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**NO. 53439-8-II**

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**IN THE COURT OF APPEALS, DIVISION II  
THE STATE OF WASHINGTON**

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NORTHWEST ABATEMENT SERVICES INC.,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF  
THE STATE OF WASHINGTON,

Respondent.

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**OPENING BRIEF OF APPELLANT  
NORTHWEST ABATEMENT SERVICES, INC.**

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## I. INTRODUCTION

On October 24, 2016, the Respondent, Department of Labor and Industries (“Department”), issued one repeat serious, three serious, and three general violations against the Petitioner, Northwest Abatement Services, Inc. (“Northwest Abatement”) in Citation and Notice Number 317941556 for alleged fall protection, flagging, and traffic control violations of the Washington Industrial Safety and Health Act (“WISHA”). (CABR 436-43).<sup>1</sup> On January 19, 2017, the Department issued Corrective Notice of Redetermination Number 317941556, which affirmed the violations. (CABR 431-35). Northwest Abatement timely appealed the Corrective Notice of Redetermination Number 317941556 to the Board. (CABR 414-15).

On January 6, 2017, the Department issued thirteen serious violations and one repeat general violation against Northwest Abatement in Citation and Notice Number 317941568 for alleged asbestos violations of WISHA. (CABR 445-457). Northwest Abatement timely appealed the Citation to the Department (CABR 308). On January 26, 2017, the Department decided not to reassume jurisdiction of the appeal and, as such, the appeal was sent directly to the Board. (CABR 306-07).

Citation and Notice Number 317941568 and Corrective Notice of Redetermination Number 317941556 were consolidated for hearings at the Board. (CABR 292-294). After hearings were held on August 7, 2017,

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<sup>1</sup> The Certified Appeal Board Record (CABR) is referenced in the Clerk’s Papers. References throughout this brief will be contained in the CABR. The Transcripts are referenced and supplemented to the CABR. Hereinafter transcripts will be referred to by “Tr.” with the date and page number(s).

August 8, 2017, August 9, 2017, Industrial Appeals Judge Leslie Birnbaum (“IAJ”) issued a Proposed Decision and Order affirming Corrective Notice of Redetermination No. 317941556 and affirming as modified Citation and Notice Number 317941568, which vacated Violation 1-1a and Violation 1-10 and affirmed the remaining violations. (CABR 49-83). The repeat general violation was withdrawn. (CABR 49).

Northwest Abatement filed a timely Petition for Review of the IAJ’s Proposed Decision and Order. (CABR 24-46). On January 29, 2018, the Board issued an Order Granting Petition for Review. (CABR 23). Thereafter, on March 14, 2018, the Board issued a Decision and Order that affirmed as modified Corrective Notice of Redetermination Number 317941556, by reducing the penalty of Violation 1-1 and affirming the remaining violations; as well as, affirming as modified Citation and Notice Number 317941568, by vacating Violation 1-1a and Violation 1-10 and affirming the remaining violations. (CABR 2-20).

Northwest Abatement timely appealed the Board’s Decision and Order to Superior Court. After oral argument on October 26, 2018, the Superior Court issued its Findings of Fact, Conclusions of Law, and Judgment affirming the Board’s Decision and Order on May 22, 2019.

Northwest Abatement timely appealed the Superior Court’s Findings of Fact, Conclusions of Law, and Judgment to this Court because the Board’s Decision and Order is not supported by substantial evidence and the law.

## II. ASSIGNMENTS OF ERROR

Northwest Abatement respectfully asserts that the Board and Superior Court erred as follows:

1. In affirming any of the cited violations and the penalties in Corrective Notice of Redetermination Number 317941556 and Citation and Notice Number 317941568 because the cited violations are not supported by substantial evidence and the applicable law<sup>2</sup>;
2. In making Fact Numbers 3 through 4; 6 through 31; 34 through 55; and 59 through 60, as to the issue of prima facie burden of the Department and the affirmative defense of unpreventable employee misconduct;
3. In making Conclusions of Law Numbers 2 through 9; 11 through 21; and 24, as to the issue of prima facie burden of the Department and the affirmative defense of unpreventable employee misconduct; and
4. Northwest Abatement excepts to and petitions for review all evidentiary rulings adverse to Northwest Abatement.

## III. ISSUES

- A. **Is the Board's Decision and Order supported by substantial evidence and the law when the Department failed to establish employee exposure to any alleged flagging violations, fall protections violations, or asbestos violations?**

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<sup>2</sup> The Board vacated Violation 1-1a and Violation 1-10 contained in Citation and Notice No. 317941568, and Northwest Abatement assigns no error to those findings and conclusions. (CABR 4-20).

- B. Is the Board's Decision and Order supported by substantial evidence and the law when the Department failed to establish Employer knowledge of any of the alleged serious violations per RCW 49.17.180(6)?**
- C. Alternatively, is the Board's Decision and Order supported by substantial evidence and the law when Northwest Abatement met its affirmative defense of unpreventable employee misconduct when Northwest Abatement demonstrated specific training instructions that its workers failed to comply with despite Northwest Abatement's supervision over the inspection site?**

#### **IV. STATEMENT OF FACTS**

On July 26, 2016, Northwest Abatement was engaging in a roof tear off job, consisting of approximately 12,000 square feet, at 955 Tacoma Avenue South, in Tacoma, Washington. (Tr. 8/7/17, p. 18; Tr. 8/8/17, p. 8). The core sample taken from the jobsite established the presence of asbestos; namely, there was Chrysotile, described as black asphaltic fibrous materials, within five of the thirteen roof layers. (Exhibit 2, page 2). There was a brown, non-asbestos containing fibrous material underneath at the bottom layers. (Tr. 8/8/17, p. 31; Exhibit 2, page 2). Because the project involved Class II asbestos material, Northwest Abatement was hired to remove the roofing materials down to the concrete deck, as they were certified asbestos workers. Fields Roofing was hired to put in a new roof after the abatement work was completed (Tr. 8/8/17, p. 32-33).

Before starting the project, Northwest Abatement held a safety meeting. (Tr. 8/8/27, p. 13). Northwest Abatement also walked the site, discussed access and any other concerns, and went over fall protection requirements. (Tr. 8/8/17, p. 33). Northwest Abatement further had toolbox safety meetings and kept a

roof schedule and notes throughout the course of the project. (Exhibits A and B). Additionally, Northwest Abatement had a fall protection program (Exhibit C); a fall protection / safety work plan (Exhibit D); daily project logs (Exhibit E); an employee handbook (Exhibit F); safety production meetings (Exhibit G); meeting minutes (Exhibit H); job site checklist (Exhibit I); a health and safety program (Exhibit J); a hazard communication program (Exhibit K); employee certifications (Exhibits N-R), and an accident prevention plan (Exhibit 13).

On the first day of the project, Fields Roofing was supposed to install a guardrail perimeter system around the edge of the roof, as well as a debris chute with proper protections, per the site's fall protection plan. (Tr. 8/8/17, p. 9). However, Fields Roofing failed to implement the fall protection plan and was still installing the guardrail perimeter system on July 26, 2016. (Tr. 8/8/17, p. 9).

Accordingly, because the fall protection plan had not been completed by Fields Roofing, Northwest Abatement had to revise its fall protection plan. (Tr. 8/8/17, p. 9). To do so, Northwest Abatement set up a warning line 6-feet from the building's edge to let its crews know where it was safe to work. It also had a cable installed around a stair tower's concrete core for workers to tie off to in the event they had to leave the delineated area. (Tr. 8/7/17, p. 63; Tr. 8/8/17, p. 9-10). Northwest Abatement workers used the fall protection provided during the early part of the project. (Tr. 8/7/17, p. 160). However, the Department alleged that Richard Crakes, a Northwest Abatement employee, was not wearing fall protection when dumping material into the chute. (Tr. 8/9/17, p. 29-30; Exhibit 1, page 7).

Northwest Abatement started the project by working on the east edge with the objective of moving the edge of the roof so that Field Roofing could continue building the railing. (Tr. 8/7/17, p. 64). To remove the roofing material, Northwest Abatement put on personal protective equipment, such as Tyvek suits and respirators; watered down the roofing material; and cut the top layer of roofing material with a cutter and hand-removed the other layers with shovels and axes down to the concrete. (Tr. 8/7/17, p. 155-56, 170, 182).

Northwest Abatement used wheelbarrows to dispose of the roofing material into a chute connected to a dumpster, utilizing bags for the dusty material. (Tr. 8/7/17, p. 69, 158). Specifically, Northwest Abatement had workers behind the regulated area bringing the wheelbarrows to workers, outside of the regulated area, who transported debris to the chute. (Tr. 8/7/17, p. 66). Northwest Abatement also had a designated area that would be roped off with an opening attached that allowed wheelbarrows to pass through. (Tr. 8/7/17, p. 183).

Northwest Abatement was responsible for hauling away the removed material. (Tr. 8/7/17, p. 70). A Northwest Abatement truck would back up and hook up to the container, and then lift it up to transport it from the worksite. (Tr. 8/7/17, p. 71). To facilitate the process, Northwest Abatement used a spotter. (Tr. 8/7/17, p. 72). That is, although it was not necessary to stop traffic when backing the truck into the dumpster, Doug Murphy, a Northwest Abatement worker, helped spot for the truck while it backed in. (Tr. 8/7/17, p. 72-73). Mr. Murphy stood in a non-traffic lane with a stop/slow paddle to help the truck back in for a period of less than two minutes. (Tr. 8/7/17, p. 127, 143). He did

not flag or direct any traffic, as that was not his intention. (Tr. 8/7/17, p. 143). His intention was to notify a bus, if it came, that a truck was pulling ahead and through the bus lane; however, he never stood in a bus lane where there was an oncoming bus. (Tr. 143, p. 143-44). Nor did oncoming traffic directly approach him. (Tr. 143, p. 143-44).

The Department initiated an inspection of the worksite on July 26, 2016, after Andrew Baja, a Department management analyst unaffiliated with the Department of Occupational Safety and Health, saw a worker at the worksite without fall protection. (Tr. 8/8/17, p. 69-70). Maili Jonkman, Compliance Safety and Health Officer (“CSHO”), initiated a safety inspection and contacted Lisa Van Loo, an industrial hygienist, because she believed that asbestos abatement was being performed at the worksite. (Tr. 8/7/17, p. 18). Therefore, Ms. Van Loo initiated a health inspection. (Tr. 8/7/17, p. 18).

As a result of the inspections, the Department issued Citation & Notice No. 317941556 against Northwest Abatement, which alleged a repeat serious fall protection violation of WAC 296-155-24611(1)(a); as well as, three serious flagging violations for directing traffic without wearing a high-visibility safety garment or a high-visibility safety garment per WAC 296-155-305(5)(a); not ensuring the employee flagging was in possession of a valid Washington traffic control flagger card per WAC 296-155-305(6)(a); and not ensuring a three sign advanced warning sequence was enforced per WAC 296-155-305(8)(a). (Tr. 8/9/17, p. 26).

The Department also issued Citation and Notice No. 317941568, which alleged numerous serious asbestos violations against Northwest

Abatement for not using wet methods per WAC 296-62-07712(10)(b)(ii); not prohibiting dry shoveling and dry cleanup per WAC 296-62-07712(4)(c); not ensuring asbestos-containing roofing material was wet, placed in a bag, or covered by plastic sheeting per WAC 296-62-07712(10)(b)(v)(A); not lowering asbestos containing material to the ground via a covered, dust-tight chute per WAC 296-62-07712(10)(b)(v); not ensuring protective clothing was replaced or repaired immediately when torn per WAC 296-62-07717(4)(b); not establishing an equipment room to decontaminate employees and equipment per WAC 296-62-07719(3)(b)(i); not ensuring employees enter and exit the regulated area through the equipment room or area per WAC 296-62-07719(3)(b)(v); not ensuring a competent person supervised employees per WAC 296-62-07728(4)(f); not providing a HEPA vacuum for employees per WAC 296-62-07719(3)(b)(iii); not ensuring bags containing asbestos scrap or waste were labeled with warnings per WAC 296-62-07721(5)(c); not ensuring all spills of asbestos containing material were cleaned up as soon as possible per WAC 296-62-07723(2); not providing fit testing when a different respirator was chosen per WAC 296-842-15505(1)(c); and not ensuring that sealing problems with tight-fitting respirators was prevented per WAC 296-842-18005(2). (Exhibit 3).

## **V. STANDARD OF REVIEW**

In a WISHA appeal, the Court directly reviews the Board's decision based on the record before the agency. *See J.E. Dunn Northwest, Inc. v. Dep't of Labor & Indus*, 139 Wn. App. 35, 42, 156 P.3d 250 (2007). The Court reviews findings of fact to determine whether they are supported by

substantial evidence and, if so, whether the findings support the conclusions of law. *Id.* 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. RCW 49.17.150; *Mowat Constr. Co. v. Dep't of Labor & Indus*, 148 Wn. App. 920, 925, 201 P.3d 407 (2009). Evidence is substantial if it is sufficient to convince a fair-minded person of the truth of the declared premise. *Id.*

Questions of law are reviewed by the appellate courts de novo. *See Dep't of Labor & Indus. v. Gongyin*, 154 Wn.2d 38, 44, 109 P.3d 816 (2005). An appellate court's prime construction objective is to "carry out the legislature's intent." *See Department of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). To discern legislative intent, courts will look to the statute as a whole. *See The Quadrant Corporation v. Growth Management Hearings Board*, 154 Wn.2d 224, 239, 110 P.3d 1132 (2005).

## VI. ARGUMENT

### A. **The Department bears the burden of proving all elements of a "serious" WISHA violation.**

The Department bears the initial burden to prove a violation. WAC 263-12-115(2)(b); *Mowat Constr. Co.*, 148 Wn. App. at 924. To establish a prima facie case of a "serious" violation under WISHA, the Department must prove the following five elements by a preponderance of the evidence: (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 conditions; (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. RCW 49.17.180(6); *SuperValu, Inc. v. Dep't of Labor & Indus.*, 158 Wn.2d 422, 433, 144 P.3d 1160 (2006); *Washington Cedar & Supply Co., v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 914, 83 P.3d 1012 (2004).

Here, the Board's Decision and Order is not supported by substantial evidence and the law because the Department failed to establish employee exposure to any of the alleged serious violations, and the Department failed to establish that Northwest Abatement had knowledge of any of the alleged serious violations. Alternatively, even if the Board's Decision and Order affirming any of the alleged serious violations is supported by substantial evidence, the Board erred in determining that Northwest Abatement failed to establish its affirmative defense of unpreventable employee misconduct. As such, the Court should reverse the Board's Decision and Order and vacate Corrective Notice of Redetermination Number 317941556 and Citation and Notice Number 317941568 in their entireties.

**B. The Board's determination that the Department established employee exposure to any flagging violations, fall protection violations, or any asbestos violations is not supported by substantial evidence and the law.**

The Board's determination that the Department established employee exposure to any flagging violations, fall protection violations, or any asbestos violations is not supported by substantial evidence and the law. To determine whether a worker is exposed to a hazard in violation of WISHA, the Department must show that the worker had access to the violative conditions.

*Mid Mountain Contractors, Inc. v. Dep't of Labor and Indus.*, 136 Wn. App. 1, 5, 146 P.3d 1212 (2006). To establish employee access, the Department must show by reasonable predictability that, in the course of the workers' duties, employees will be, are, or have been in the zone of danger. *Id.* The zone of danger is determined by the hazard presented by the violative condition and is normally the area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent. *RGM Construction Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995).

The "zone of danger" standard is well established under Federal OSHA cases. With regards to the statutory language, "could cause serious bodily injury or death," the OSHRC held in *Rockwell International Corp*, 80 OSAHRC 118/A2, 9 BNA OSHC 1092, for employee exposure the Secretary must prove more than just the possibility an employee may get injured. The test of whether an employee would have access to the "zone of danger" is "based on reasonable predictability." *Kokosing Constr. Co., Inc.*, 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996). The inquiry is not whether the exposure is theoretically possible but whether the employee's entry into the danger zone is reasonably predictable. *See, Fabricated Metal Products, Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997) (determining that it was not reasonably predictable that an employee would be in the zone of danger presented by the press points of a machine because the record established that there could be exposure to a hazard through inadvertent entry due to a slip and fall, which was highly unlikely and too remote).

**1. The Board's determination that the Department established employee exposure to any flagging violations is not supported by substantial evidence or the law.**

First, substantial evidence does not support the Board's determinations that Mr. Murphy was engaging in flagging activities and was exposed to serious flagging hazards. Mr. Murphy was engaged in spotting activities and, therefore, the cited flagging regulations in Corrective Notice of Redetermination No. 317941556 (WAC 296-155-305(5)(a); WAC 296-155-305(6)(a); and WAC 296-155-305(8)(a)) do not apply.

Under WAC 296-155-305, a flagger is defined as "a person who provides temporary traffic control." However, Mr. Murphy was not providing temporary traffic control, as he was spotting or helping a truck back into the work zone to remove a dumpster holding roofing material. That is, Mr. Murphy stood in a non-traffic lane with a stop/slow paddle to help the truck back in for a period of less than two minutes. He never stood in an active traffic lane, and he never flagged or directed any traffic, as that was not his intention. His intention was to make sure that it was clear for the truck to come out into the street.

Mr. Murphy's supervisor, Mr. Hamilton, testified that it was not necessary to stop traffic when spotting for a truck backing in. (Tr. 8/7/17, p. 71). Instead, the purpose of the spotter was to "keep the driver from running into anything, because he can't see behind." (Tr. 8/7/17, p. 101). Mr. Murphy's intentions and actions do not constitute flagging per the regulations and, therefore, the Board erred in affirming any of the alleged flagging hazards.

If Mr. Murphy's actions are considered to be "flagging", then anytime a truck or other vehicle needed to have a spotter the spotter would have to be a certified flagger, and all of the Part VI Manual for Uniform Traffic Control Devices (MUTCD) cones, flags and barricades would need to be used. WAC 296-155-305(1). At the time of the inspection, the CSHO saw no traffic. Moreover, Mr. Murphy's job was not to stop any traffic that might be present, his job was only to keep the dump truck from coming out until it was clear from traffic.

Regardless, even if Mr. Murphy's actions are construed as flagging, he was never exposed to any hazard and the Board erred in determining otherwise. It is undisputed that the area where Mr. Murphy was standing was closed due to the construction activities. (Tr. 8/9/17, p. 52; Exhibit S). The sidewalk was closed with a barricade, the parking lane was closed with a sign, and the bus zone was not open for direct travel by cars. (Tr. 8/9/17, p. 52; Exhibit S).

Moreover, Mr. Murphy never stood in a bus lane when there was an oncoming bus. Per Mr. Murphy's own testimony, to the best of his recollection, he "was not standing in traffic in a lane at all." (Tr. 8/7/17, p. 142). Nor were any busses present in the photograph shown to Mr. Murphy at hearing (Exhibit 1, page 13; Tr. 8/7/17, p. 142). By Mr. Murphy's own account, he did "not recall standing there when a bus was there." Clearly, Mr. Murphy was not exposed to any hazard.

Additionally, Mr. Murphy did not do anything to stop, flag, or direct any cars in the traveling lane. (Tr. 8/7/17, p. 143). Mr. Murphy even testified that he did not really receive any specific instructions from Mr. Hamilton to hold a stop paddle. (Tr. 8/7/17, p. 144).

Maili Jonkman, CSHO, confirmed that she did not see any buses approaching the bus zone, nor did she see Mr. Murphy stop or direct any kind of traffic. (Tr. 8/9/17, p. 53-54). In fact, CSHO Jonkman never saw a vehicle approaching Mr. Murphy to where he was exposed to any hazards. (Tr. 8/9/17, p. 54). The Department also failed to establish when or how often buses would use the otherwise inactive lane. (Tr. 8/9/17, p. 72). Clearly, if Mr. Murphy's actions are construed as flagging, he was not in the zone of danger, nor was it reasonably predictable that, during his spotting duties, he was, or would be in the zone of danger given the lane closures.

As such, the Board clearly erred in affirming the alleged flagging violations under WAC 296-155-305(5)(a); WAC 296-155-305(6)(a); and WAC 296-155-305(8)(a) contained in Citation and Notice No. 317941556.

**2. The Board's determination that the Department established employee exposure to the fall protection violation is not supported by substantial evidence or the law.**

The Board's determination that the Department established employee exposure to the fall protection violation under WAC 296-155-24611(1)(a) is not supported by substantial evidence in the record. WAC 296-155-24611(1)(a) requires an employer to ensure that an appropriate fall protection system is provided, installed, and implemented when employees are exposed

to fall hazards of 10 feet or more to the ground or lower level while engaged in roofing work on a low-pitched roof.

In the present case, the Department identified Mr. Crakes as the Northwest Abatement employee exposed to a fall hazard, as pictured in Exhibit 1. (Tr. 8/9/17, p. 58-59; Exhibit 1). This is the only person that the Department alleged was exposed to a fall hazard. (Tr. 8/9/17, p. 59-60).

However, the Department did not know the distance that Mr. Crakes was from the edge of the roof. (Tr. 8/9/17, p. 67). Nor did the Department ever calculate how close Mr. Crakes was from the edge of the roof. (Tr. 8/9/17, p. 67). That is, the Department does not know how tall Mr. Crakes is, the Department does not know the distance from where CSHO Jonkman took the photograph to where the building is, and the Department does not know the angle from which CSHO Jonkman was taking the photo. (Tr. 8/9/17, p. 66).

Without utilizing this key information, the Department cannot establish that Mr. Crakes was closer than 6 feet from the edge of the roof where the delineators were set up and, therefore, the Department cannot establish Richard Crakes was exposed to a fall hazard. *See Secretary of Labor v. Tricon Industries, Inc.*, 24 BNA OSHRC 1427 (No. 11-1877, 2012) (determining the Secretary failed to establish that Tricon employees were in the zone of danger when they were no closer than six to seven feet from the unguarded edge because there was no evidence to suggest that it was reasonably predictable that employees had any reason or occasion to wander around the deck, or that in the course of their assigned working duties or their

personal comfort activities while on the job, they would come any closer to the edge of the deck); *see also Secretary of Labor v. Fastrack Erectors*, 21 BNA OSHC 1109 (No. 04-0780, 2004) (determining that the record failed to show that the employees were exposed to a fall hazard when the testimony established that employees were never closer than 6 feet from the edge and there was no reason for the employees to be closer than 6 feet from the edge).

Thus, the Board erred in affirming this alleged violation because it is not supported by substantial evidence.

**3. The Board's determination that the Department established employee exposure to any of the serious asbestos violations is not supported by substantial evidence or the law.**

The Board's determinations that Northwest Abatement's employees were exposed to any of the serious asbestos violations is not supported by substantial evidence. In analyzing the asbestos violations contained in Citation and Notice No. 317941568, it is imperative to understand that the Board overlooked the critical fact that the Department had no evidence establishing that Northwest Abatement's employees were exposed to, or working with asbestos during its inspection and the taking of the photographic exhibits. The Board misconstrued the Employer's asbestos arguments. At page 3 of the Decision and Order, lines 37 - 40, the Board wrote:

Northwest Abatement maintains that the Department provided no proof in terms of measurements of the amount of asbestos present at the jobsite. But the Department is not required to take such measurements. Any amount of asbestos triggers the need to examine the risk of exposure.

The Board further found in Finding of Fact No. 34:

Violation 1-1b: A substantial probability existed that Northwest Abatement workers were exposed to the hazard described in Violation 1-1b, consisting of dry sweeping, shoveling, or other dry clean-up of dust and debris containing asbestos-containing materials prohibited under WAC 296-62-07712(4)(c). The safety officer observed workers shoveling dry roofing material and placing it into bags that did not appear to contain water. Substantial probability existed that the workers could be injured as a result of the exposure...

Northwest Abatement has never argued that the Department needed to “measure” the amount of asbestos present at the jobsite. Rather, the Employer respectfully asserts that the asbestos containing layers of the roof had been removed, stored and disposed of in a manner consistent with all of the asbestos safety regulations. The activities observed by the Department were made after the asbestos had been removed and involved the non-asbestos-containing material. Consequently, there were no asbestos violations because at the time of the inspection, no asbestos-containing material was present. The Department erroneously believes that the material that they observed contained asbestos.

For instance, CSHO Van Loo performed sampling on two loose samples of material at the inspection site because she thought they contained asbestos. (Tr. 8/9/17, p. 115). Yet, neither of her samples contained asbestos as both samples that were tested in the laboratory were negative for asbestos. (Tr. 8/9/17, p. 116, 121). CSHO Van Loo also failed to take any wipe samples or area samples at the inspection site to determine whether asbestos was present, nor did she perform any personal air monitoring to determine whether any airborne asbestos fibers were present. (Tr. 8/9/17, p. 127-28). There was

nothing that would have prevented CSHO Van Loo from taking more samples at the inspection site. (Tr. 8/9/17, p. 148).

It is undisputed that objective testing is necessary to determine the presence of asbestos because, as CSHO Van Loo testified, asbestos fibers are so small that an electron microscope is needed to see them. (Tr. 8/9/17, p. 128). Instead, CSHO Van Loo appears to completely rely upon the good faith inspection, or bulk sample, contained in Exhibit 2, page 2, to establish asbestos exposure, which showed the presence of black asphaltic fibrous material containing Chrysotile (asbestos) in layers 3, 5, 7, 9, and 11 only, with brown, non-asbestos containing fibrous material underneath. (Tr. 8/7/17, p. 26-29; Exhibit 2, page 2).

However, examination of the good faith inspection establishes that the bottom layer, number 13, was the only brown layer and it did not contain asbestos. (Exhibit 2, page 2; Tr. 8/7/17, p. 98). This is the same brown, non-asbestos containing layer identified in the Department's photographic exhibits that the Board mistakenly relied upon in determining that Northwest Abatement employees were exposed to asbestos. Therefore, as outlined below, the Board's affirmation of any of the serious violations contained in Citation and Notice No. 317941568 is unsupported by substantial evidence.

Moreover, the Board did not make any specific finding of fact that dry roofing material the Department observed actually contained asbestos. That is because there was no basis to establish that the brown roofing material actually contained asbestos. Although the Board is entitled to make reasonable inferences, such inferences must be support by substantial

evidence. There was no circumstantial evidence to support any finding that the brown roofing material observed by the Department contained asbestos.

**Violation 1-1b:**<sup>3</sup>

The Board's determination that Northwest Abatement performed dry shoveling and sweeping of asbestos-containing material in violation of WAC 296-62-07712(4)(c) is not supported by substantial evidence, as the Department relied on photographs taken by Mr. Baga and CSHO Van Loo's observations of workers in the process of shoveling dry roofing material. (CABR 107). WAC 296-62-07712(4)(c) prohibits dry sweeping, shoveling, or other dry cleanup of dust and debris containing asbestos containing material or presumed asbestos containing material.

However, this material consisted of the brown, non-asbestos containing material that did not present any asbestos exposure to Northwest Abatement's employees. (Exhibit 2, p. 69). Examination of the good faith inspection shows that the bottom layer, number 13, was the only brown layer, and the brown layer did not contain asbestos. (Exhibit 2, page 2; Tr. 8/7/17, p. 98). This is the same brown, non-asbestos containing layer that Mr. Hamilton testified was pictured in Exhibit 2. (Tr. 8/7/17, p. 97-99).

Mr. Hamilton testified that there is no doubt that the material inside the wheelbarrows in Exhibit 2 were the brown fibrous materials, as compared to the black asphaltic materials that contained asbestos. (Tr. 8/7/17, p. 99).

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<sup>3</sup> The Board vacated Violation 1-1a and Violation 1-10 contained in Citation and Notice No. 317941568, and Northwest Abatement assigns not error to those findings and conclusions. (CABR 4-20).

Ms. Van Loo, however, testified that she did not know whether the specific material in the wheelbarrows contained asbestos. (Tr. 8/7/17, p. 42). Mr. Hamilton also testified that when Northwest Abatement was picking up the brown cellulose layer, all the black asphaltic material that had chrysotile (asbestos containing material) had already been removed. (Tr. 8/7/17, p. 99-100). Nevertheless, the asbestos fibers were bound in an asphalt tar paper, which prevents the release of asbestos fibers between layers. (Tr. 8/9/17, p. 181-82).

Mr. Hamilton further testified that he did not see any black asphaltic pieces identified to contain asbestos in the brown cellulose. (Tr. 8/7/17, p. 109). Accordingly, Northwest Abatement could have treated the removal of the brown fibrous material identified in layer 13 with non-asbestos protocol.

Similarly, Doug Henry, Northwest Abatement's expert, testified that, based upon the analytical data, the brown material shown in the wheelbarrows did not contain asbestos. (Tr. 8/9/17, p. 183-84). Mr. Henry has been an AHERA building inspector since 1997, and has worked on hundreds of built-up roofing projects, like the roofing work in the present case. (Tr. 8/9/17, p. 171, 179-80). These projects involved locating asbestos, removing asbestos, and performing air monitoring during asbestos removal operations to ensure that asbestos fibers are not being released in areas where anybody other than a certified asbestos worker is present. (Tr. 8/9/17, p. 179-80).

Mr. Henry testified that the brown layer is the insulation layer that goes down first, and then the built-up layer is over the top of the insulation layer. (Tr. 8/9/17, p. 184). This testimony was based upon the analytical

report submitted to Med-Tox Northwest, as well as the description of the analytical testing conducted by the Department. (Tr. 8/9/17, p. 184). Mr. Henry opined that the material shown in Exhibit 2, page 17, the brown soil and debris that did not contain asbestos per the Department's testing, is the same brown insulation material which, when provided to an asbestos analyst in a bag, would appear like soft, brown soil. (Tr. 8/9/17, p. 186).

Mr. Henry also testified that even if the workers were disturbing, handling, or moving this brown material, there would be no release of asbestos fibers. (Tr. 8/9/17, p. 187-88). That is, the asbestos fibers in Class II<sup>4</sup> material are typically bound in a matrix that holds the fibers within the matrix. (Tr. 8/9/17, p. 181). In this case, the asbestos fibers are bound in an asphalt tar paper, which prevents the release of asbestos fibers between layers. (Tr. 8/9/17, p. 181-82). Thus, if workers were disturbing, handling, or moving this brown material, there would be no release of asbestos fibers and employees would not be exposed to asbestos fibers above the permissible exposure level. (Tr. 8/9/17, p. 188).

In fact, Mr. Henry exemplified this point by CSHO Van Loo's objective testing results from materials at the inspection site. (Tr. 8/9/17, p. 186). Mr. Henry testified that the Department's own objective testing confirmed that CSHO Van Loo's samples involving fine soil with rock debris and soft brown soil confirmed that no asbestos fibers were present in the

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<sup>4</sup> Class II asbestos work means activities involving the removal of ACM which is not thermal system insulation or surfacing material. This includes, but is not limited to, the removal of asbestos-containing wallboard, floor tile and sheeting, roofing and siding shingles, and construction mastics. WAC 296-62-07703.

materials. (Tr. 8/9/17, p. 186). This is the same brown insulation material, which when provided to an asbestos analyst in a bag, would appear like a soft, brown soil. (Tr. 8/9/17, p. 186). Thus, if Northwest Abatement's workers were disturbing, handling, or moving this brown material, there would not only be a lack of asbestos exposure above the permissible exposure level, but there would also be a lack of any asbestos fibers being released from the matrix. (Tr. 8/9/17, p. 187-88).

Mr. Henry's opinion is also supported by his personal sampling or area sampling of black, asphaltic, Class II roofing material, which is below the permissible exposure level and, typically, below detection limits given that the work is being performed outdoors. (Tr. 8/9/17, p. 188).

Mr. Henry further testified that without a sample, from an industrial hygiene point of view, one cannot state with any kind of objective certainty that a material contained asbestos because asbestos fibers cannot be seen with the naked eye; therefore, the material must be analyzed. (Tr. 8/9/17, p. 186-870).

Undoubtedly, CSHO Van Loo's lack of objective testing for asbestos and reliance upon the bulk sample demonstrates that the Department failed to establish employee exposure to any of the alleged asbestos violations when considering that the only material present at the jobsite at the time of the inspection was the brown, non-asbestos containing material.

The Board erroneously relied upon CSHO Van Loo's observations regarding the shoveling dry roof material and placing material into bags that did not appear to contain water. (CABR 107). Yet, the Department failed to

establish that any of the plastic bags contained anything other than the brown, non-asbestos containing material that Northwest Abatement's employees were working on. CSHO Van Loo never opened any of the plastic bags. (Tr. 8/9/17, p. 123). In fact, she never touched the bags, lifted the bags, or knew what roofing layers were contained in the bags. (Tr. 8/9/17, p. 123-24). Nor did she take any bulk samples of the material contained inside of the plastic bags. (Tr. 8/9/17, p. 126). She also failed to perform any area samples or wipe samples of this area. (Tr. 8/9/17, p. 132). Therefore, CSHO Van Loo had no objective evidence demonstrating the presence of asbestos fibers in the bags, and it is implausible to infer that the bags contained asbestos given that Northwest Abatement's employees were working on the brown, non-asbestos containing layer.

The Board's affirmation of this violation is not supported by substantial evidence and must be vacated.

**Violation 1-2:**

The Board erred in determining that Northwest Abatement did not ensure that the asbestos-containing roofing material from all five layers was saturated, placed in a bag or covered by plastic sheeting, per WAC 296-62-07712(10)(b)(v)(A), while it stayed on the roof, based on CSHO Van Loo's testimony that there was uncovered dry roofing material in wheelbarrows.

Again, Mr. Hamilton testified that there is no doubt the material inside the wheelbarrows on Exhibit 2 was the brown fibrous material, as compared to the black asphaltic material that contained asbestos. (Tr. 8/7/17, p. 99). Similarly, Doug Henry, the Employer's expert, testified that, based upon the

analytical data, the brown material shown in the wheelbarrows did not contain asbestos. (Tr. 8/9/17, p. 183-84). CSHO Van Loo, however, testified that she did not know whether the specific material in the wheelbarrows contained asbestos. (Tr. 8/7/17, p. 42).

Mr. Hamilton also testified that when Northwest Abatement was picking up the brown cellulose layer, all the black asphaltic material that had chrysotile (asbestos-containing material) had already been removed. (Tr. 8/7/17, p. 99-100). Moreover, Mr. Hamilton did not see any black asphaltic pieces identified to contain asbestos in the brown cellulose. (Tr. 8/7/17, p. 109).

Likewise, Mr. Henry testified that even if the workers were disturbing, handling, or moving this brown material there would not be any release of asbestos fibers, nor would any employees be exposed to asbestos fibers above the permissible exposure level. (Tr. 8/9/17, p. 187-88). Accordingly, Northwest Abatement was not required to saturate and place this material in a bag or cover it with plastic sheeting while it stayed on the roof, and the Board's contrary determination is not supported by substantial evidence.

Regardless, the Board also failed to consider that the material that did contain asbestos was non-friable, as the asbestos was bound within the asphalt material. (Tr. 8/8/17, p. 31). Therefore, Northwest Abatement would bag material if it was necessary, as bagging non-friable asbestos material is not a requirement. (Tr. 8/8/17, p. 33-34). The Board's affirmation of this violation is not supported by substantial evidence and must be vacated.

**Violation 1-3:**

The Board determination that Northwest Abatement's employees were exposed to a serious hazard, under WAC 296-62-07712(10)(b)(v), when there was a tear or gap in the plastic sheeting that attached to the chute and dumpster is not supported by substantial evidence. WAC 296-62-07712(10)(b)(v) requires, in relevant part, that if asbestos is lowered to the ground using a chute, it must be dust tight.

CSHO Van Loo did not know when the tear occurred and what type of material was contained inside of the dumpster at the time of the inspection. (Tr. 8/9/17, p. 132). Indeed, she did not know what kind of material was being dumped, nor did she know how the material was dumped because she never saw anybody use the chute on the inspection date. (Tr. 8/9/17, p. 132, 134). She also, again, failed to perform any area samples or wipe samples of this area. (Tr. 8/9/17, p. 132). Therefore, CSHO Van Loo had no objective evidence demonstrating the presence of asbestos fibers in the dumpster, and it is implausible to infer that the bags contained asbestos given that Northwest Abatement's employees were working on the brown, non-asbestos containing layer.

Regardless, Mr. Hamilton clarified that Northwest Abatement was sending material already bagged through the shoot; the poly at the bottom of the chute was added safety protection. (Tr. 8/7/17, p. 108-09). Therefore, the small tear was not going to release any material. (Tr. 8/7/17, p. 108). The purpose of the chute was for dust control. (Tr. 8/7/17, p. 108-09). Moreover, after viewing Exhibit 2, page 11, Mr. Hamilton confirmed that because the

plastic had been cut from the container, Northwest Abatement was in the process of replacing the cover. (Tr. 8/7/17, p. 103-05, 06).

Given the above, the Board clearly erred in evaluating the record and determining that the tear in the plastic sheeting that attached to the chute and dumpster created any exposure to a serious hazard, as the decision is not supported by substantial evidence in the record. The Board's affirmation of this violation is not supported by substantial evidence and must be vacated.

**Violation 1-4:**

The Board erred in determining that Northwest Abatement committed a serious violation of WAC 296-62-07717(4)(b) when Mr. Crakes had a tear in his Tyvek suit. WAC 296-62-07717(4)(b) states that "[w]hen rips or tears are detected while an employee is working, rips and tears shall be immediately mended, or the work suit shall be immediately replaced."

Here, the Department failed to establish when Mr. Crakes' Tyvek suit was ripped, as well as, whether any Northwest Abatement employees knew it was ripped prior to CSHO Van Loo's observation. Moreover, once the rip was brought to Mr. Hamilton's attention, Mr. Crakes' Tyvek suit was immediately repaired. (Tr. 8/7/17, p. 43). Clearly, Northwest Abatement did not violate the standard, and the Board's conclusion otherwise is not supported by substantial evidence. The Board's affirmation of this violation is not supported by substantial evidence and must be vacated.

**Violations 1-5a, 1-5b, and 1-5c:**

The Board erred in determining that Northwest Abatement failed to provide an equipment room or area for decontamination per WAC 296-62-

07719(3)(b)(i); for failing to have employees enter and exit the regulated area without passing through a decontamination area, equipment room, or designated area per WAC 296-62-07719(3)(b)(v); and for failing to have a competent person to perform duties to ensure the safety of workers for an asbestos project per WAC 296-62-07728(4)(f). These determinations are unsupported by substantial evidence.

Even though the job began as an asbestos abatement project, the Department failed to establish that Northwest Abatement did not have a decontamination area and failed to ensure that its employees enter and exit the regulated area through an equipment area after the asbestos containing material had been removed. That is, CSHO Van Loo used Exhibit 1, page 26 and page 34, to establish a violation of Item 1-5 outlined above. (Tr. 8/9/17, p. 139).

However, CSHO Van Loo does not know who took the photographs, she does not know when the photographs were taken, and she does not know who was in the photographs. (Tr. 8/9/17, p. 139-142). CSHO Van Loo admitted that she had no personal knowledge of what was taking place on the roof prior to her arrival. (Tr.8/9/17, p. 142). Regardless, even though the job contained asbestos abatement, the Department failed to establish that any exposure was above the permissible exposure limit; as such, the Department cannot establish that a decontamination area was even required. (Tr. 8/9/17, p. 148-49).

Again, Doug Henry, the Employer's expert, testified that based upon the analytical data, the brown material shown in the wheelbarrows did not

contain asbestos. (Tr. 8/9/17, p. 183-84). His opinion was based upon the analytical report submitted to Med-Tox Northwest, as well as the description of the analytical testing conducted by the Department. (Tr. 8/9/17, p. 184). Mr. Henry clearly testified that even if the workers were disturbing, handling, or moving this brown material there would not be any release of asbestos fibers, nor would any employees be exposed to asbestos fibers above the permissible exposure level given the asphalt tar paper the asbestos fibers were bound in (the matrix). (Tr. 8/9/17, p. 187-88). The Department offered no evidence to the contrary.

Thus, a decontamination area would not be required for Class II asbestos work if the regulated area is below the permissible exposure level. (Tr. 8/9/17, p. 189). The Board's affirmation of this violation is not supported by substantial evidence and must be vacated.

**Violation 1-6:**

The Board erred in affirming a serious violation of WAC 296-62-07719(3)(b)(iii) for Northwest Abatement having a HEPA vacuum in the van, which was not on the roof at the time of the Department's inspection. WAC 296-62-07719(3)(b) contains requirements for "Class II and Class III asbestos work operations where exposures exceed a PEL or where there is no negative exposure assessment produced before the operation, and WAC 296-62-07719(3)(b)(iii) requires that work clothing must be cleaned with a HEPA vacuum before it is removed.

Here, the record establishes that the asbestos containing layers of the roof had been removed, stored and disposed of in a manner consistent with all

of the asbestos safety regulations. The activities observed by the Department were made after the asbestos had been removed and involved the non-asbestos-containing material; accordingly, Northwest Abatement was not required to have a HEPA vacuum on the roof at the time of the Department's inspection. Therefore, the Board's affirmation of this violation is not supported by substantial evidence and must be vacated.

**Violation 1-7:**

The Board erred in affirming a serious violation of WAC 296-62-07721(5)(c) for an alleged failure to communicate asbestos hazards to employees for failing to label plastic bags and the dumpster allegedly containing scrap or waste containing asbestos. WAC 296-62-07721(5)(c) requires employers to ensure that bags containing asbestos scrap or waste were labeled with warnings about asbestos.

In making its decision, the Board ignores the fact that the Department failed to establish that any of the plastic bags or the dumpster on site contained asbestos. Again, CSHO Van Loo never opened any of the plastic bags, she never touched the bags, she never lifted the bags, and she did not know what roofing layers were contained in the bags. (Tr. 8/9/17, p. 123-24). Nor did she take any bulk samples of the material contained inside of the plastic bags. (Tr. 8/9/17, p. 126).

CSHO Van Loo also did not know what material was contained inside of the dumpster at the time of the inspection, nor did she know what kind of material was being dumped, as she never saw anybody use the chute on the inspection date. (Tr. 8/9/17, p. 132, 134). Therefore, CSHO Van Loo had no

objective evidence demonstrating the presence of asbestos fibers in the bags or dumpster.

Yet, CSHO Van Loo testified that she believed there was asbestos in the bags because the good faith inspection identified there was asbestos in the roofing material. However, the good faith inspection, contained in Exhibit 2, page 2, clearly establishes that the bottom layer, number 13, was the only brown layer and it did not contain asbestos. (Exhibit 2, page 2; Tr. 8/7/17, p. 98). This was, undoubtedly, the layer Northwest Abatement was working on and the layer that was inside the wheelbarrows. The Board's affirmation of this violation is not supported by substantial evidence and must be vacated.

**Violation 1-8:**

The Board erred in affirming a serious violation of WAC 296-62-07723(2) for the failure to clean up materials located near the chute and in the wheelbarrows in a timely fashion because the material did not contain asbestos. WAC 296-62-07723(2) requires employers to ensure that all spills of asbestos-containing material are cleaned up as soon as possible.

Here, the good faith survey unequivocally established that layer 13, the only brown layer, did not contain asbestos. (Exhibit 2, page 2; Tr. 8/7/17, p. 98). Mr. Hamilton confirmed that there is no doubt that the material inside the wheelbarrows was the brown, non-asbestos containing material, and that he did not see any black asphaltic pieces within the brown material. Furthermore, at the time Northwest Abatement was picking up the brown cellulose layer, all the black asphaltic material that had chrysotile had been

removed. Again, Mr. Henry agreed that the brown material within the wheelbarrows did not contain asbestos based upon the good faith survey.

Furthermore, from an industrial hygiene point of view, you cannot state with any kind of objective certainty that a material contained asbestos because you cannot see asbestos fibers with the naked eye; therefore, material must be analyzed. However, both of CSHO Van Loo's bulk samples from material at the jobsite came back negative for asbestos. (Tr. 8/9/17, p. 116, 121; Exhibit L).

Simply put, CSHO Van Loo relies upon the good faith survey to establish the presence of asbestos, but the good faith survey establishes that the materials located near the chute and the material in the wheelbarrows did not contain asbestos. The Board's affirmation of this violation is not supported by substantial evidence and must be vacated.

**Violation 1-9:**

The Board erred in affirming a serious violation of WAC 296-842-15005(1)(c) for Mr. Crakes wearing a half-mask respirator that he was not fit-tested for. WAC 296-842-15005(1)(c) requires fit testing, which involves testing the seal of a respirator to determine if it is adequate.

Here, the record establishes that the asbestos containing layers of the roof had been removed, stored and disposed of in a manner consistent with all of the asbestos safety regulations. The activities observed by the Department were made after the asbestos had been removed and involved the non-asbestos-containing material; accordingly, Mr. Crakes was not required to wear a respirator at the time of the Department's inspection. Nevertheless,

Mr. Crakes testified that he believed he was fit tested for a half face respirator, and he was fit tested for a full mask respirator. (Tr. 8/8/17, p. 155-56). Therefore, the Board's affirmation of this violation is not supported by substantial evidence and must be vacated.

**C. The Department failed to establish Employer knowledge for any of the alleged violations.**

To prove a serious violation under WISHA, the Department must show that the Employer had actual or constructive knowledge of the violation's existence. RCW 49.17.180(6); *see also BD Roofing, Inc. Dep't of Labor & Indus.*, 139 Wn. App. 98, 108, 161 P.3d 387 (2007) (determining that constructive knowledge is sufficient). An employer who could not have known of the violation by exercising reasonable diligence does not have constructive knowledge of the violation. *See Erection Co. Dep't of Labor & Indus.*, 160 Wn. App. 194, 206-07, 248 P.3d 1085 (2011).

Factors relevant to the reasonable diligence inquiry include the employer's duty to have adequate work rules and training programs, to supervise and discipline employees, and to inspect the work area to take measures to prevent workplace violations. *In re Longview Fibre*, Dckt. No. 02 W0321 (2003). Whether an employer was reasonably diligent with regards to safety rules is a question of fact that will vary in each case. *Id.*

**1. Northwest Abatement did not have knowledge of the alleged fall protection violation.**

Here, the Board's determination that Northwest Abatement had knowledge of Mr. Crakes' alleged fall protection violation is not supported

by substantial evidence. First, Northwest Abatement did not have actual knowledge that Mr. Crakes was exposed to any fall hazards. Mr. Hamilton, Northwest Abatement's project supervisor, testified that he did not see or have knowledge that the person, in Exhibit 1, page 7, that he identified as Richard Crakes, was standing near the chute without fall protection. (Tr. 8/7/17, p. 95-96). Likewise, Mr. Eckholm, Northwest Abatement's project manager, did not see or know of any workers using the chute before the railing was installed. (Tr. 8/8/17, p. 11). Clearly, Northwest Abatement did not have actual knowledge of any fall protection violations.

Additionally, the Department cannot establish that Northwest Abatement failed to exercise due diligence regarding the alleged fall protection violation, especially given the short period of the alleged violative conduct. It is important to consider if the violative conduct existed for a sufficient period for it be identified and corrected when determining whether an Employer failed to exercise reasonable diligence. *See Latshaw Drilling and Exploration, LLC*, 2006 WL 6472835 (No. 15-1561, 2016) (determining that considering the length of time and visibility help to decipher whether an Employer had the opportunity to observe the condition, and, thus, provide context for applying the reasonable diligence factors); *see also Texas ACA, Inc.*, 17 BNA OSHC 1048 (No. 91-3467) (determining the Employer's duty is to take reasonably diligent measures to inspect its worksite and discover hazardous conditions; so long as the Employer has done so, it is not in violation simply because it has not detected or become aware of every instance of a hazard).

After all, an Employer is not required to supervise its employees on a continual basis. *See Summit Contractors, Inc.*, 21 BNA 1375 (No. 04-0492, 2005). An employer cannot be held *strictly liable* for a safety violation if the violation could only have been discovered by exercising absolute vigilance of the worker and the worksite. *In re: Obayashi Corp.*, Dkt. No. 07 W2003 (June 10, 2009) (citing *Sec'y of Labor v. Precision Concrete Constr.*, 19 (BNA) O.S.H. Cas. 1404, 2001 WL 422968 (O.S.H.R.C.) (emphasis added)).

Here, CSHO Jonkman testified that the alleged fall protection violation occurred for a period of “two, three, four minutes.” (Tr. 8/9/17, p. 64). Whereas, Mr. Crakes testified that dumping material down the chute with a wheelbarrow would only have taken approximately three seconds. (Tr. 8/7/17, p. 161). This is hardly enough time for Northwest Abatement to spot and correct any alleged violative conduct given the unique facts of this case.

Additionally, this is a case where Northwest Abatement exercised reasonable diligence in ensuring that its workers were protected from fall hazards, and despite this due diligence, it could not have known of the alleged violation. Mr. Hamilton testified that he talked about the need of workers to protect themselves against fall hazards, in that they needed to stay behind the barrier tape, and if they went beyond the barrier tape, they needed to utilize fall protection, which was provided to the workers in the form of harnesses, lanyards, and vertical lifelines. (Tr. 8/7/17, p. 96-97).

Northwest Abatement's modified fall protection plan provided that the crew was to tie off for use of the debris chute. (Tr. 8/7/17, p. 37-38). As such, workers, such as Mr. Cruz and Mr. Tarry, used the available fall protection

during the early part of the project when approaching the chute. (Tr. 8/7/17, p. 157, 160, 184). Ms. Jonkman even confirmed that she saw a worker wearing a harness, which was not connected because the worker was away from the edge and inside the controlled work zone. (Tr. 8/9/17, p. 16).

Overall, the Board correctly stated that Northwest Abatement established that it had “rules about fall protection, the rules have been communicated to workers, and that it took steps to discover violations.” (CABR 100). Moreover, given the subcontractor’s failure to erect the guardrail around the roof’s perimeter per the fall protection plan, Northwest Abatement acted diligently and created an appropriate fall protection system that could be used by two employees. This fall protection system for two employees was sufficient because it allowed two employees to dump material into the chute while being tied off. Otherwise, all other employees were working in the demarcated work area away from the roof’s edge.

Furthermore, Northwest Abatement had a fall protection program and a fall protection safety work plan. (Exhibit C and D). Northwest Abatement’s fall protection safety work plan provides that fall protection would be accomplished with a warning line, guardrail system, and fall arrest. (Exhibit D). Because the guardrail system was not erected, a warning line and fall arrest were provided for use and protection. Northwest Abatement’s fall protection safety work plan further provided that its employees were to “tie-off for use of debris chute – otherwise once the parapet/guardrail is in place, crew will use this system.” (Exhibit D).

Clearly, Northwest Abatement took proactive and reasonable steps to prevent a fall protection violation from occurring. Unbeknownst to Northwest Abatement, however, one of its employees was arguably exposed to a fall hazard for an incredibly brief period, despite Northwest Abatement's reasonable diligence. Thus, given the above, the Board's determination that Northwest Abatement had knowledge of Mr. Crakes' alleged fall protection violation is not supported by substantial evidence in the record and the violation must be vacated.

**2. Northwest Abatement did not have knowledge of the alleged flagging violations.**

In the present case, the Department cannot prove that Northwest Abatement had actual or constructive knowledge of Mr. Murphy's alleged flagging violations. As Mr. Hamilton testified, the purpose of a spotter is to keep the driver from running into anything by using visual hand gestures, because the driver cannot see behind him. (Tr. 8/7/17, p. 101). This is to ensure that the driver backs up in the correct way to pick up the dumpster, as the truck driver needs to maneuver the truck into the proper position to make the connection to the dumpster. (Tr. 8/7/17, p. 101-02).

Mr. Hamilton did not see Mr. Murphy engaging in spotting activities, nor was he aware of what Mr. Murphy was doing at the time the Department's photographs were taken. (Tr. 8/7/17, p. 103). He did not direct Mr. Murphy to act as a spotter. (Tr. 8/7/17, p. 74). As Mr. Hamilton explained, the crew would help each other out whenever they could, so if somebody saw the driver needing help, they would assist without direction. (Tr. 8/7/17, p. 74).

Furthermore, although Mr. Hamilton was on site, the work was being conducted on a roof away from where Mr. Murphy was spotting. Moreover, Mr. Murphy spotted for a period of two to four minutes, and the Department cannot establish that Northwest Abatement was required to supervise Mr. Murphy every two to four minutes.

After all, an Employer is not required to supervise its employees on a continual basis. *See Summit Contractors, Inc.*, 21 BNA 1375 (No. 04-0492, 2005). If this position is adopted, it would be akin to holding an employer *strictly liable* for a safety violation, as this incident could only have been discovered by exercising absolute vigilance over the worker and the worksite. *In re: Obayashi Corp.*, Dkt. No. 07 W2003 (June 10, 2009) (citing *Sec'y of Labor v. Precision Concrete Constr.*, 19 (BNA) O.S.H. Cas. 1404, 2001 WL 422968 (O.S.H.R.C.) (emphasis added)).

The Board's affirmation of these violations are not supported by substantial evidence and must be vacated.

**D. Even if the Department can establish its burden of proof for any of the alleged violations, the Board's determination that Northwest Abatement did not establish its affirmative defense of unpreventable employee misconduct is not supported by substantial evidence or the law.**

Before the burden of establishing unpreventable employee misconduct is shifted to Northwest Abatement, the Department must first establish a prima facie case that a violation occurred. *See* RCW 49.17.120(5)(a); *see also Legacy Roofing, Inc. v. Dep't of Labor and Indus.*, 129 Wn. App. 356, 362-63, 119 P.3d 366 (2005).

The affirmative defense of unpreventable employee misconduct is codified in RCW 49.17.120(5)(a), which provides:

No citation may be issued under this section if there is unpreventable employee misconduct that led to the violation, but the employer must show the existence of:

- (i) A thorough safety program, including work rules, training, and equipment designed to prevent the violation;
- (ii) Adequate communication of these rules to employees;
- (iii) Steps to discover and correct violations of its safety rules; and
- (iv) Effective enforcement of its safety program as written in practice and not just in theory.

The defense does not negate an element of the Department's prima facie case. *Asplundh Tree Expert Company v. Dept. of Labor and Indus.*, 145 Wn. App. 52, 61-62 (2008). The defense addresses situations in which employees disobey safety rules despite the Employer's diligent communication and enforcement. *Id.* at 62. It defeats the Department's claim, even when the Department has proved all the elements of the violation. *Id.* at 61-62.

Here, the Board determined although Northwest Abatement had "a safety program in place, communicated safety rules to employees, and took some steps to discover and correct violations, it failed to enforce its safety program and has not proved the defense of unpreventable employee misconduct." (CABR 8). Here, however, the uncontroverted testimony demonstrates that Northwest Abatement clearly met the elements set forth in RCW 49.17.120(5), and the Board's decision to the contrary is not supported by substantial evidence.

First, Northwest Abatement clearly had a thorough safety program, including work rules, training, and equipment designed to prevent violations. Northwest Abatement had a fall protection program (Exhibit C); a fall protection / safety work plan (Exhibit D); daily project logs (Exhibit E); an employee handbook (Exhibit F); safety production meetings (Exhibit G); meeting minutes (Exhibit H); job site checklist (Exhibit I); a health and safety program (Exhibit J); a hazard communication program (Exhibit K); employee certifications (Exhibits N-R), and an accident prevention plan (Exhibit 13). Northwest Abatement also provides each worker with a copy of its health and safety program upon hire. (Tr. 8/8/17, p. 42).

Moreover, Northwest Abatement designed and implemented a reliable training program to provide its employees with specific instruction on the practices necessary to perform their work in a safe manner. Indeed, Northwest Abatement helps certify their workers. This means that Northwest Abatement's workers have cards from the State of Washington certifying them as being appropriately trained on how to safely work with asbestos. (Tr. 8/8/17, p. 42-43; Exhibits O-R). In addition, Northwest Abatement sends its workers to Occupational Health to have respirator fit testing and physicals. (Tr. 8/7/17, p. 85; Tr. 8/8/17, p. 42; Exhibits O-R).

Northwest Abatement also conducts regular safety meetings to provide a reliable system for communicating safety and health matters to its staff. (Tr. 8/7/17, p. 192). During the safety meetings, Northwest Abatement would talk about various kinds of topics. (Tr. 8/7/17, p. 192; Tr. 8/8/17, p. 42). Northwest Abatement's workers knew that if they had any questions or

concerns regarding safety, they could ask questions. (Tr. 8/7/17, p. 194). Furthermore, Northwest Abatement also took numerous steps to verify that its employees followed the safety and health rules in the workplace. Northwest Abatement has a safety manager, Mr. Peters, who performs random job site inspections one to two times a month, in addition to the project managers who perform their own inspections. (Tr. 8/8/17, p. 52). Mr. Peters would bring any issues that he noted to the individual's attention and/or the supervisor's attention, so everything would be self-corrected on site. (Tr. 8/8/17, p. 53).

Finally, Northwest Abatement also had a disciplinary system in place to prevent its workers from using unsafe work practices. Specifically, Northwest Abatement has a disciplinary program, wherein employees receive a verbal warning, written warning, and then termination. (Tr. 8/8/17, p. 53, 57). However, Northwest Abatement retains the ability to impose a harsher penalty if warranted by the circumstances. (Tr. 8/8/17, p. 57). For instance, a suspension could be implemented for a gross violation that would impact the safety of the individual or other workers. (Tr. 8/8/17, p. 57). In addition, Mr. Eckholm and Mr. Stephens testified to disciplining employees. (Tr. 8/8/17, p. 20; Tr. 8/8/17, p. 62). Written documentation for safety discipline is also placed in the workers' personnel file. (Tr. 8/8/17, p. 53).

Given the above, the record overwhelmingly establishes that Northwest Abatement met its burden of proving the affirmative defense of unpreventable employee misconduct as set forth in RCW 49.17.120(5)(a). Therefore, Corrective Notice of Redetermination Number 317941556 and Citation and Notice Number 317941568 must be vacated in their entireties.

## VII. CONCLUSION

For the above reasons, Northwest Abatement respectfully requests that the Court reverse the Board's Decision and Order its affirmation of any serious violation lacks substantial evidence and is unsupported by the law. As a result, Corrective Notice of Redetermination Number 317941556 and Citation and Notice Number 317941568 must be vacated in their entireties.

RESPECTFULLY submitted this 23<sup>rd</sup> day of September 2019.

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**CERTIFICATE OF SERVICE**

I certify that on September 23, 2019, I caused the original and copy of the **Employer's/Appellant's Opening Brief** to be filed via Electronic Filing, with the Court of Appeals, Division II and that I further served a true and correct copy of same, on:

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