70142-8

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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.

BRIEF OF RESPONDENT DEPARTMENT OF LABOR & INDUSTRIES

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ORIGINAL

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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.

Following the inspection, the Department issued a citation that alleged thirteen violations of the asbestos safety standards. The Board of Industrial Insurance Appeals (Board) affirmed twelve of the violations. 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.

BNB argues that it relied on a good faith asbestos survey, and that according to the survey the areas it worked in did not contain asbestos. But a contractor may not rely on areas outside of the scope of the survey. Here, the evidence was that BNB worked in rooms and areas that had not been tested but were likely to contain asbestos based on the results in the survey. There was also evidence that BNB was made aware of the limited

nature of the good faith survey, and chose not to obtain a more complete survey. Therefore, BNB could not reasonably rely on the good faith survey.

Essentially, BNB asks this Court to reweigh the evidence to accept its arguments that it lacked "knowledge" that it was violating asbestos regulations. Here, there are five independent bases to find "knowledge." 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 trial court correctly affirmed.

II. STATEMENT OF THE ISSUES

1. Does substantial evidence support finding that BNB knew or should have known that its employees were exposed to asbestos containing material when the good faith survey showed the presence of asbestos, when BNB did not work within the scope of the survey, when BNB was aware of inadequacies in the survey, and when BNB's foreman admitted that he suspected the presence of asbestos?

2. Does substantial evidence support the Board's finding that BNB failed to clean up and dispose of presumed asbestos containing material when it left chunks of asbestos it had removed lying on the floor (violation 1-9)?

3. Does substantial evidence support the Board's finding that BNB failed to have a work-site specific written respiratory protection program when BNB used a blank template as its "program" (violation 2-3)?

4. Does substantial evidence support the Board's findings that the penalty calculations were appropriate, such that the Department did not abuse its discretion in assessing penalties?

III. STATEMENT OF THE CASE

The Department disputes many of the factual statements in both the factual and argument sections of BNB's brief. However, because many of BNB's factual assertions are without any citation to the record, they cannot be specifically refuted, and should not be accorded any weight by this Court. *See* RAP 10.3(a)(5). Nor should BNB be allowed to argue that the Department has "conceded" any unsupported factual assertion.

A. BNB's Workers Were Exposed to Asbestos

1. BNB Had Knowledge That the 2007 Good Faith Survey Was Limited

In late December 2009, BNB began work on a demolition project at a former hospital that was to be turned into a private school. BR Voss at 5; BR Ex. 30.[1] The original building was constructed in the 1920s, with

[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. 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.

an additional wing added in 1945. BR Ex 34 (Kappers letter at 1).[2] Because flooring and thermal insulation in buildings built before 1980 are presumed to have asbestos, WISHA required BNB to obtain a survey regarding the presence of asbestos. WAC 296-62-07712(1)(b), (10)(a)(ix). This survey is called a good faith survey. BNB had obtained a 2007 good faith survey for the building from the owner. BR Voss at 36. However, this survey contained significant limitations: "Samples of suspect materials were limited to exposed surfaces and did not include possible insulated pipe or other ACM [asbestos containing material] located behind walls, above ceilings, or under floors." BR Ex. 35 at 5. This limitation put BNB on notice that large portions of the work areas at this jobsite had not been tested for asbestos. The limitations of the 2007 survey were further emphasized to BNB in a 2008 letter attached to the survey from a second survey company that reiterated the limitations of the 2007 survey, and recommended that a more comprehensive and complete survey be undertaken. BR Ex. 35; BR Ex. 34 (Kappers letter at 6).

Because it was aware of the limitations in the 2007 survey, before work started on the project, BNB solicited bids for a more complete asbestos assessment. BR Carling at 156-57; BR Gladu at 155; BR Exs. 34, 55, 56. However, BNB ultimately decided not to obtain a more

[2] Attached to Exhibit 34 is a letter dated April 9, 2008, addressed to Mr. Greg Kappers, this will be referred as the "Kappers" letter.

complete survey before work began in late December 2009, and used the 2007 survey instead. BR Carling at 156-57.

2. The Good Faith Survey Revealed Asbestos in Several Locations, Yet BNB Performed Work in Areas Not Covered by the 2007 Survey

The 2007 good faith survey revealed the presence of asbestos in several locations. *See* BR Ex.34. For some locations, the good faith survey showed no asbestos. *See* BR 34. However, the worksite was checkered with asbestos in other locations. *See* BR 34. Therefore, under the survey, it cannot be assumed that if an area is untested it does not contain asbestos. BR Rees 1/12/11 at 13, 17. BNB claims that the tile appeared to be homogenous. App's. Br. at 15. However, the tile and mastic types present at the worksite were not homogenous, were often different colors, and those differences were readily apparent to the unaided eye. *See* BR Rees 1/12/11 at 38.

BNB also claims that "there was no testimony that the tiles BNB did encounter were actually of a different color or type." App's Br. at 36. However, Rees observed over ten different kinds of tile on the main floor alone during her inspection. BR Rees 1/12/11 at 38. These tiles all had different levels of asbestos containing material, many over one percent. BR Ex. 24 at 326. Because the tile and mastic types were not

homogenous, it was not reasonable to believe that areas not tested in the good faith survey were free of asbestos. BR Rees 1/12/11 at 38, 40.

Without citing to the record, BNB generally claims that the 2007 survey addressed all areas in which it worked. App's. Br. at 9-12. However, BNB performed work in areas that had not been tested such as the hallway on the main floor. BR Ex. 35 (Table 1 at 3). BNB ripped up well over one hundred feet of carpet and tile and mastic in the hallway on the main floor.[3] BR Weston 71. Yet, the 2007 survey only sampled one location in the main floor hallway, designated M3, which is located at the far south end of the building. BR Ex. 35 (Table 1 at 3). Further, the 2007 survey did not contain a single carpet/tile/mastic survey for the 1945 wing hallway. BR Ex. 35.

Additionally, there are at least 33 rooms on the main level of the building. BR Ex. 35 (map marked "Main Floor," with "Map 1" handwritten in lower right corner (numbering rooms up to M33).[4] BNB

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[3] Rees testified to 300 feet in the hallway alone. BR Rees 1/12/11 at 46-49. The workers testified to ripping up carpet in rooms in addition to the hallway, but because BNB's documents do not use the same numbers for the various rooms, it is difficult to say with certainty in which rooms the workers ripped up carpet. In addition to disturbing untested tiles and mastic, BNB had employees remove cove base and baseboards at the worksite for which the mastic had not been tested in the 2007 survey. BR Pennington at 20; BR Weston at 82.

[4] There may be more than 33 rooms on the main floor, but the legibility of the numbering, and the readability of the drawings makes the maps in Exhibit 35 difficult to read. Of the maps in the exhibit binder, those contained in Exhibit 35 are the only maps that existed at the time of the demolition. The maps in Exhibit 24and Exhibits. 62-67 did not exist until after the inspection.

claims it is undisputed that no samples from the main floor came back positive for asbestos. App's Br. at 37. To make this claim, BNB cites one sample of tile from the main floor that came back negative to argue that "there was no asbestos containing material under the carpet." App's Br. at 6, 14, 33, 35. Yet, on the main floor, the 2007 survey sampled vinyl tile from approximately nine locations.[5] BR Ex. 35 (Table 1 at 3). Of those nine locations, a third came back positive for asbestos. BR Ex. 35 at 4.

BNB's own maps show that BNB did carpet demolition in rooms in which no sample was taken for the 2007 survey. *See* BR Ex. 64. For example, BNB removed carpet/tile/mastic from M5, M6, M7, even though neither the vinyl tiles nor the mastic had been tested for asbestos. *See* BR Ex. 35, 64. Similarly, no vinyl tile samples were taken from M4, yet workers removed tile there. *See* BR Ex. 35 (Table 1 at 3, 4) and Ex 62.

BNB sent workers into rooms that had not been sampled. For example, on the main floor map of Exhibit 35, the room that is second from the farthest south is labeled M5. The 2007 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.

Similarly, there are at least 34 rooms on the upper level. BR Ex. 35 (map marked "Upper Floor" - numbering rooms up to U34). On the upper floor, the 2007 survey sampled vinyl tile or vinyl tile and mastic from seven locations. BR Ex. 35 (Table 1 at 3, 4). Five locations were tested for vinyl tile, Ex. 35 (Table 1 at 3, 4), and two for vinyl tile and mastic. Br Ex. 35 (Table 1 at 3, 4). Of those seven locations, five came back positive for asbestos. BR Ex. 35 at 4. The 2007 survey also tested mastic only at the far end of the south hallway on the main floor, but it did not test any vinyl tiles in the upper hallway. BR Ex. 35.

BNB employee Stewart Weston testified that he performed carpet/tile/mastic demolition on three rooms upstairs. BR Weston at 78-79. On Exhibit 24, Weston drew a box around three rooms and testified that he removed carpet/tile/mastic in those rooms. BR Weston at 78-79. None of these locations were tested in the 2007 survey. BR Ex. 35.

3. BNB's Foreman Treated the Tiles as Asbestos Containing

BNB had several workers onsite. BR Ex. 30. One of their primary tasks was to rip up carpet. BR Ex. 30. As the carpet came up, many old tiles that were stuck to the carpet came up as well. BR Weston at 70. Some tiles came up whole, while other tiles broke. BR Weston at 70.

When a tile containing asbestos fibers is broken, asbestos fibers are released into the air. *See* BR Ex 35 at 2.

BNB foreman Robert Voss was present at the worksite on every day in question. BR Ex. 30. For carpet that was removed without tiles stuck to it, Voss instructed the workers that the carpet could go into the dumpster. BR Pennington at 10-11. For carpet that was removed with tiles still stuck to it, Voss instructed the workers to wrap the carpet/tile/mastic refuse in plastic and duct tape it shut. BR Pennington at 8-10; BR Weston at 77.

Significantly, Voss treated the tiles as asbestos containing material or presumed asbestos containing material for the purpose of disposal. BR Pennington at 8-10; BR Weston at 77. He then instructed the workers to place all of the bags of carpet/tile/mastic in a designated room for the asbestos abatement contractors to collect later. BR Pennington at 10; BR Weston at 77. As of January 13, 2010, the room designated for carpet/tile/mastic (the asbestos room) contained between 30 and 50 large bundles of carpet/tile/mastic. BR Pennington at 10; BR Ex. 6; BR Rees 1/14/11 at 10. This is consistent with what Voss told inspector Rees when he admitted he suspected the mastic contained asbestos:

> Voss stated . . . that he suspected that the mastic that adhered the tile to the floor contained asbestos, and he directed the workers, the BNB workers to take tile that had

> been pulled up when the carpet had been stripped up, to wrap that material and seal it in plastic and place it in a storage room, and that he had contacted, he being BNBuilders, had contacted a certified asbestos abatement contractor to remove those materials and dispose of them as asbestos-containing material.

BR Rees 1/12/11 at 40.

Voss treated the materials as asbestos-containing for disposal purposes, but not for purposes of protecting BNB's workers from exposure to asbestos. BR Pennington at 8-10.

4. Samples of the Materials Tested Positive for Asbestos

The Department took samples of the materials bagged and stored in the designated asbestos room, and the State lab found they were positive for asbestos. BR Rees 1/12/11 at 124-27; BR Ex. 27. A survey performed by NVL Labs after the inspection further confirmed that the tile and mastic BNB's workers removed was in fact positive for asbestos. BR Ex. 24.

5. The Workers Also Damaged Presumed Asbestos Containing Material in the Walls

In addition to removing asbestos containing tiles from the floor, the workers also removed cove base and demolished walls. BR Pennington at 20-21, 11-12; BR Weston at 80-82. In demolishing the walls, thermal system insulation was damaged. BR Pennington at 13-14; BR Weston at 81. Inspector Rees observed damaged and deteriorating

asbestos and asbestos debris along the pipe in the walls that had been demolished by BNB when the walls had been opened up. BR Rees 1/12/11 at 130-33. She also observed "chunks of fluffy, dry friable asbestos pipe insulation containing amosite and chrysotile asbestos that had dropped on the floor." BR Rees 1/12/11 at 133.

6. Workers Expressed Concerns to BNB Management, Who Were Present When Asbestos Containing and Presumed Asbestos Containing Material Were Removed

Various members of upper BNB management were present during several days when the workers were removing PACM/ACM. BR Campbell at 104; BR Blake at 4; Ex. 30. At least two BNB employees expressed concerns to at least three members of management about the safety of performing this kind of demolition of PACM. BR Pennington at 8-9, 55; BR Weston at 72–73. Following the complaints to management, one of those employees contacted the Department with his concern; and the Department initiated the inspection at issue. BR Weston at 89.

7. It Is Undisputed That BNB Failed to Comply With the Rules Governing Asbestos Removal

BNB's brief does not dispute that it failed to comply with the asbestos regulations as alleged in the citation. BNB was not a certified asbestos contractor. *See* App's Br. 1-50. Namely, it had no certified asbestos workers onsite. It had no certified asbestos supervisor onsite.

BNB had not notified the Department of intention to perform asbestos work. App's Br. at 43.

Further, it is undisputed that BNB did not perform a negative exposure assessment, pre-abatement, initial, or clearance air monitoring. BR Voss at 24-27. In fact, BNB did not use any asbestos controls at the worksite. App's Br. at 43. It did not require asbestos respirators or full body protective clothing, critical barriers, or saturated removal. BR Weston at 84.

8. BNB Did Not Have an Adequate Respirator Program

For its respirator program for non-asbestos hazards, BNB had only a blank template at the worksite. Ex. 25. The Board made a specific finding that: "The employer's written respiratory protection program was generic in nature, not tailored to the jobsite and the hazard present." BR 8 (Decision and Order, Finding of Fact 24).

B. The Board Found That BNB Violated Asbestos Regulations

After the Department's inspection was complete, the Department issued a citation alleging ten serious and three general violations to BNB. BR Ex 1. Twelve of those violations concern asbestos removal procedures. BR Ex 1. One regards a deficient respirator program. BR Ex 1.

BNB appealed the citation to the Board. An industrial appeals judge issued a proposed decision and order, which affirmed the citations.

BR 44-54. BNB petitioned the three-member Board for review. BR 12-28. The Board granted review and issued a decision that affirmed nine of the serious violations, and all three general violations.[6]

The Board made specific findings of fact noting the facts it relied upon for each violation. BR 5-8. Subsequently, BNB appealed to King County Superior Court. The court affirmed the Board's decision in its entirety. CP 14. This appeal followed. CP 15.

IV. STANDARD OF REVIEW

In a WISHA appeal, this Court directly reviews the Board's decision based on the record before the agency. *Legacy Roofing, Inc. v. Dep't of Labor & Indus.*, 129 Wn. App. 356, 363, 119 P.3d 366 (2005). The Board's findings of fact are conclusive if they are supported by substantial evidence when viewed in light of the record as a whole. *Mowat Constr. Co. v. Dep't of Labor & Indus.*, 148 Wn. App. 920, 925, 201 P.3d 407 (2009); RCW 49.17.150(1). Evidence is substantial if it is sufficient to convince a fair-minded person of the truth of the declared premise. *Mowat Constr. Co.*, 148 Wn. App. at 925. The Board's conclusions of law are reviewed to see if they follow from its findings of fact. *Pilchuck Contractors, Inc. v. Dep't of Labor & Indus.*, 170 Wn. App. 514, 517, 286 P.3d 383 (2012).

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[6] The Board's decision is attached as appendix A.

The Court of Appeals does not weigh evidence or make credibility determinations on appeal. *Greene v. Greene*, 97 Wn. App. 708, 714, 986 P.2d 144 (1999). Likewise, the reviewing court will not substitute its judgment for that of the fact finder even though it may have resolved a factual dispute differently. *Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003).

WISHA statutory provisions and regulations must be interpreted in light of WISHA's stated purpose of ensuring safe and healthful working conditions for all Washington workers. *Elder Demolition, Inc. v. Dep't of Labor and Indus.*, 149 Wn. App. 799, 806, 207 P.3d 453 (2009) (citing RCW 49.17.010). This Court gives substantial weight to the Department's interpretation of WISHA. *See Wash. Cedar & Supply Co. v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 913, 83 P.3d 1012 (2003).

V. ARGUMENT

A. The Legislature Has Recognized That Asbestos Is Inherently Dangerous

The Legislature has ordered the Department to enact asbestos regulations in order to protect workers from asbestos exposure. In RCW 49.26.010, the Legislature expressly recognized that asbestos is an inherently dangerous material, stating:

> Air-borne asbestos dust and particles, such as those from sprayed asbestos slurry, asbestos-coated ventilating ducts,

> and certain other applications of asbestos are known to produce irreversible lung damage and bronchogenic carcinoma. One American of every four dying in urban areas of the United States has asbestos particles or dust in his lungs. The nature of this problem is such as to constitute a hazard to the public health and safety, and should be brought under appropriate regulation.

The Legislature accordingly adopted a comprehensive set of statutory provisions regarding exposure to asbestos. RCW 49.26. Under these statutory provisions, all "construction, renovation, remodeling, maintenance, repair or demolition" projects with a "reasonable possibility of disturbing or releasing asbestos into the air" must be inspected, and all of the precautions mandated by the asbestos regulations must be put into place before any work begins on a project. RCW 49.26.013. Asbestos regulations are implemented and enforced, "including penalties, violations, citations, and other administrative procedures" under WISHA. RCW 49.26.140.

Under this legislative mandate, the Department enacted rules for all occupational exposures to asbestos in all industries covered by RCW 49.17. WAC 296-62-077 through -07755. The fundamental purpose of these regulations is to protect workers from asbestos exposure, which is critical since exposure to asbestos is known to result in serious injury or death. *In re Walkenhauer & Assoc., Inc.*, No. 91 W088, 1993 WL 453604, *3 (Wash. Bd. Indus. Ins. Appeals Sept. 7, 1993). Thus, the

Legislature has recognized the danger of asbestos and the asbestos regulations should be construed to ensure worker safety. *See Inland Foundry Co., v. Dep't of Labor & Indus.,* 106 Wn. App. 333, 336, 24 P.3d 424 (2001).

Here, WAC 296-65-003 establishes that an asbestos abatement project is an asbestos project involving three square feet or three linear feet, or more, of asbestos containing material. This in turn triggers application of several regulations, including WAC 296-65-030, and the other regulations cited in the citation issued to BNB. These regulations should be given effect to further the legislative intent to protect workers.

Asbestos containing material is defined by WAC 296-62-07703: "Asbestos-containing material (ACM) means any material containing more than 1% asbestos." But the term "asbestos" in the standard includes material that is presumed to be asbestos containing. *Id.* Under the asbestos regulatory scheme, it would have been sufficient to prove the Department's violations that the workers were exposed to PACM. WAC 296-62-07721(1)(b) . Unfortunately, the workers in this case were, in fact, exposed to asbestos particles when they ripped up carpet/tile/mastic, removed cove base and mastic, and performed wall demolition. BR Weston 78-81.

The reason this inspection took place was because an employee complained to the Department that employees were being exposed to asbestos. BR Weston at 89. Following the inspection, NVL Labs identified almost all mastic and tile onsite as ACM. BR Ex. 24 at 343-44, 346-47. Department inspector Rees collected samples at the worksite from bags Voss instructed employees to bag, seal, and place in the designated asbestos room. Those samples came back positive for asbestos. BR Rees 1/12/11 at 124-27; BR Ex. 27.

BNB has never denied that it failed to comply with the applicable asbestos regulations. This failure to comply with the asbestos rules caused the worker exposure to ACM that is the basis for the violations at issue in this matter.

As a non-certified asbestos contractor, BNB was not in a good position to be able to deal with asbestos hazards, as evidenced by how BNB mishandled the ACM at the worksite. BR Rees 1/12/11 at 140-42. Accordingly, the Department appropriately cited BNB for serious violations of the asbestos rules.

B. Substantial Evidence Supports Finding That BNB Knew, or Through the Exercise of Reasonable Diligence, Could Have Known of the Violative Conditions For Which BNB Was Cited

Employers are statutorily mandated to comply with all rules and regulations the Department promulgates under WISHA. *Superior Asphalt*

& Concrete Co. v. Dep't of Labor & Indus., 121 Wn. App. 601, 604, 89 P.3d 316 (2004); RCW 49.17.060(2). The Department cited BNB for several serious violations of WISHA. RCW 49.17.180(6) provides that a serious violation exists when there is a substantial probability that death or serious physical harm could result from the employer's practices:

> 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 workplace, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

Case law enumerates the elements the Department must prove in order to make its prima facie case with regard to a serious violation. The Department must demonstrate that:

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

Wash. Cedar & Supply Co., Inc. v. Dep't of Labor & Indus., 119 Wn. App. 914, 83 P.3d 1012 (2003) (quoting *D.A. Collins Constr. Co. v. Sec'y of Labor*, 117 F.3d 691, 694 (2nd Cir. 1997)) (emphasis added).

In applying the above five elements of a serious violation to this matter, with the exception of two violations of the citation discussed

below, BNB disputes only one element. *See* App's Br. at 3-5.[7] BNB contests element four, the requirement for a serious violation that there be actual or constructive knowledge. *See* App's Br. at 3-5.

In fact, most of BNB's argument focuses on the "knowledge" element of a WISHA citation by arguing that, because BNB relied upon the 2007 asbestos survey, it could not have known its actions were hazardous. *E.g.*, App's Br. at 23, 27, 28. This argument fails because, as shown below, BNB had knowledge of the violative conditions occurring at the worksite, and let these conditions to continue for at least ten days until the Department shut the worksite down. BR Rees 1/12/11 at 20-21. Moreover, there are at least five ways that the Department proved knowledge, and any one of them provides substantial evidence to support the Board's findings.

Because the Department only needs to show that "the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition," knowledge can be either actual or constructive. *Wash. Cedar*, 119 Wn. App. at 914; RCW 49.17.180(6). Here, there is

[7] This is with the exception of its claims regarding violations 1-9 and 2-3. *See* App's Br. at 3-5.

substantial evidence that BNB had both actual and constructive knowledge of the violative conditions. [8]

1. BNB Demonstrated Its Actual Knowledge of the Violative Conditions by Treating the Material as Asbestos-Containing

The Board found that BNB had reason to suspect that its employees were working with asbestos. BR 5-8 (Decision and Order, FF 5, 7, 9, 11, 13, 15, 18, 21). These findings are supported by substantial evidence. The conduct by BNB's management demonstrates actual knowledge that the employees were exposed to asbestos. Voss, the foreman/supervisor, was present at the worksite on every day in question. BR Ex. 30. Voss's treatment of the vinyl tile evidences BNB's knowledge that the tiles were not asbestos-free. Two employees testified on separate days that Voss instructed them to bag, seal and segregate any broken tiles because they contained asbestos. BR Pennington at 8-10; BR Weston at 77.

This is consistent with what Voss told inspector Rees when he admitted he suspected the mastic contained asbestos:

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[8] App's. Br. 29-33discusses several state and federal asbestos cases. Because the issue here is a fact specific inquiry whether there is substantial evidence to support the Board's findings, the applicability of these cases to this matter is not at issue. For example, several cases are cited that hold that if an employer exercises "reasonable diligence," there is no "knowledge" of the alleged violation. (e.g., *North American Rockwell Corp.*, 2 BNA OSHC 1710 (1975)). The Department agrees with this statement of the law. However, it begs the question of whether BNB has exercised reasonable diligence in this matter.

> Mr. Voss stated . . . that he suspected that the mastic that adhered the tile to the floor contained asbestos, and he directed the workers, the BNB workers to take tile that had been pulled up when the carpet had been stripped up, to wrap that material and seal it in plastic and place it in a storage room, and that he had contacted, he being BNBuilders, had contacted a certified asbestos abatement contractor to remove those materials and dispose of them as asbestos-containing material.

BR Rees 1/12/11 at 40.

Voss treated the materials as asbestos-containing for disposal purposes, but not for purposes of protecting BNB's workers from exposure to asbestos. BR Pennington at 8-10.

BNB makes a number of arguments about Voss's knowledge, including pointing to his testimony where he claims did not know there was asbestos. *See* App's Br. at 18, 39. BNB argues that the different treatment of the disposal of the tiles was purely a waste sorting exercise for recycling purposes. *See* App's Br. at 18, 39. The flaw in these arguments is that they mistake the standard of review applicable here. BNB asks this Court to reweigh the testimony and accept Voss's version of events, and reject both the consistent testimony of three witnesses (Rees, Pennington, Weston), and the inferences reasonably drawn from the segregation by Voss of the suspected asbestos material into a storage room. But the Court of Appeals does not reweigh the evidence. *See Greene*, 97 Wn. App. at 714. Here, the evidence that Voss suspected there

was asbestos is substantial evidence to support the Board's findings of fact.

BNB focuses on the Board's statement BNB had reason to "suspect" there was asbestos. It then argues that mere "suspicion" is not enough; rather the standard is "knowledge." App's Br. at 32, 34, 36-37. BNB similarly argues it is "undisputed" that it lacked specific knowledge regarding inadequacies in the survey. App's Br. at 37. These arguments are without merit for several reasons.

First, BNB had actual knowledge, not a "mere suspicion" about the asbestos. It was relying on a good faith survey that had major limitations and BNB had rejected recommendations it obtain a more comprehensive survey. BNB apparently adopted a "see no evil" approach that guaranteed it would not know *exactly* where asbestos was located at its worksite, even though it knew about the asbestos' presence. Such conduct cannot be rewarded. Second, BNB employees had complained to BNB management that they were concerned for their safety and thought they were working with asbestos. BR Weston at 72-73, 82, 88. Rather than stopping work or providing protection, BNB's response was to call a meeting with the employees to reassure them that they were safe. BR Ex. 52 at 2. Third, BNB's careful segregation of asbestos containing material evidences far more knowledge than "mere suspicion." The Court of Appeals views the

evidence and all reasonable inferences from the evidence in the light most favorable to the prevailing party. *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006). Certainly, a reasonable inference of knowledge of the asbestos may be drawn by BNB's actions in carefully segregating the asbestos material.

Finally, and perhaps most importantly, RCW 49.17.180(6) requires an employer to exercise reasonable diligence. Here Voss admitted to the inspector that he had reason to believe that there was asbestos present and he admitted to two workers that there was asbestos in the materials, yet work continued on the project. *See* BR Rees 1/12/11; BR Pennington at 8-10; BR Weston at 77. This is not reasonable diligence.

2. BNB Had Knowledge When Its Employees Voiced Concerns About Asbestos

BNB's actual knowledge of the violative conditions is also evidenced by the fact that at least two employees at the worksite complained regarding asbestos exposure to Voss, its foreman. BR Pennington at 8-9, 55; BR Weston at 72-73, 82.

On January 11, 2010, BNB's general superintendent demonstrated management's actual knowledge of asbestos exposure when he wrote notes stating that "there were a lot of concerned people on our approach to

the demolition decided to have a quick meeting with the guys and tell them by no way do we want people exposed to hazards." Ex. 52 at 2.

3. BNB Had Knowledge When It Directed Carpet and Vinyl Tile Removal in Areas Not Covered by the Good Faith Survey

The regulations presume that certain material, like vinyl tile installed before 1980, is ACM unless the employer rebuts that presumption by producing a good faith survey that shows that the pre-1980 vinyl tiles are not asbestos containing. WAC 296-62-07721(1)(b),(10)(a)(ix).[9] BNB inaccurately argues that its 2007 survey rebuts such a presumption. App's Br. at 34. BNB performed work outside of the limitations of the good faith survey. It is not reasonable to rely on a survey for areas it did not cover. BNB claims, without citation to the record, that "The Board found BNB believed the GFS indicated the tiles did not contain asbestos." App's. Br. at 32. It also asserts "The Board found BNB had been reasonably diligent and reasonably believed it was following the GFS." App's Br. at 35. Neither of these statements can

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[9] WAC 296-62-07721(1)(b) provides:

> Asphalt and vinyl flooring installed no later than 1980 also must be treated as asbestos-containing. The employer or building owner may demonstrate that PACM and flooring materials do not contain asbestos by complying with WAC 296-62-07712 (10)(a)(ix).

WAC 296-62-07712(10)(a)(ix) provides:

> Resilient flooring material including associated mastic and backing must be assumed to be asbestos-containing unless an industrial hygienist determines that it is asbestos-free using recognized analytical techniques.

be found in the Board's Decision and Order, and are not inferences that may be drawn under the substantial evidence standard of review.

Moreover, the work site had many different types of tile and mastic. Given this checkerboard pattern, it is not reasonable to assume that if one type of tile or mastic is tested that means that other types are asbestos free. *See* BR Rees 1/12/11 at 38.

When BNB sent workers to rip up a section of carpet that was outside of the scope of the 2007 survey, it had knowledge it was in violation of the asbestos rules. This is because it knew it was working in a building checkered with different kinds of vinyl tile and mastic, some of which had been tested, and some of which had not. *See* BR Rees 1/12/11 at 38. Thus, when it required workers to perform demolition work in areas outside of the limitations of the survey, it acted with knowledge that it was placing employees at risk. Indeed, the Board recognized that information in the survey would lead BNB to know about the presence of asbestos when the Board found that the survey could be used to determine if the material to be demolished contained asbestos. BR 8 (Decision and Order FF 19).

a. The Worksite Had a Checkerboard of Different Tiles and Mastics, Which Was Readily Apparent

BNB argues that, because some types of tile and mastic appeared on the 2007 survey, it was reasonable for BNB to assume that these samples were representative of all of the untested tiles and mastic at the worksite. *E.g.*, App's Br. at 34. BNB's argument fails because the tile and mastic types present at the worksite were not homogenous and those differences were readily apparent to the unaided eye. BR Rees 1/12/11 at 38. Because the differences were readily apparent to the unaided eye, reasonable diligence on BNB's part would lead it to treat the different tile as PACM and not assume they were the same type of tile as tested in the 2007 survey. Because of these easily observable differences, if BNB encountered a different tile or mastic than that covered in the survey, reasonable diligence would lead it to treat the tile as PACM.

The worksite was replete with non-homogenous types of tile. Rees observed over ten different kinds of tile on the main floor alone during her inspection. BR Rees 1/12/11 at 38. These tiles all had different levels of ACM, many over one percent. BR Ex. 24 at 326. Although not friable when intact, these tiles were removed with various tools that caused the tiles to break. BR Weston at 69; BR Pennington 8. "Possible friable materials may include damaged floor tiles." BR Ex. 35 at 2.

Similarly, the mastics that adhered to these non-homogenous tiles to the floor were not all the same kind of mastic. NVL's survey demonstrates this. BR Ex. 24. Again, it was not reasonable for BNB to assume that because one kind of mastic was shown as non-ACM on the 2007 survey, all other kinds of mastic – particularly those adhering different colors and shapes of tiles – was non-ACM. Voss admitted that before lifting up the carpet, he did not know what color tile was underneath. BR Voss at 72. In ordering BNB laborers to rip up carpet and untested tile and mastic, BNB exposed these employees to the dangers associated with asbestos fibers.

b. One Hallway Was Not Tested in the 1945 Wing Therefore It Was Not Reasonable To Work There

BNB worked in the hallways. This alone supports knowledge. *See* BR 3. With respect to establishing BNB's work areas, the Board correctly stated that "As it turns out, it does not matter if BNBuilders removed carpet in the rooms because the work they performed in the hallways is a sufficient basis for affirming the violations related to working on asbestos-containing material without taking the appropriate protective measures." BR 3. It is undisputed that BNB ripped up well over one hundred feet of carpet and tile and mastic in the hallway on the main floor. BR Weston 71. Yet, the 2007 survey only sampled one location in the main floor

hallway, which is located at the far south end of the building. BR Ex. 35 (Table 1 at 3). Further, the 2007 survey did not contain a single carpet/tile/mastic survey for the 1945 wing hallway, with the sole hallway sample at the far end of the south hallway for the 1920 wing. BR Ex. 35 (Table 1 at 3, 4).

Therefore, it was not reasonable for BNB to assume that its hallway demolition was within the scope of the 2007 survey, particularly in light of the presumption that materials before 1980 contain asbestos and the checkerboard of positive asbestos samples in the survey. Additionally, the sole hallway sample was sampled only for vinyl tile, but not asbestos mastic. BR Ex. 35.

This evidence provides substantial evidence of knowledge because BNB knew that once it was working outside of the limitations of the survey, it was potentially exposing employees to asbestos.

c. The Rooms on the Main Level Were Checkered With Asbestos

There are at least 33 rooms on the main level of the building. BR Ex. 35 (map marked "Main Floor," with "Map 1" handwritten in lower right corner (numbering rooms up to M33)). Yet, on the main floor, the 2007 survey sampled vinyl tile from approximately nine locations.[10] BR

Ex. 35 (Table 1 at 3). Of those nine locations, a third came back positive for asbestos. BR Ex. 35 at 4.

BNB's own maps show that BNB did carpet demolition in rooms in which no sample was taken for the 2007 survey. *See* Ex. 64. For example, BNB removed carpet/tile/mastic from M5, M6, M7 even though neither the vinyl tiles nor the mastic had been tested for asbestos. *See* BR Exs. 35, 64. Similarly, no vinyl tile samples were taken from M4, yet workers removed tile there. *See* Ex. 35 (Table 1 at 3, 4) and Ex. 64.

The record is replete with examples of BNB sending workers into rooms that had not been sampled. For example, on the main floor map of Exhibit 35, the room that is second from the farthest south is labeled M5. The 2007 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. 64. On the basis of BNB's work in these rooms alone, the Department has established knowledge.

d. BNB Also Had Knowledge That Demolition Exceeded the Scope of the Survey in the Upper Floor Rooms

There are at least 34 rooms on the upper level. BR Ex. 35 (map marked "Upper Floor" (numbering rooms up to U34). On the upper floor, the 2007 survey sampled vinyl tile or vinyl tile and mastic from seven

locations. BR Ex. 35 (Table 1 at 3, 4). Five locations were tested for vinyl tile, BR Ex. 35 (Table 1 at 3, 4), and two for vinyl tile and mastic. BR Ex. 35 (Table 1 at 3, 4). Of those seven locations, five came back positive for asbestos. BR Ex. 35 at 4. Without a doubt, having knowledge that five out of seven locations contained asbestos gives BNB knowledge that the untested areas contained PACM, if not ACM, given the prevalence of asbestos in the upper rooms.

The 2007 survey also tested mastic only at the far end of the upper south hallway, but it did not test vinyl tiles in the upper hallway. BR Ex 35.

BNB employee Stewart Weston testified that he performed carpet/tile/mastic demolition on three rooms on the upper level. BR Weston at 78-79. On Exhibit 24, Weston drew a box around three rooms and testified that he removed carpet/tile/mastic in those rooms. BR Weston at 78-79. None of these locations was covered by the 2007 survey. BR Ex 35. This evidence is taken as true and shows that BNB had knowledge that it was exposing its workers to asbestos.

4. BNB Had Knowledge When It Saw the Limitations Language in the 2007 Survey and the 2008 Letter Reiterating the 2007 Survey's Limitations

In arguing that it lacked "knowledge," BNB argues throughout its brief that its reliance on the good faith survey should be conclusive

evidence that BNB exercised reasonable diligence in determining whether its specific work activities would disturb asbestos. *See* App's Br. at 32-34. BNB also makes a related argument that 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 the law requiring a GFS." App's Br. at 32. Both arguments are flawed. First, the fact that the Board found that BNB had, in fact, obtained a good faith survey does not give BNB the right to ignore limitations expressed in the survey. Second, in addition to the various colors of mastics and tiles, and the fact that the survey only covered three rooms on the main floor, BNB had actual knowledge of the inadequacy of the 2007 survey. The 2007 survey by Earth Consulting Inc. (ECI) says on its face that the survey contains limitations:

> 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 other inaccessible areas.

Ex. 35 (Section 3.0 "Limitations") (emphasis added).

At issue is whether BNB's demolition of materials was "beneath flooring" as that phrase is used in the limitation quoted above. BNB argues that "beneath flooring" means beneath the subfloor. *See* App's Br. at 13-14. This defies common sense. The limitations in the 2007 survey address any area where ECI would have had to do destructive testing to

access the area. Since the vinyl tile present at the worksite was non-homogenous, it would have been necessary to do destructive testing – to lift up all carpet in order to test all of the vinyl tile beneath the carpet. BR Rees 1/12/11 at 31, 37. But the 2007 survey was explicit that it did not do destructive testing: "Samples of suspect materials were *limited to exposed surfaces and did not include* possible insulated pipe or other ACM located behind walls, above ceilings, *or under floors*." BR Ex. 35 at 2 (emphasis added).

Rees was asked about these limitations, and whether they are "boilerplate," as BNB contends:

> Q. In your experience, what might the reasons be for a good-faith survey having limitations imposed?
> A. Can be a wide variety of reasons. It could be related to the budget of the property owner. It could be that the building may still be occupied. It could be that the property owner does not want holes, pilot holes, broken into the side of the -- the wall structure.... For a roofing sample, for example, they may not want you putting a hole in their roof at that point in time. So it's dependent on a wide variety of things. Most surveys do have some limitations built into them.
> Q. You testified earlier that there were many types of vinyl tile throughout this building. In order to test all of them, would somebody conducting a good-faith survey have to lift up more than a little bit of carpet?
> A. Yes.
> Q. How much carpet would you imagine they -- if you -- if you can estimate, they would have to lift up, in order to examine all those tiles, those different kinds of tiles.

> A. A large quantity of carpet would have to be lifted, to try and examine, and determine what the variety of tile are, remaining.

BR Rees 1/14/11 at 97-98.

BNB also argues that there were holes in the carpet; presumably to show there was testing for asbestos. App's Br. at 14. There is no support in the record for this assertion, and it is mere speculation. There are a myriad of reasons why there may have been holes in the carpets.

In addition to the express limitations in the 2007 survey, Argus provided a 2008 letter that highlighted the inadequacies of the 2007 survey and was attached to the survey. BR Exs. 34 and 35 (Kappers letter). The 2008 letter specifically warns of large amounts of suspect asbestos materials:

> During our sampling activities, we identified a large number of suspect asbestos-containing materials that were not sampled and analyzed during the previous asbestos inspection. Argus recommends that Prescott Homes have a more thorough asbestos inspection conducted prior to demolition in accordance with the requirements for a "good faith inspection" per WAC 296-65(sic). Argus Pacific recommends that the inspection be conducted when the building becomes vacant to allow for destructive sampling, providing a more complete survey.

BR Ex. 34 and 35 (Kappers letter at 6).

Upon reviewing this clause, particularly combined with the limitations clause in the 2007 survey, "a prudent person would stop and say, "What's missing from the survey?" BR Rees 1/12/11 at 37-38.

Apparently recognizing the limitations emphasized by the 2007 survey's "Limitations" section, and the 2008 Kappers letter, BNB solicited bids for a more complete asbestos assessment. BR Carling at 156-57.

One proposal included a complete survey that would cost BNB $4800. A BNB representative testified (during his discovery deposition, though at hearing he attempted to change his testimony), that he had presented the $4800 bid to the building owner, and the owner had not wanted to pay that amount of money. BR Carling at 156-157. So, knowing the risks involved, BNB proceeded without a complete survey.

Thus, BNB's main argument, that it was entitled to rely on the 2007 good faith survey, and that it could infer from the survey it was safe to work in areas not covered by the survey, is without merit. BNB had actual knowledge of the limitations in the survey, and knowingly decided to accept this risk and proceed with the work without an updated survey after being advised of these limitations and the costs of an updated survey.

5. BNB Had Knowledge When Upper Management Visited the Worksite and Saw Vinyl Tile Being Segregated Into a Separate Room for the Asbestos Abatement Contractor

In cases like *BD Roofing*, where workers stood on a roof without fall protection but without management present, it has been necessary for courts to engage in "plain view" analyses in order to find employer knowledge. *BD Roofing, Inc. v. Wash. State Dep't of Labor & Indus.*, 139 Wash. App. 98, 109-110, 161 P.3d 387 (2007); *see also Erection Co., v. Dep't of Labor & Indus.*, 160 Wn. App. 194, 206-07, 248 P.3d 1085, *review denied*, 171 Wn.2d 1033 (2011). Here, not only were BNB's workers working in plain view, they were also working in the presence of upper management and under the daily direction of BNB's supervisor, Voss. BR Pennington at 8-10, Weston at 77. So, again, actual knowledge has been demonstrated.

The testimony of Voss, Blake, and Campbell explaining their day to day conduct at the worksite demonstrates that BNB management was constantly present at the worksite, knew that its employees were encountering asbestos, and saw such readily-observable violations as failure to mandate respirators, protective clothing, saturated removal, prompt cleanup or a site-specific respirator program. Obviously, BNB also knew that it did not have the required asbestos certifications, for

either its workers, supervisors, company, or project. Similarly, BNB knew that it did not conduct required air monitoring. Rather than denying knowledge of these facts, BNB argues that compliance was not necessary. BR Campbell at 136-37.

In addition to Voss's presence, other members of BNB management also regularly visited the worksite. Blake, the general superintendent of the worksite, was present at the worksite on the first day at the worksite, during mobilization. BR Blake at 4; BR Ex. 30. Blake was present on December 31, 2009, when carpet removal was being performed, and he was present on January 11, 2010, when wall demolition was being performed. BR Ex. 30. Campbell, BNB's safety director, was present at the worksite for an asbestos awareness class on December 28, 2009, a day when carpet and baseboard removal was being performed, and when the tile and carpet was being bagged and put in the asbestos room. BR Campbell at 105; BR Ex. 30. Campbell visited the worksite seven times before the Department's inspection. BR Campbell at 104. Campbell testified that Voss "Should have stopped work as soon as tile started coming up." BR Campbell at 112.

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 writes that "*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. Blake's comments are another example of actual knowledge by BNB.

C. Neither the Board nor the Department Inappropriately Impose a Strict Liability Standard; They Merely Require That the Law Be Followed

BNB cites an array of administrative and court decisions addressing citations issued under the federal Occupational Safety and Health Act in support of its argument that strict liability is not required by it. *E.g.*, App.'s Br. 40-42. But there is no evidence that BNB is being held to a strict liability standard. The asbestos regulatory scheme is rigorous. This rigor is commensurate with the hazards associated with asbestos. A Board decision explains this preventive methodology quite clearly:

> [T]he Washington Legislature has consistently weighed-in on the side of caution with respect to worker exposure to airborne asbestos particles. Underlying this caution is the recognition that it is difficult, if not impossible, to accurately determine the level of airborne asbestos particles to which a worker is exposed at any given moment. Given that, our state mandates work practices that may, in some situations, exceed what is required to prevent actual inhalation of airborne asbestos fibers. (sic) Because

> asbestos is a known carcinogen and because the safe level of exposure is unknown, varying from individual to individual, the Legislature has crafted a system in which the Department of Labor and Industries is directed to focus on the methodology of prevention. It has determined that it is more effective to require protective measures based on the kind of operation undertaken, herein asbestos abatement, than it is to rely on suspected safe exposure levels . . . .
>
> Airborne asbestos fibers present a sufficiently serious risk to worker health that it is imperative that employers follow known, preventive methodology with respect to asbestos abatement.

In Re William Dickson Co., Dckt. No. 99 W0381, 2001 WL 1755614, 1755615 (Bd. of Ind. Ins. Appeals 2001).

The above discussion demonstrates that substantial evidence shows at least five different ways in which BNB either had constructive or actual knowledge that it was exposing its employees to asbestos. This Court should affirm the Board's decision that the Department proved knowledge by BNB in this case.

D. Substantial Evidence Supports the Board's Findings That BNB Failed to Comply With the "Clean Up Asbestos" and Respiratory Program Regulations

With the exception of violations 1-9 and 2-3, BNB's only argument relating to the validity of the violations is its argument that the Department cannot prove the "knowledge" element of its burden of proving a serious violation of RCW 49.17. Therefore, only violations 1-9 and 2-3 are discussed below.

Violation 1-9 involves WAC 296-62-07712(2)(d), which requires: "Prompt cleanup and disposal of wastes and debris contaminated with asbestos in leak-tight containers." BNB argues at App's Br. at 43-44, that there "was no evidence" BNB created the debris or was aware of its existence. However, in addition to removing asbestos containing tiles from the floor, the workers also removed cove base and demolished walls. BR Pennington at 20-21, 11-12; BR Weston at 80-82. In demolishing the walls, thermal system insulation was damaged. BR Pennington at 13-14; BR Weston at 81. It is undisputed that inspector Rees observed damaged and deteriorating asbestos and asbestos debris along the pipe in the walls that had been demolished by BNB when the walls had been opened up. BR Rees 1/12/11 at 133. She also observed "chunks of fluffy, dry friable asbestos pipe insulation containing amosite and chrysotile asbestos that had dropped on the floor." BR Rees 1/12/11 at 133. Thus, there is substantial evidence that BNB created the debris, and these conditions violate WAC 296-62-07712(2)(d).

BNB also makes a circular argument that, because it is not a certified asbestos contractor, it would have somehow been worse if it had cleaned up the asbestos debris rather than leaving it on the floor. App's Br. at 42-43. BNB does not cite any authority that, once it illegally removes or disturbs asbestos, it is free to expose its employees to asbestos

because it is not certified to properly clean it up. The Court should disregard this unsupported argument. *See* RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *Joy v. Dep't of Labor & Indus.*, 170 Wn. App. 614, 629, 285 P.3d 187 (2012), *review denied*, 176 Wn.2d 1021 (2013). Therefore, substantial evidence supports the Board's finding that BNB violated WAC 296-62-07712(2)(d) and properly affirmed Violation 1-9.

Violation 2-3 involves WAC 296-842-12005(1), a general violation with no penalty, which requires employers to: "Develop a complete worksite-specific written respiratory protection program . . . ." By being site-specific, an adequate respiratory program sets forth in one place the various hazards found at a particular worksite and the various forms of respiratory protection intended to prevent exposure to those hazards.

There is no question that the worksite was dusty. BR Weston 73, 84; BR Voss 20, 53. Common sense and substantial evidence supports the argument that the respiratory protection program BNB had onsite was not specifically tailored to the worksite because it was a blank template that had not been filled out. BR Ex. 25; BR Campbell at 118-19. Thus, no information about the worksite was in the document. BNB's argument is

that a multitude of documents taken as a whole satisfies the regulatory requirement for a respiratory protection program. App's Br. at 44-45.

This argument fails because Weston, who complained of the dust and lack of respirator, had never ever seen any of the site specific documents that supposedly made up the "program." BR Weston at 85. Also, one purpose of a respiratory protection program is so that workers can go to one document to find out what kind of respiratory protection they should be using. Additionally, BNB failed to have a written respiratory program that addressed the non-asbestos hazards at the worksite, such as lead, nuisance dust, and silica. BR Rees 1/14/11 at 14-15; BR Weston at 85. Accordingly, substantial evidence supports the Board's finding that BNB violated WAC 296-842-12005 and therefore properly affirmed Violation 2-3 as a general violation with no penalty.

E. The Department Did Not Abuse Its Discretion in Assessing Penalties for the Serious Violations in the Citation

The Department has the statutory power to assess civil penalties. RCW 49.17.180. These assessments are guided by WAC and by policy. *See* WAC 296-900-14005 through -14020. The Department's assessment of WISHA penalties is reviewed for abuse of discretion. *Danzer v. Dep't of Labor & Indus.*, 104 Wn. App. 307, 327, 16 P.3d 35 (2006) ("We review the penalty amount for abuse of discretion."). Here, the

Department's assessments are not arbitrary, and do not rest on "untenable grounds or untenable reasons." *Danzer*, 106 Wn. App. at 327.

BNB argues that the 20 percent penalty increase due to the lack of "good faith" by BNB was inappropriate. App's Br. at 46-49. BNB's lack of good faith is evidenced in multiple places in the above discussions of "knowledge." For example, its decision to continue to expose employees to asbestos despite two employees complaining to management, and its decision to rely on a limited good faith survey after receiving recommendations that a more complete asbestos survey be undertaken.

Additionally, BNB was uncooperative during the inspection because it provided incorrect or evasive information to the Department. BR Rees 1/12/11 at 44-45. For example, Voss initially reported that respirators were being worn during carpet removal, but later admitted that respirators were not provided until the end. BR Rees 1/12/11 at 45. Voss and Campbell changed their stories regarding who took the additional asbestos samples at the worksite. BR Rees 1/12/11 at 45. Voss misrepresented, and then later corrected, the amount of tile that was removed at the worksite. BR Rees 1/12/11 at 45. The Board correctly found based on this record that BNB had poor faith. BR 8 (Finding of Fact 18). The penalty assessments are not arbitrary, and do not rest on

"untenable grounds or untenable reasons." Therefore, substantial evidence supports the Board's findings.

VI. CONCLUSION

It is uncontested that BNB was inspected because one of its employees complained to the Department about exposure to asbestos. Yet, BNB asks this Court to find that it lacked "knowledge" it was exposing its employees to asbestos. The Board and the superior court have both rejected BNB's arguments. There is substantial evidence supporting the Board's factual findings. Therefore, the Department requests that this Court deny BNB's appeal and uphold the Board's decision.

RESPECTFULLY SUBMITTED this 8th day of November, 2013.

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