... the Act imposes liability on the employer *only* if the employer knew, or 'with the exercise of reasonable diligence, [should have known] of the presence of the violation.' " *W.G. Yates & Sons v. Occupational Safety & Health,* 459 F.3d 604, 606–07 (5th Cir.2006) (citations and some internal quotation marks omitted; emphasis, brackets, and omissions in original); *accord Titanium Metals Corp. of America v. Usery,* 579 F.2d 536, 543–44 (9th Cir.1978).

> "Not requiring the Secretary to establish that an employer knew or should have known of the existence of an employee violation would in effect make the employer strictly and absolutely liable for all violations and would render meaningless the statutory requirement for employee compliance." *Brennan v. Occupational Safety and Health Review Commission*, 511 F.2d 1139, 1145 (9th Cir. 1975).

WISHA has the same stated purpose, and so, similarly, strict liability should not be imposed. If this Court finds that BNB will be cited for a violation solely because BNB *could* have known the tiles being removed contained asbestos, despite the fact they had obtained a GFS in accord with the promulgated standard and the law, despite the fact the GFS informed them the tiles being removed had been tested and did not contain asbestos, and despite the fact BNB ***reasonably believed*** the GFS informed them the tiles being removed had been tested and did not contain asbestos, this will amount to an imposition of a strict-liability contrary to law and contrary to the stated purpose of WISHA. BNB implores this court not to impose strict-liability in this matter. For the foregoing reasons the citations must be vacated.

4. **Is it error to affirm Item 1-9 citing BNB for failure to properly clean up asbestos debris when BNB is not a certified asbestos abatement contractor, there was no evidence BNB was responsible for or caused the debris, and such clean up was beyond their scope of work?**

In Item 1-9, the Department alleged that, "The employer did not promptly clean up and dispose of presumed asbestos thermal system insulation that

was damaged by employees during interior wall demolition." In violation of WAC 296-62-07712(2)(d).

The application of this section is clear: regardless of the exposure level of asbestos, when an employer undertakes an asbestos operation, the engineering controls set forth therein must be followed. As previously noted, BNB never sought to undertake an asbestos operation. PAS was hired to specifically engage in asbestos abatement work. Consequently, the cited regulation simply does not apply to BNB's activities. Demolition is covered in a separate WAC. See WAC 296-155-775 through 830.

Moreover, BNB was not a certified asbestos contractor. It is inconsistent for the Department to cite BNB for failing to engage in the clean up operations for asbestos, when BNB was never certified to engage in such activities. Under the Department's own regulations, BNB could not perform the work which they are being cited for not performing. In fact, if BNB had attempted to perform the clean up, the Department could have cited BNB for that activity.

Even if the cited regulation applied to BNB, the Department offered no evidence that BNB was responsible for the alleged damage. There was no evidence that BNB created the debris, or that it was even aware that it existed. The evidence before the board and the Superior Court is exactly the opposite. "The record is clear that the employer

stopped work when thermal system insulation was encountered." the Board D&O, at Page 3, lines 25 – 26. As soon as thermal system insulation was encountered, BNB employees, in a manner consistent with their asbestos awareness training, immediately stopped work, put up danger tape, and stayed away from the area. Furthermore, in a manner consistent with their asbestos awareness training, went about their work to avoid asbestos, cutting peep hole inspections prior to breaking into walls and to avoid any asbestos debris. There is no substantial evidence in the record to support this citation. Item 1-9 must be vacated.

5. Yes. It is error to affirm Item 2-3 when it is not support by substantial facts.

In Item 2-3, the Department alleged that "The employer's written respirator protection program is deficient in the following instances: The program does not list specific respirators to be used for each type of hazard, such as lead, silica, asbestos or dusts."

BNB's Written Respirator Program, Pre-Activity Hazardous Analysis, specific training on lead and asbestos, and Respirator Fitness tests, Exhibits 25, 26, 40, 44, 46, 47, 48 and 49, demonstrate beyond question that BNB provided a comprehensive review of potential respiratory hazards and effectively dealt with those potential concerns. While the Written Respirator Program, considered by itself, may not

specifically identify the hazards at the particular site, it was not the only document that BNB relied on to address these concerns.

BNB had a written Respirator Program. See Exhibit 25. For the MMSC project, BNB performed a "Pre-Activity Hazard Analysis" on December 23, 2009. This analysis specifically identified that lead was identified on painted surfaces. See Exhibit 40. As noted in Exhibit 40, BNB followed the hierarchy of controls by using engineering controls. See Section on "Lungs/Respirator" wherein neg air machines, fans, ventilation and HEPA vacuums would be used ***in lieu of respirator protection*** for "irritating dust or particulate. Additionally, Respirator training was provided to the employees on February 14, 2008. See Exhibit 44. Asbestos and Lead Awareness Training was provided on June 6, 2008, July 24, 2008, November 5, 2009 and December 28, 2009. See Exhibits 46, 47, 48 and 49. Respirator fit tests were performed in the first week of January, 2010. See Exhibit 26.

The cited regulation does not require all of the elements be covered in one document. Rather, the purpose of the standard is to ensure all of the elements are covered by the employer. In this case, there is no question that all respiratory hazards were fully addressed by BNB. Respirators were simply not needed in this instance, because BNB had selected other methods of protecting its employees from respiratory irritants through

negative air machines, fans and ventilation. Due to the use of alternative means of protection, respirators would not be used. BNB did not commit any violation of WAC 296-842-12005(1) by not identifying the type of respirator that would be used because no respirators would be used.

Only if respiratory protection had been used, would it become necessary for BNB to specifically identify the type of respirator to be used. The Department issued a citation for not identifying the specific type of respirator to be used, although NO respirators were to be used under BNB's alternative means of protection. Item 2-3 must also be vacated.

6. **Is it error to affirm the increased penalties stemming from a "poor" rating for good faith when there was no factual basis for such a rating?**

This Court should vacate all of the citations for the reasons stated above. However, in the event the serious citations are not vacated, BNB asserts the Department had no basis for, and there is no evidentiary support in the record for, issuing a "poor" rating for good faith in the penalty calculation. A "poor" rating for good faith increased the monetary penalty adding to the base penalty. The Department asserted BNB deserved a "poor" for good faith because: BNB was "clearly alerted" to the inadequacy of the GFS; did not provide respirators or other personal protective equipment; and that Mr. Voss had lied to the inspector.

BNB did not know the GFS was inadequate prior to the start of the

job. For the reasons stated above, BNB did not have actual or constructive knowledge the GFS was inadequate until well after the inspection started. Moreover, the IAJ further concluded that Mr. Voss had not lied. The IAJ wrote at page 13, line 31, "More specifically, I do not believe Mr. Voss deliberately misled Ms. Rees." The evidence clearly shows BNB had a written Respirator Program. BNB followed that program using negative air machines, fans, ventilation and HEPA vacuums in lieu of respirator protection for "irritating dust or particulate." Additionally, Respirator training was provided to the employees on February 14, 2008.

Despite these contrary findings, the Board, and subsequently the Superior Court, nevertheless, maintained the penalty calculations that included the "poor" rating for good faith.

As set forth in WAC 296-900-14015, the base penalty may be adjusted by several categories, including, "good faith". This rule sets forth the following considerations for determining an adjustment relating to "good faith": awareness of the act; effort before an inspection to provide a safe and healthful workplace; effort to follow a requirement they have violated, and cooperation during an inspection measured by a desire to follow the cited requirement and immediately correct identified hazards.

It was undisputed that Mr. Voss and Mr. Campbell took steps to consult with the ECI survey, Mr. Carling had submitted bids and hired a

certified asbestos abatement contractor to remove asbestos containing material, and Mr. Voss followed the results of the ECI survey. The only documents not provided to Ms. Rees were the documents that were referenced in the GFS (i.e. the photographs) that were not provided to BNB by the property owner. BNB did not have the photographs. As such, they did not refuse to provide any documents within its possession or control. Moreover, at a considerable cost, BNB agreed to hire a second AHERA certified inspector to prepare an accurate Good Faith Survey. Thus, not only did BNB cooperate during the inspection, it voluntarily took steps to be in compliance once the inadequacies of the GFS came to light.

The specific criteria set forth in WAC 296-900-14015 includes prior efforts to comply with the safety and health regulations. Exhibit 50 more than demonstrates that BNB had an excellent safety program as recognized by several construction associations, including the Association of General Contractors (AGC) of Washington and the National AGC Safety Committee. As recognized by CEO of Washington, for five years BNB doubled in size, but decreased its injuries in half. This is hardly evidence of "poor" faith that warrants an increase of 20% to the penalty.

The stated reasons for increasing the penalty, i.e., not providing respirators or other PPE, were already cited by the Compliance Officer as

separate violations. The WAC does not allow the Department to cite a separate violation and then use it to enhance the monetary penalty for the other citations. The Superior Court, the Board and the IAJ erred by affirming the "poor" for good faith in the penalty calculations.

VI. CONCLUSION

For all of the reasons set forth above, this Court must vacate the asbestos and respiratory protection citations. BNB has a proven track record of excellence in safety. It relied on a Good Faith Survey as required by law. BNB did not learn that the ECI GFS was inaccurate for the samples underneath the carpet in the hallways until after the Department conducted an inspection and provided additional sample results that showed the presence of asbestos. There were no facts to support any finding that BNB had any reason to suspect that the material underneath the carpet could contain asbestos. The "reason to suspect" is not the correct standard set forth under RCW 49.17.180(6) as either actual or constructive knowledge of the asbestos hazard is required.

By holding BNB violated the asbestos regulations after they relied on the GFS incorrectly imposes a strict liability standard. All of the asbestos related citations must be vacated.

There was no evidence that BNB was responsible for asbestos debris in Item 1-9. Moreover, the law prohibited BNB from cleaning up

the asbestos because BNB is not a certified asbestos abatement contractor. The Department incorrectly cited BNB for not engaging in an activity which the Department's own regulations prohibited it from performing.

Alternative means for respiratory hazards was provided by BNB such that respirator selection was not applicable. Consequently, the "general" violation Item 2-3 should be vacated.

RESPECTFULLY SUBMITTED this 9th day of August, 2013.

AMS Law, P.C.

Aaron K. Owada, WSBA No. 13869
Attorneys for Appellant

CERTIFICATE OF SERVICE

I, Kasey Johansen, hereby certify under penalty of perjury under the laws of the State of Washington that on August 9, 2013, I filed with the Court of Appeals Division I, via hand delivery, the original of the following document and one copy of:

1. **APPELLANT'S AMENDED OPENING BRIEF**

and that I further served a copy via hand delivery upon:

Elliott Furst
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

SIGNED in Seattle, Washington on August 9, 2013.

Kasey Johansen, Paralegal