NO. 99620-2

SUPREME COURT OF THE STATE OF WASHINGTON

NORTHWEST ABATEMENT SERVICES, INC.,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This is a factual case that presents no legal issues meriting review. A routine review of work place safety and health citations for substantial evidence does not present a conflict with court decisions or involve an issue of substantial public interest, despite Northwest Abatement Services, Inc.'s suggestions to the contrary. The Board of Industrial Insurance Appeals found that Northwest Abatement failed to follow workplace safety rules during an asbestos roof removal project in Tacoma, including fall protection standards, flagging requirements, and procedures for mitigating asbestos risk. The Court of Appeals applied well-settled safety and health case law to the record to hold Northwest Abatement responsible for the 19 violations of workplace safety it committed. *Northwest Abatement v. Dep't of Labor & Indus.*, No. 53439-8-II, 2021 WL 798930 (Wash. Ct. App. March 2, 2021) (unpublished decision).

Northwest Abatement's arguments mainly rest on its attempts to have this Court review the facts. To claim legal error despite the plain factual nature of this case, Northwest Abatement claims that this decision and other Court of Appeals' decisions conflict with *Adkins v. Aluminum Co. of America*, 110 Wn.2d 128, 750 P.2d 1257 (1988). But the Court of Appeals' decision does not conflict with *Adkins* in any way; instead, the Court applied the zone of danger standard for establishing the employee

exposure element of a safety violation that *Adkins* adopted to the facts of the case. Northwest Abatement's other conflict arguments are baseless and do not show any basis for review, while its arguments regarding the facts of the case depend on misstatements of fact, or assertions contrary to the record. Substantial evidence supports the Court of Appeals' decision, and there is no issue of substantial public interest meriting review. This Court should deny the petition for review.

II. ISSUES

1. *Adkins v. Aluminum Company of America*, 110 Wn.2d 128, 750 P.2d 1257 (1988), adopted the zone of danger standard. The Court of Appeals in *Mid Mountain Contractors, Inc. v. Department of Labor & Industries*, 136 Wn. App. 1, 146 P.3d 1212 (2006), and in this case, applied the zone of danger standard from *Adkins* to the facts of the cases presented. Does that create a conflict justifying review?

2. In *Pilchuck Contractors, Inc. v. Department of Labor & Industries*, 170 Wn. App. 514, 286 P.3d 383 (2012), the Court of Appeals applied the flagging rule, WAC 296-155-305, and seeing that "temporary traffic control" was undefined by the rule, it adopted the Manual on Uniform Traffic Control Devices (MUTCD) definition, which described "flagging procedures as stopping, directing, slowing, and alerting traffic." Here, the Court of Appeals applied the same analytical framework to similar, but not identical facts. Does that create a conflict justifying review?

3. Does substantial evidence support the finding that Northwest Abatement violated the fall protection regulation when a worker worked by an unguarded chute without any fall protection?

4. Does substantial evidence support that a worker acted as a flagger when he was not certified as a flagger and directed traffic in a bus lane?

5. Does substantial evidence support the Board's finding that Northwest Abatement exposed its employees to work place hazards when the workers had access to the hazards?

III. STATEMENT OF THE CASE

The Court should disregard Northwest Abatement's statement of the case as it is presented in the light most favorable to it (contrary to substantial evidence principles) and it lacks proper record citation to the administrative record and clerk's papers. *See Matter of Estate of Lint*, 135 Wn.2d 518, 531-32, 957 P.2d 755 (1998) ("an appellant's brief is insufficient if it merely contains a recitation of the facts in the light most favorable to the appellant even if it contains a sprinkling of citations to the record throughout the factual recitation); RAP 9.1; RAP 10.3(a)(5).

A. The Department's Industrial Hygienist Observed Several Work Place Safety Violations About Asbestos

Northwest Abatement is an asbestos removal company hired for the sole purpose of removing asbestos-containing roofing materials at a "built-up" rooftop replacement project located at 955 Tacoma Ave S, Tacoma, WA. *See* CP 549, 551, 1051, 1127. The roof it worked on consisted of 13 layers of roofing material, including multiple layers of black asphaltic material containing asbestos. CP 725; CP 1267. The top eleven layers were asphaltic material and the bottom two layers of "brown fibrous material." CP 552, 1267. The workers used mechanized saws and

hand tools to break the asphaltic materials into moveable pieces. CP 551-52, 615. The asphaltic layers generally adhered together so were removed together, leaving the crumbly "brown fibrous material" containing "Filler, Perlite" and "Cellulose," which was pulled up separately. *See* CP 574; CP 1267.

Department Industrial Hygienist Lisa Van Loo also inspected the site and observed numerous violations of safety standards, some of which were confirmed by testimony by the workers at the jobsite. CP 619, 964-65 (no decontamination area); CP 569-70, 620 (workers doffed their suits just outside the protection barrier); CP 620, 969-71 (no HEPA vacuum on the roof available for employees); CP 620-21 (workers were not saturating the materials being removed with water); CP 537 (tear in protective Tyvek suit); CP 979-81 (respirator fit test cards inaccurate). Contrary to Northwest Abatement's claims, Inspector Van Loo witnessed removal of asbestos-containing materials without the required protective gear. *E.g.*, CP 541, 1025. For example, she watched workers scraping along the edges

of the asphaltic layers, which loosens the asbestos fibers. CP 541; CP 1025.[1]

B. Department Employees Witnessed Fall Protection Violations

Andrew Baga, a Department employee, witnessed workers working on a roof close to the edge without fall protection through his office window while working at his desk at Tacoma's L&I office. CP 763-64. Maili Jonkman, a DOSH compliance inspector went to the jobsite with Baga to open an inspection. CP 769-70. When they approached the job site, Inspector Jonkman witnessed Richard Crakes, a Northwest Abatement employee, standing in front of the unguarded chute area without fall protection. CP 880-84; *see also* CP 842-43 (Crakes confirms violation), 1090-91 (photos of Crakes without fall protection). The chute was used to remove materials from the roof. CP 559.

Inspector Jonkman took several photographs of Crakes' exposure to the fall hazard. CP 1090-91. Baga and Inspector Jonkman also saw a worker use the chute to dispose of the roofing materials. CP 881-82.

[1] As Inspector Van Loo explained in her testimony, when Northwest Abatement's workers "were initially cutting the material, they used the roof saw, and they made what's called a cut line and then removed the roofing in sections. When [she] arrived, they had removed several layers down. How many, [she] did not know, but the cut line was observable. And in order for them to establish that there is no asbestos exposure [they] would have to, then, seal off that cut line in some fashion or encapsulate all along that cut line, and that had not taken place." CP 1024.

During the course of her investigation, Inspector Jonkman also saw another Northwest Abatement worker, who she later learned was Doug Murphy, performing flagging duties. CP 889-90. He was standing in an active bus lane with a stop paddle as Northwest Abatement's truck removed the dumpster. CP 890; *see also* CP 621-622. He was not wearing the required high-visibility vest or hardhat, and no warning signage for flagging had been posted. CP 905-06, 1097. He also did not have a flagger's card, which indicates that he had not been trained how to be a flagger. CP 891.

C. The Board Affirmed Citation Items and the Superior Court Affirmed the Board's Order

Ultimately, the Department issued two citations, including multiple violations as part of the safety and hygiene inspections. CP 474-489. Northwest Abatement appealed to the Board. CP 380.

The industrial appeals judge issued a detailed decision addressing both citations, which affirmed all the violations except two. CP 128-62. Northwest Abatement petitioned the Board for review. The Board granted review to adjust the penalty calculations, but otherwise reached the same result as the proposed order in its final decision and order. CP 40-56. Northwest Abatement appealed to superior court. CP 3-5.

The superior court affirmed the Board. CP 1648-59. The court reasoned that substantial evidence supported each of the violations and it adopted the Board's analysis. CP 1648-59. In an unpublished decision, the Court of Appeals affirmed the Board's order. *Northwest Abatement Services, Inc. v. Dep't of Labor & Indus.*, No. 53439-8-II, 2021 WL 798930 (Wash. Ct. App. Mar. 2, 2021) (slip op.) It rejected Northwest Abatement's arguments and likewise concluded that substantial evidence supported the Board's order. Slip op. at 1.

IV. ARGUMENT

The Washington Industrial Safety & Health Act (WISHA) is designed to protect workers from work place hazards like falls, injuries from vehicles while flagging, and asbestos exposure. This case presents a routine application of well-established WISHA law to the facts, so review is not merited. The Court of Appeals relied on established principles and thus further analysis on the issues raised in the petition will provide no meaningful guidance for other parties.

Northwest Abatement raises four arguments as to why review should be granted, but none justify review. First, Northwest Abatement's claim that the Court of Appeals' application of the zone of danger standard is inconsistent with Supreme Court precedent is without merit. Pet. 9 (citing *Adkins*, 110 Wn.2d 128). *Adkins* adopted the zone of danger

standard and, like many other Court of Appeal decisions, the Court here simply applied it to the facts of the case. Second, Northwest Abatement attempts to apply the wrong legal standard for showing a fall-protection violation—claiming a 6-foot standard from an inapplicable rule applies—but the Court of Appeals correctly rejected this approach, and substantial evidence shows the worker was exposed to a fall hazard in any case. Third, Northwest Abatement's claim that treating a worker holding a stop-and-slow paddle in an active bus lane as engaged in "temporary traffic control" is inconsistent with the flagging rules is nonsensical, and the case it cites, *Pilchuck Contractors, Inc. v. Department of Labor & Industries*, 170 Wn. App. 514, 286 P.3d 383 (2012), does not conflict with the decision here. Instead, that case only supports the Court of Appeals' reading of the rule. Finally, none of Northwest Abatement's demands to reweigh the evidence that shows it exposed its employees to asbestos, or any of the other safety violations, supports granting review. Allowing the Department to require employers to follow the asbestos protocols and other safety rules meant to keep workers from serious injury or death does not raise any issue of substantial public importance. This Court should deny review.

A. Review is Not Warranted to Reconsider Well-Established Law Applying WISHA's Exposure Element Because the Court of Appeals' Decisions are Consistent with *Adkins* and Further WISHA's Legislative Goals to Protect Workers from Injury

Northwest Abatement's suggestion that the Court of Appeals' exposure analysis here, and in prior cases, is inconsistent with *Adkins* lacks merit, so it provides no basis for review.

Following *Adkins*, the Courts of Appeals have developed a body of case law around the employee exposure element that furthers the Legislature's intent "to assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington." RCW 49.17.010; *Shimmick Constr. Co. v. Dep't of Labor & Indus*., 12 Wn. App. 2d 770, 785–86, 460 P.3d 192 (2020); *Mid Mountain Contractors, Inc. v. Dep't of Labor & Indus.*, 136 Wn. App. 1, 5–7, 146 P.3d 1212 (2006) (citing *Adkins*, 110 Wn.2d at 131-32, 148). The Court of Appeals' consistent approach to exposure follows from the general principle in *Adkins* that the Department may establish exposure by showing "access to the violative conditions." 110 Wn.2d at 147.

In *Adkins*, the Court applied WISHA standards to a negligence case to conclude that a worker has neither exposure nor access to a violative working condition when the worker "consciously and deliberately" removed a protective barrier to reach the violative condition.

110 Wn.2d at 148. Under those circumstances, the Court concluded that it was not "a *reasonable predictability* that, in the course of their duties" the worker would have been in the zone of danger. 110 Wn.2d at 147. Northwest Abatement's complaint that the Court of Appeals here did not follow *Adkins*'s analysis is misplaced. The type of conduct at issue in this case is simply not the same. Here, the workers were all engaged in tasks assigned by their employer at the worksite that resulted in the violations: they removed asbestos containing materials from the roof surface using mechanized saws and hand tools (the asbestos violations), they transported asbestos-containing waste materials to a chute using a wheelbarrow (the fall protection violation), and they used a stop-slow paddle to warn traffic that the truck was backing in-and-out of the worksite (flagging violations). CP 551-52, 615, 621, 880-84, 890, 1047.

Nothing in the Court of Appeals' analysis here or in prior cases is inconsistent with *Adkins*. Since *Adkins*, the Courts of Appeals have developed a sensible and consistent approach to the exposure element based on *Adkins* and the federal OSHA cases addressing exposure. The courts have recognized that, to prove an employer exposed a worker to a hazard in violation of WISHA, the Department may show the worker was in the zone of danger covered by the regulation. *Shimmick*, 12 Wn. App. 2d at 785–86 (citing *Wash. Cedar & Supply., Inc. v. Dept. of Labor &*

Indus., 119 Wn. App. 906, 914, 83 P.3d 1012, (2003)). Or the Department may show that the worker had *access* to the zone of danger by being near it. *Mid Mountain Contractors, Inc. v. Dep't of Labor & Indus.*, 136 Wn. App. 1, 5–7, 146 P.3d 1212 (2006). The Court of Appeals applied that well-reasoned analysis here. Slip op. at 7-8. Northwest's Abatement other complaints are without basis.

First, Northwest Abatement suggests that the *Adkins* Court's language is "limited to the context of an unguarded machine with a dangerous fan." Pet. 12. It is right that the "reasonable predictability" analysis is limited because the Court merely found that the federal courts' "reasonable predictability" analysis was helpful in analyzing the facts of that case. 110 Wn.2d at 147. But in looking at the "reasonable predictability" analysis, *Adkins* also recognized and reasoned that exposure can be established if "employees will be, are, or have been in the zone of danger." *Id*. It is this broader analysis that provides the framework for analyzing employee exposure for WISHA.

Northwest Abatement complains that the Courts of Appeals have expanded *Adkins*' analysis, creating conflict. It is wrong. The Supreme Court jurisprudence does not require that the Department show exposure to a "hazard" rather than exposure to a "violative condition." *Contra* Pet. 16 ("clearly demonstrates the requirement that a hazard exist, not merely a

violative condition."). This Court has already recognized that "if the violation concerns a specific standard, it is not necessary to *even* prove that a hazard exists, just that the specific standard was violated." *Supervalu v. Dep't of Labor & Indus.*, 158 Wn.2d 422, 434, 144 P.3d 1160 (2006) (citing *Lee Way Motor Freight, Inc. v. Sec'y of Labor*, 511 F.2d 864, 869 (10th Cir.1975) (emphasis in original). In other words, the Department need only show exposure to the violative condition rather than to a "hazard." But, in any case, Northwest Abatement's quibbles are inconsequential. The Court of Appeals found that substantial evidence supports the findings of exposure to the hazard for each of the violations. Slip op. at 10 ("We conclude that substantial evidence supports the Board's determination that flagging violations 2-1, 2-2, and 2-3 exposed Murphy to a *hazard*") (emphasis added); slip op. at 8 ("DLI presented substantial evidence that supported the finding that a fall protection violation exposed Crakes to *a hazard*.") (emphasis added); slip op. at 10 ("Northwest Abatement argues that substantial evidence does not support the Board's determination that Northwest Abatement's employees were exposed to asbestos *hazards*. We disagree.") (emphasis added).

Contrary to Northwest Abatement's suggestion, the *Shimmick* Court and the Court of Appeals here also applied the correct standards from *Adkins* and *Mid Mountain*. The *Shimmick* Court and the Court of

Appeals here merely considered a federal case in refuting the employers' "misapprehension of the meaning of 'zone of danger'" and there is nothing wrong with looking at federal OSHA cases when presented with a similar fact pattern. *Shimmick*, 12 Wn. App. 2d at 785.[2]

Finally, *Adkins* did not set a blackletter rule that the zone of danger must always be in the workers' "normal areas of work." *Contra* Pet. at 12-13. And suggesting that workers hired to remove an asbestos roof were not in their normal work area when all the violations occurred in places that were designated by the employer defies common sense. In *Adkins*, the Court found no exposure because the fan was out of the way and not within a worker's normal routine, while here the Department observed workers doing their normal routine and being exposed to the fall hazard. The Court of Appeals correctly concluded that the Department showed actual exposure or access exposure to all the hazards identified under well-established appellate cases addressing exposure. There is no basis for review under RAP 13(b)(1) here.

[2] In interpreting WISHA, courts look to federal decisions under the federal Occupational Safety & Health Act (OSHA). *Asplundh Tree Expert Co. v. Dep't of Labor & Indus.*, 145 Wn. App. 52, 60, 185 P.3d 646 (2008).

B. Review Need Not Be Granted to Reconsider the Interpretation of the Flagging Rules Because Substantial Evidence Shows the Worker Was Engaged in Temporary Traffic Control

Northwest Abatement claims Murphy was "spotting" rather than flagging, but substantial evidence (and common sense) defeat this claim under the definition of flagger. Pet. 1. WAC 296-155-305 sets forth requirements for flagging: "[a] flagger is a person who provides temporary traffic control." Substantial evidence supports that there was temporary traffic control.

First, the project scope specifically states that Northwest Abatement's employees will need to "flag for [the Northwest Abatement truck driver] to place can," which is what Murphy was doing. CP 1127; CP 890. The photograph in Exhibit 1 shows Northwest Abatement worker Douglas Murphy "standing in the road with a stop/slow sign. The stop is towards oncoming traffic." CP 890, 1097. Also, Murphy explained that he was there because that "was right where the bus came in and our container truck had to go against traffic and back into our disposal site." CP 621. He was present "to hold up a stop sign so nobody would run into him when he was pulling into the job site . . . ." CP 621. This is "temporary traffic control" under the flagging rule. *See* WAC 296-155-305.

Northwest Abatement's claim that the Court of Appeals decision here is inconsistent with *Pilchuck* is spurious. As in *Pilchuck*, the Court of

Appeals looked at WAC 296-155-305 and seeing that "temporary traffic control" was undefined by the rule, it used *Pilchuck*'s approach of adopting the Manual on Uniform Traffic Control Devices (MUTCD) definition, which described "flagging procedures as stopping, directing, slowing, and alerting traffic." Slip op. at 8; *Pilchuck*, 170 Wn. App. at 519. Just like in *Pilchuck*, the traffic control plan required flaggers (CP 949-50), yet both the employers in *Pilchuck* and in *Northwest Abatement* claim they weren't engaged in flagging. And both the *Pilchuck* Court and the Court of Appeals here refused to read all meaning out of the definition of "temporary traffic control" to allow the employer to escape responsibility for its safety failings. It is not a "substantial extension" of *Pilchuck* to treat a worker using a stop-slow sign in a bus lane as a flagger. Pet. 17. It's simply a correct application of the flagging rules to the facts of this case.

C. Review is Not Warranted to Reweigh the Evidence in a Substantial Evidence Case

Northwest Abatement's remaining arguments are simply a request for this Court to reweigh the Board's factual determinations after the superior court and Court of Appeals rejected Northwest Abatement's improper request to do so. There is no reason to grant review to consider these arguments for a third time.

First, the Court of Appeals correctly recognized that the Department presented substantial evidence that supported the finding that a fall protection violation exposed one of Northwest Abatement's workers to a fall hazard because he was standing "in front of an *unguarded chute* on top of the roof without fall protection," based on the eye-witness testimony and photographs of the violation. Slip op. at 7-8. Northwest Abatement's suggestion that the Department's citation was based primarily on the testimony of Andrew Baga, that the Department couldn't determine how close the worker was to the edge, and that the unprotected worker testified he didn't remember dumping the materials are all unsupported. Pet. 4. Northwest Abatement's employees confirmed that they "were loading out down the chute without being tied off," while the safety railing was incomplete. CP 618. The Department's inspector provided testimony regarding her observations of the lack of fall restraint protection on either side of the chute, which posed a fall hazard to someone standing near the chute. Slip op. at 8; CP 880-84; *see also* CP 1090-91.[3] The inspector photographed the worker standing on the flat roof *directly* in front of the unguarded chute area without fall protection, and as

[3] The chute led several stories down to the street level and a fall down the chute could result in serious injury or death. CP 880-84.

the Court of Appeals recognized, the worker depicted in the photograph confirmed the exposure. CP 1090-91; slip op. at 8; *see also* CP 880-84;

Second, substantial evidence supports that Northwest Abatement's flagger was in the zone of danger when he was committing the flagging violations. CP 46-47 (FOF 10, 12, 14); *Mid Mountain*, 136 Wn. App. at 6. Northwest Abatement's claim that the location he "was standing was closed due to the construction activities" is false. Pet. 16. Inspector Jonkman testified he was in an active bus lane where he could be injured by a bus. CP 889-90; CP 891 ("That particular location is a combination of the through traffic and the bus stop"). The worker also testified he was at an active bus stop. CP 635-36. Although the duration of traffic control was short, it was part of the regular work pattern at the work site because Northwest Abatement workers removed materials twice a day during the course of the project. *Contra* Pet. 5.[4] Murphy reported that "[they did] it every time the truck came in and out," which would have been a once or twice per day. CP 622. As the Board recognized, the foreman testified: "I think we were given that sign to keep people from driving in, because there was people that would come and drop people off on the corner there while we were trying to do what we were doing." CP 597; CP 41. These

[4] WISHA penalties take into consideration the duration of an event by reducing the penalty based on the probability of harm. *See* WAC 296-900-140. But in any event Northwest Abatement does not challenge the penalty calculations here.

facts establish exposure. *Mid Mountain,* 136 Wn. App. at 6. Northwest Abatement asserts that there was no exposure because there was no bus present at the time of the inspection. Pet. 16. But the exposure analysis turns on the potential for exposure to a hazard. *See Potelco, Inc. v. Dep't of Labor & Indus.*, 191 Wn. App. 9, 27, 361 P.3d 767 (2015). What Northwest Abatement is really contesting is the likelihood of exposure—but this goes to a different element under calculation of a penalty. *See* WAC 296-900-140.

Finally, Northwest Abatement's claim that there was no asbestos on-site at the time of inspection and that the Department submitted no objective evidence showing asbestos exposure are unsupported. Pet. 16-18. Substantial evidence supports that asbestos was on-site at the time of inspection because the good faith inspection sample report shows there was asbestos present. CP 1024, 1267. Northwest Abatement's claim that all the asbestos containing materials were removed before the Department investigator observed its violations is patently false. Pet. 18. The roof was removed in sections and when the Department started its investigation the Northwest Abatement workers had not removed all the asphaltic materials because it had removed asphalt from only a quarter of the roof. CP 616. And, the workers were actively scraping along the asphaltic edges of the

next section, so the site was not free of asbestos containing materials as Northwest Abatement asserts. CP 541, 1025.

The Board and Court of Appeals correctly relied on the good faith inspection sample report to establish that asbestos was present. CP 1267; CP 9-20. And Northwest Abatement's claims to contrary are no basis for review.

V. CONCLUSION

For the above reasons, this Court should deny review.

RESPECTFULLY SUBMITTED this 8th day of June, 2021.

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