NO. 70142-8-I

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

BNBUILDERS, INC. a Washington Corporation,

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.



# ANSWER TO BRIEF OF AMICUS CURIAE BY DEPARTMENT OF LABOR & INDUSTRIES

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## I. INTRODUCTION

This is a substantial evidence case arising from an employer's appeal of a citation issued under RCW 49.17, the Washington Industrial Safety and Health Act (WISHA). The Department of Labor and Industries (Department) inspected BNBuilders, Inc., (BNB) in response to an employee complaint regarding the presence of asbestos in the worksite. The Department treats asbestos complaints seriously because asbestos is an extremely hazardous material, with even the smallest exposure leading to potential death.

The Amicus Curiae, the Associated General Contractors of Washington (AGC), has restated BNB's primary argument, namely that the Board and the superior court have held BNB to an improper "strict liability" standard because they rejected BNB's arguments that they reasonably relied upon an asbestos good faith survey.

The legal and policy arguments raised by the AGC are wholly premised upon BNB's version of the underlying facts in this matter. BNB's factual arguments were rejected by the Board; and the superior court determined there was substantial evidence to uphold the Board's findings. The Board's decision, which is reviewed on appeal, was based on overwhelming evidence that BNB knew or should have known that it was disturbing tiles and mastic (adhesive) that contained asbestos.

By assuming the correctness of all of BNB's factual arguments, the AGC (like BNB) asks this Court to reweigh the evidence to accept its arguments that the Department, Board, and superior court have imposed "strict liability" upon BNB. Here, there are several independent bases to find that BNB was not reasonably relying on the good faith survey. Well-established standards for substantial evidence review provide that appellate courts do not reweigh this evidence. Ample evidence supports the Board's rejection of BNB's arguments, which the superior court correctly affirmed.

## II. ARGUMENT

### A. The Board Decision Does Not Preclude Use of Good Faith Surveys

Contrary to AGC's arguments, the Board decision does not preclude the use of good faith surveys. The concern raised by the AGC is that if the Board's Order is upheld, contractors will not be able to rely on asbestos good faith surveys and construction costs will rise without any corresponding benefit to worker safety. AGC Br. at 2-3. Nothing in the Board's Order prevents contractors from relying upon good faith surveys. Here, the Board found that BNB chose to expose its employees to asbestos after it suspected it found asbestos in floor tile. BR 2.[1] As a general

[1] The certified appeal board record is cited as BR, with the last name used for witness testimony. Janine Rees testified on both January 12, 2011, and January 14, 2011.

proposition, the Department agrees with the AGC's contention that employers need to be able to rely on good faith asbestos surveys. However, an employer is not reasonably relying on a good faith survey if the company is working in areas not covered by the survey, or when it becomes obvious to both the employer and its employees that they are encountering asbestos, even if the employer believes it is working in an area that the survey said was "safe."

### B. The AGC's Policy Concerns Incorrectly Assume BNB's Versions of the Facts

The AGC appears to have adopted BNB's primary argument, namely that BNB reasonably relied upon the good faith survey, and the Board improperly imposed "strict liability" on BNB. AGC Br. at 2, 4, 5-6. The AGC appears to believe that once an employer obtains a good faith survey, the employer can both ignore the known limitations in the survey, and has no further obligations to protect its employees from exposure to asbestos.

Contrary to the AGC's assumptions, this case does not involve an employer that received a good faith asbestos survey and is being penalized for relying upon the survey. Here, there were several separate lines of evidence that demonstrated that BNB did not rely on the good faith

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For this reason, citations to her testimony include the date. The remaining witnesses testified on only one day; therefore, those citations do not contain a date.

survey. This evidence is discussed in detail in the Department's Brief of Respondent and will not be unnecessarily repeated here. However, the evidence generally demonstrated that:

1. BNB knew that there were serious limitations in the good faith survey, and chose not to obtain a more comprehensive survey. BR Carling at 156-57; BR Gladu at 155; BR Exs. 34, 55, 56.

2. BNB knew its workers were working in areas that were beyond the limitations of the survey. BNB sent workers into rooms that had not been sampled in the good faith survey. BR Ex. 64. For example, on the main floor map of Exhibit 35, the room that is second from the farthest south is labeled M5. BR Ex. 35, 64. The good faith survey shows that no samples were taken from this room. BR Ex. 35. BNB had its workers remove carpet/tile/mastic from this room, even though neither the vinyl tiles nor the mastic had been tested for asbestos. BR Ex. 62-67. Workers worked in several other untested areas. *See* Resp't's Br. at 6-7. Because asbestos was found throughout the building, it cannot be assumed that untested areas do not have asbestos. BR Rees 1/12/11 at 38,40.

3. The Board noted that BNB's actions were inconsistent with actions of a party that was truly relying on the good faith survey. The Board emphasized that Voss separated material because of concern it contained asbestos:

> 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 to be 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.

BR 2. Voss's actions demonstrate that BNB was not relying on the good faith survey. It is uncontested that Voss took these actions, and the Board's determination that he separated material he believed may contain asbestos indicates it did not accept BNB's explanation that he was only separating this material for disposal purposes. BR 2. Significantly, Voss admitted in the inspection that he suspected the presence of asbestos. BR Rees 1/12/11 at 40. Yet, AGC's factual assumptions ask this Court to reweigh this testimony.

In addition to Voss's actions, the actions of BNB's Superintendent, Blake, demonstrate that BNB had knowledge that the BNB was removing asbestos. Blake wrote up a "time line" that described his visits to the worksite. He describes how Voss showed him on December 31, 2009, that "if you just rip and tear the carpet you end up pulling the *suspect* floor tiles up with it." BR Ex. 52 at 1 (emphasis added). Blake wrote "*I told him we needed to stop carpet removal until an abatement crew is on site.*" BR Ex. 52 at 1 (emphasis added). Yet, work continued, and workers

continued to be exposed to asbestos after Blake's orders to Voss. BR Voss at 13-14. Contrary to the AGC's arguments that BNB was relying on the survey, Blake's comments demonstrate actual knowledge by BNB that it was not relying on the survey, and knew that it was removing asbestos without providing protection to its employees.

The AGC's argument that there was reliance on the good faith survey appears to be based upon the fact that much of BNB's brief centers on the Board's Finding of Fact 19 that accompanies its finding that BNB did obtain a good faith survey. BR 3,7; AGC Br. at 2,4,6; Reply Br. at 1-3,10. However, the context of the Board's finding is simply that violation 1-8 for not obtaining a good faith survey is incorrect because BNB had obtained a survey from "an appropriate survey firm." BR 3. The Board specifically noted that the "fact that the survey did not cover all of the materials does not constitute a violation of the statute." BR 3.

The Board then explained that it was affirming the other violations based on the "employer's actions in working with asbestos-containing materials *once the employer had reason to believe such materials were present* . . . ." BR 3 (emphasis added). The Board's Order recognizes that a contractor is not allowed to obtain a good faith survey that clearly states its limited scope, and then claim he or she can rely on the survey to conduct work beyond its limited scope. Contrary to the AGC's concerns

at page 6 of its brief, nothing in the Board's Order would require a contractor to second-guess a survey and obtain an additional survey or conduct testing itself. Here, the Board found that BNB both knew of the survey's limitations, and knew that it was working outside of the areas covered by the survey.

### C. The Safety Concerns Raised by BNB's Employees Demonstrate That BNB Was Not Reasonably Relying On The Good Faith Survey

In addition to the substantial evidence discussed above that demonstrates BNB was not reasonably relying on the good faith survey, BNB knew that at least two of its employees had complained to management that they thought they were being exposed to asbestos. BR Pennington at 8-9, 55; BR Weston at 72–73. BNB management then called a special meeting to tell the employees that they were safe, but BNB did not provide them with any additional protection from asbestos. BR Ex. 52 at 2.

AGC argues that the Court should not consider the employees' information about the presence of asbestos that was conveyed to BNB. AGC Br. at 5. But the AGC cannot reconcile the fact that BNB's employees found it obvious they were being exposed to asbestos with its arguments that BNB reasonably relied upon the good faith survey. Therefore, the AGC argue that BNB is entitled to ignore employee

concerns if it has a good faith survey. AGC Br. at 5. The AGC invites this Court to adopt a dismissive attitude towards worker concerns because the employees were not certified asbestos professionals. *Id.*

This argument should be rejected for several reasons. First, it again asks this Court to reweigh the testimony in this matter. Two employees testified that they told BNB they were concerned about the presence of asbestos. *See* BR Pennington at 8-9, 55, BR Weston at 72-73. BNB's employees filed the complaint with the Department that led to this inspection because of this concern. BR Weston at 89.

Second, the AGC's arguments are contrary to one of the basic premises underlying the WISHA that encourage employees to bring safety concerns to the attention of their employers because the government cannot be present in every workplace at all times. *See* RCW 49.17.110. If carried to their logical conclusions, the AGC's arguments would apply to countless worker safety issues that arise on a regular basis.

For example, its arguments would allow an employer to ignore complaints from employees while removing lead based paint from a hundred year old house because the employees are not experts in identifying lead in paint. Or, an employer could ignore employees' concerns that an excavation is unsafe, and that they fear a cave-in or being crushed by nearby excavated dirt, because the employees are not certified

engineers with expertise in how to properly slope and protect excavation trenches at construction sites.

Tellingly, despite the thousands of published state and federal worker safety opinions arising from inspections resulting from employee complaints, no authority is cited by the AGC to support the argument that employee complaints can be ignored because the employees are not "experts" in identifying the hazards at issue. No court has allowed employers to disregard employee concerns about their own safety.

Further, applying the AGC's request to ignore employee concerns and complaints to this matter demonstrates the flaws in its argument. It is not surprising that asbestos was found in a building built in the 1940s. The potential of asbestos exposure to workers in this building would be known to many members of the general public without specialized training in light of the amount of attention our society has given the problems associated with asbestos in old buildings. An employee does not have to be extensively trained in asbestos removal to know that he or she may be at risk when removing floor tiles in a more than 70 year-old building.

Additionally, as the Board noted, BNB's employees were being told by their supervisor, Voss, to separate certain materials because it may contain asbestos. BR Pennington at 8-10, BR Weston at 77. Yet, they were not provided with the necessary safety equipment to remove this

asbestos. App's Br. at 43. So, this is not a case where untrained employees lacked a reasonable basis to believe they were in danger.

Nor is this a case where a regulatory standard sets an exposure limit of several hundred parts per million for a hazardous chemical, and employees were guessing that those limits had been exceeded even though they had not conducted any testing. It must be remembered that no safe level of exposure to asbestos has been found. *In Re William Dickson Co.*, Dckt. No. 99 W0381, 2001 WL 1755614, 1755615 (Bd. of Ind. Ins. Appeals 2001). It was reasonable for the Board to consider and rely upon the testimony of the workers, together with other testimony, to find employer knowledge.

## III. CONCLUSION

AGC's arguments are entirely premised on BNB's version of the facts in this matter. The Board and the superior court have both rejected BNB's arguments. There is substantial evidence supporting the Board's factual findings. The AGC has adopted BNB's primary argument, namely that, once it obtained a good faith survey that met the bare minimum requirements of a good faith survey, it had no further responsibilities to protect its employees. It asks the Court to ignore what BNB knew about the limitations of the survey, and what was encountered during the course

of the work. The Department again requests that this Court uphold the Board's decision.

RESPECTFULLY SUBMITTED this 14th day of April, 2014.

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| BNBUILDERS INC., a Washington Corporation,<br><br>Appellant,<br><br>v.<br><br>WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES,<br><br>Respondent. | CERTIFICATE OF SERVICE |

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on April 15, 2014, she caused to be served the Answer to Brief of Amicus Curiae by Respondent Department of Labor & Industries and this Certificate of Service in the below-described manner:

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DATED this 15th day of April, 2014.

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