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

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## I. REPLY TO THE DEPARTMENT'S ARGUMENTS

### A. Substantial evidence does not support the Board's finding that Northwest Abatement exposed its employees to a fall hazard or had knowledge of the alleged fall hazard.

First, the Board's determination that the Department established employee exposure to the fall protection violation is not supported by substantial evidence. To determine whether a worker is exposed to a hazard in violation of WISHA, the Department must show that the worker was actually exposed or 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 test for determining an employee exposure is whether it is "reasonably predictable" that employees would be in the zone of danger created by a noncomplying condition. *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996). The Secretary must show that it is reasonably predictable, either by operational necessity or otherwise, including inadvertence, that employees have been or will be in the zone of danger. 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).

In the present case, the Department's analysis of this issue fails to mention that on the first day of the project, Fields Roofing was supposed to install a guardrail perimeter system around the edge of the roof, per the site's fall protection workplan. 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). Therefore, 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. (Tr. 8/7/17, p. 63, 160; Tr. 8/8/17, p. 9-10). Northwest Abatement also had a cable installed around a stair tower for workers to tie off to in the event they had to leave the delineated area, which was used by Northwest Abatement's employees. (Tr. 8/7/17, p. 63, 160; Tr. 8/8/17, p. 9-10).

The Department asserted that Richard Crakes was the only person allegedly exposed to a fall hazard when dumping material into the chute. (Tr. 8/9/17, p. 29-30, 50-60; Exhibit 1, page 7). Mr. Crakes, however, did not have any recollection of ever dumping material down the chute before the guardrail was up. (Tr. 8/8/17, p. 161). (Tr. 8/8/17, p. 161). Yet, Mr. Crakes testified that if he dumped material down the chute, the process would have taken only approximately three seconds. (Tr. 8/8/17, p. 161).

In addition, the Department did not know the distance that Mr. Crakes was from the edge of the roof, nor did it calculate how close Mr. Crakes was to the edge of the roof. (Tr. 8/9/17, p. 67). Without ascertaining this key information, substantial evidence does not support the Board's finding of the fall protection violation because the Department

cannot establish that Mr. Crakes was closer than 6 feet from the edge of the roof where the delineators were set up.

This distance from the edge of the roof is significant and shows that the Department did not establish it was reasonably predictable that Northwest Abatement's workers would enter the zone of danger, despite the Department's contrary arguments. For example, *In re Hawkeye Construction, Inc.*, Dekt. No. 06 W0030 (July 30, 2007), the Board vacated a fall protection violation where employees were on a roof estimated to be 20 feet high without fall protection while installing fiber optic cable in a limited area on the roof of a building, no more than 6.5 feet from the roof's edge. The Board noted that the Department inspector failed to consider whether there was a reasonable likelihood of exposure and therefore vacated the fall protection violation because it determined that it was not reasonably predictable that the employees would enter the zone of danger. *Id.*; see also *Secretary of Labor v. Tricon Industries, Inc.*, 24 BNA OSHRC 1427 (No. 11-1877, 2012) (vacating a fall protection violation when the Secretary failed to establish 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 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) (vacating a fall protection violation when the record failed to

show 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); *see also Secretary of Labor v. Fishel*, OSHRC Docket No. 97-102 (determining Gussler, a laborer, did not have access to the zone of danger because although he was in close proximity to the deep portion of the unprotected trench, there was no reason for Gussler to enter the unsafe portion of the trench).

Given the above, the Department cannot establish Mr. Crakes was exposed to a fall hazard. Accordingly, the Board's determination that Mr. Crakes was exposed to a fall hazard is not supported by substantial evidence, and Violation 1-1 contained in Citation and Notice No. 317941556 must be reversed.

Next, the Board's determination that the employer had knowledge of the alleged fall protection violation because it was in "plain view" is not supported by substantial evidence. To prove a serious violation under WISHA, the Department must show 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 (2007). 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 (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. *Erection Co., Inc. v. Dep't of Labor and Indus.*, 160 Wn. App. at 207-08. Constructive knowledge may be proved through evidence that a violation was readily observable or in a conspicuous location in the area of the employer's crews. *BD Roofing, Inc.*, 139 Wn. App. at 109-10.

Here, the Board correctly stated that Northwest Abatement established it had "rules about fall protection, the rules have been communicated to workers, and that it took steps to discover violations." (CABR 100). Indeed, 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). Forrest Hamilton, a Northwest Abatement supervisor, communicated to the workers that they needed to stay behind the demarcation line, and if they were going beyond the demarcation line, they needed to use the fall protection systems provided. (Tr. 8/7/17, p. 96). As such, workers, including Hector Cruz and Brandon 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).

However, Mr. Crakes testified that dumping material down the chute with a wheelbarrow would only have taken approximately three seconds, and he did not know whether he dumped material down the chute on more than one occasion without the guardrail in place. (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. Indeed, Mr. Hamilton did not observe Mr. Crakes standing near the chute without fall protection, nor did he know that Mr. Crakes was standing near the chute without fall protection. (Tr. 8/7/17, p. 96).

Requiring Northwest Abatement to constantly and continuously monitor its employees every three seconds would be analogous to holding it strictly liable for the alleged fall protection violation. *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).

To downplay the duration of time and the difficulty in observing Mr. Crakes' alleged, and incredibly brief, fall protection violation, the Department points to the observations of Andrew Baja, a Department management analysis unaffiliated with DOSH. (Tr. 8/8/17, p. 68, 81). Specifically, the Department erroneously asserted that Mr. Baja's

observations of the workers established the “frequency and duration of the fall protection violations.” However, Mr. Baja’s testimony reveals that he did not remember what part of the rooftop that he saw the workers. (Tr. 8/8/17, p. 71). Instead, he “would say” or “thought” that the workers were walking all over the rooftop. (Tr. 8/8/17, p. 71). This makes sense because the workers were engaged in work, but a six-foot perimeter of the roof was demarcated to ensure that no workers were exposed to a fall hazard. Clearly, Mr. Baja’s testimony is not probative regarding this issue and should be rejected.

Given the above, the Board’s determination that Northwest Abatement had knowledge of the alleged fall protection violation is not supported by substantial evidence, and Violation 1-1 contained in Citation and Notice No. 317941556 must be reversed.

**B. Substantial evidence does not support the Board’s finding that Northwest Abatement violated the flagging requirements.**

Despite the Department’s assertions, the Board’s determination that Mr. Murphy was engaged in flagging activities and was exposed to a serious hazard is not supported by substantial evidence. Mr. Murphy was engaged in spotting activities and, therefore, the cited flagging regulations in Corrective Notice of Redetermination No. 317941556 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. (Tr.

8/7/17, p. 143). Specifically, Mr. Murphy stood in a non-traffic lane that was open to busses with a stop/slow paddle to help the truck back in for a period of less than two minutes. (Tr. 8/7/17, p. 141-43). He did nothing to flag, stop, or direct any cars, as that was not his intention. (Tr. 8/7/17, p. 143). His intention was to make sure that it was clear for the truck to come out into the street. (Tr. 8/7/17, p. 143-44). In fact, Mr. Murphy's supervisor, Mr. Hamilton, testified 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's determination that Mr. Murphy engaged in flagging is unsupported by substantial evidence and the law.

For the sake of argument, however, even if Mr. Murphy's actions are construed as flagging, he was never exposed to any hazard and the Board's contrary determination is unsupported by substantial evidence. The area where Mr. Murphy was standing was closed to traffic due to the construction activities; 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, although the closed lane was open to the bus, 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."

Additionally, the Department's assertion that Mr. Murphy was in the zone of danger because he could have been hit by a bus is misplaced because the Department never established if, when, or how often a bus was traveling on the date of the Department's inspection. Moreover, Mr. Murphy did not do anything to stop, flag, or direct any cars in the traveling lane, so it was not reasonably predictable that, during his spotting duties, he was or would be in the zone of danger given the lane closures and the short duration he was in the bus lane.

Furthermore, the Board's determination that the Department established Northwest Abatement had knowledge of Mr. Murphy's alleged flagging activities is not supported by substantial evidence. 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). Clearly this alleged violation was not committed in the presence of Northwest Abatement's crew.

Finally, although Mr. Hamilton was on site, the work was being conducted on a roof away from where Mr. Murphy was spotting. Mr. Murphy spotted for a period of only 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).

Given the above, the Board's affirmation of Violations 2-1, 2-2, 2-3, 3-1, 3-2, and 3-2 contained in Citation and Notice No. 317941556 are unsupported by substantial evidence and must be vacated.

**C. Substantial evidence does not support the Board's finding that Northwest Abatement committed any serious asbestos violations.**

The Board's determinations that Northwest Abatement's workers were exposed to any of the serious asbestos violations is not supported by substantial evidence because there was not a substantial probability that death or serious harm could result from any exposure to the brown, non-asbestos containing layer identified in the Department's photographic exhibits.

Although asbestos triggers the need to examine the risk of exposure, the good faith survey clearly establishes that the brown, non-asbestos containing fibrous material contained in the photographic exhibits did not contain asbestos. Accordingly, there was no risk of asbestos exposure at the time of the Department's inspection.

Instead, Ms. Van Loo appears to completely rely upon the good faith inspection, or bulk sample, contained in Exhibit 2, page 2, to establish asbestos exposure. The good faith inspection 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 layers were 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.

For instance, Mr. Hamilton testified 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). Ms. Van Loo, however, testified 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 having chrysotile (asbestos containing material) had already been removed. (Tr. 8/7/17, p. 99-100). 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).

Moreover, Mr. Hamilton did not see any black asphaltic pieces identified to contain asbestos in the brown cellulose. (Tr. 8/7/17, p. 109). Indeed, the material that did contain asbestos was non-friable, as the asbestos was bound within the asphalt material. (Tr. 8/8/17, p. 31).

Accordingly, Northwest Abatement could have treated the removal of the brown fibrous material identified in layer 13 with non-asbestos protocol.

Doug Henry, Northwest Abatement's expert witness, provided unrebutted testimony to this affect. Mr. Henry testified 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). Mr. Henry also testified that the brown layer did not contain asbestos per the Good Faith survey, which was also corroborated by the Department's own testing verifying no asbestos was contained in the brown soil and debris. (Tr. 8/9/17, p. 184-86).

Mr. Henry further 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>1</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). The Department offered no evidence to the contrary.

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<sup>1</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.

Given the above, the Board's affirmation of any of the serious asbestos violations contained in Citation and Notice No. 317941568 lacks substantial evidence in the record and must be reversed.

**D. Substantial evidence does not support the Board's finding that Northwest Abatement failed to establish its affirmative defense of unpreventable employee misconduct.**

Although the Board's determination that Northwest Abatement had "a safety program in place, communicated safety rules to employees, and took some steps to discover and correct violations," the Board's determination that Northwest Abatement failed to enforce its safety program is not supported by substantial evidence in the record.

First, 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).

Northwest Abatement further conducted 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).

Moreover, Northwest Abatement 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).

Overall, the Board's determination that Northwest Abatement did not enforce its safety program is unsupported by substantial evidence. Northwest Abatement had an in-depth accident prevention plan, communicated its rules to its workers, and took steps to discover and correct violations of its safety rules. Accordingly, 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, the serious violations issued against Northwest Abatement must be vacated.

## II. 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 17<sup>th</sup> day of December 2019.

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**CERTIFICATE OF SERVICE**

I certify that on December 17, 2019, I caused the original and copy of the **Employer's/Appellant's Reply 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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## Transmittal Information

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