

**FILED
Court of Appeals
Division II
State of Washington
11/25/2019 11:58 AM**

NO. 53439-8

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

NORTHWEST ABATEMENT SERVICES, INC,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE
OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

ROBERT W. FERGUSON
Attorney General

James P. Mills
Assistant Attorney General
WSBA No. 36978
Office No. 91040
1250 Pacific Avenue, Suite 105
Tacoma WA 98402
(253) 597-3896

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	STATEMENT OF THE ISSUES	2
	1. Employee exposure is established when workers are exposed to or have access to a violative condition. An employee was standing in active bus lane with a stop paddle, but without any warning signage or any personal protective gear. Another employee was working on the edge of multi-story roof without fall protection. And multiple employees worked around asbestos materials without following the proper protocols for asbestos work. Does substantial evidence support the Board's finding that Northwest Abatement exposed its employees to the hazards associated with flagging violations, fall protection violations, and asbestos violations?.....	2
	2. The Department can establish constructive knowledge of a violation if a supervisor knew about the violation or if the violation was in plain view. The site supervisor participated in the violations and they were in plain view from a public building. Does substantial evidence show that Northwest Abatement knew about the violations?	2
	3. Unpreventable employee misconduct is an affirmative defense that the employer must establish by showing that it has effectively enforced its safety program in practice and not just in theory. Northwest Abatement failed to offer its safety program into the record, a supervisor participated in the violations, and Northwest Abatement communicated the incorrect safety standard to its employees in its safety manual. Does substantial evidence show that Northwest Abatement failed to prove its safety program is effective in practice?	3
III.	STATEMENT OF FACTS.....	3

A.	Regulatory Background for Asbestos Containing Materials	3
B.	Northwest Abatement Was Hired to Remove the Asbestos Materials Identified in the Good Faith Survey So Another Contractor Could Replace the Roof.....	5
C.	The Department Initiated a Safety Inspection After a Department Employee Witnessed Potential Fall Protection Violations on a Nearby Roof.....	6
D.	The Department's Industrial Hygienist Identified Numerous Violations of the Asbestos Rules When She Conducted Her Inspection.....	8
E.	The Board Affirmed All But Two of the Items in the Department's Citation and the Superior Court Affirmed the Board's Order.....	12
IV.	STANDARD OF REVIEW.....	14
V.	ARGUMENT	15
A.	Substantial Evidence Supports the Board's Findings That Northwest Abatement's Exposed its Employees to the Cited Hazards.....	16
3.	Substantial evidence shows that the crew members were exposed to asbestos fibers when they removed asbestos containing roof materials without following proper procedures	24
a.	Northwest Abatement was required to follow asbestos abatement protocols once the good faith survey established the presence of ACMs and substantial evidence supports the presence of ACMs.....	25

b.	Substantial evidence shows that Northwest Abatement workers violated WAC 296-62-07712(4)(c) by dry shoveling and scrapping ACMs (Item 1-1(b)).....	28
c.	Substantial evidence shows that Northwest Abatement failed to properly dispose of asbestos materials (Items 1-2 and 1-3).....	30
d.	Substantial evidence shows Northwest Abatement exposed its employees to asbestos by failing to follow the appropriate protective clothing practices (Items 1-4, 1-5(a), 1-5(b), 1-5(c)).....	31
B.	Northwest Abatement’s Violations Were in Plain View and a Supervisor Participated So Substantial Evidence Supports the Board’s Constructive Knowledge Finding for All the Violations	36
1.	Northwest Abatement’s fall protection violations were in plain view so it had constructive knowledge.....	37
2.	Northwest Abatement knew or should have known Murphy was engaging in flagging activities	40
3.	Northwest Abatement knew of the hazards associated with the asbestos work at issue here and it had constructive knowledge of the asbestos violations	41
C.	Northwest Abatement Failed to Tailor Its Accident Prevention Program to its Work Site and Document Safety Meetings and Walk-around Inspections	44
VI.	CONCLUSION	50

TABLE OF AUTHORITIES

Cases

<i>Adkins v. Aluminum Co. of Am.</i> , 110 Wn.2d 128, 750 P.2d 1257 (1988).....	18
<i>Asplundh Tree Expert Co. v. Dep't of Labor & Indus.</i> 145 Wn. App. 52, 185 P.3d 646 (2008).....	15, 46
<i>BD Roofing, Inc. v. Dep't of Labor & Indus.</i> 139 Wn. App. 98, 161 P.3d 387 (2007).....	passim
<i>Brennan v. Gilles & Cotting, Inc.</i> 504 F.2d 1255 (4th Cir. 1974).....	17
<i>Elder Demolition, Inc. v. Dep't of Labor & Indus.</i> 149 Wn. App. 799, 207 P.3d 453 (2009).....	17, 36
<i>Erection Co. v. Dep't of Labor & Indus.</i> 160 Wn. App. 194, 248 P.3d 1085 (2011).....	38, 41
<i>Estate of Lint</i> 135 Wn.2d 518, 957 P.2d 755 (1998).....	41, 44
<i>Express Constr. Co. v. Dep't of Labor & Indus.</i> 151 Wn. App. 589, 215 P.3d 951 (2009).....	15
<i>Frank Coluccio Constr. Co., Inc. v. Dep't of Labor & Indus.</i> 181 Wn. App. 25, 329 P.3d 91 (2014).....	14
<i>Legacy Roofing, Inc. v. Dep't of Labor & Indus.</i> 129 Wn. App. 356, 119 P.3d 366 (2005).....	48
<i>Mid Mountain Contractors, Inc. v. Dep't of Labor & Indus.</i> 136 Wn. App. 1, 146 P.3d 1212 (2006).....	17, 21, 23
<i>Mowat Constr. Co. v. Dep't of Labor & Indus.</i> 148 Wn. App. 920, 201 P.3d 407 (2009).....	14

<i>Potelco, Inc. v. Dep't of Labor & Indus.</i> 191 Wn. App. 9, 361 P.3d 767 (2015).....	24, 36
<i>Potelco, Inc. v. Dep't of Labor & Indus.</i> 194 Wn. App. 428, 377 P.3d 251 (2016).....	38, 39, 40, 42
<i>Potelco, Inc. v. Dep't of Labor & Indus.</i> 7 Wn. App. 2d 236, 433 P.3d 513 (2018).....	38, 40, 42
<i>Pro-Active Home Builders, Inc., v. Dep't of Labor & Indus.</i> 7 Wn. App. 2d 10, 432 P.3d 404 (2019).....	39
<i>Sec'y of Labor v. Evergreen Tech., Inc.</i> 18 BNA OSHC 1528, 1998 WL 518250 (Occup. Safety Health Review Comm'n Aug. 17, 1998).....	17
<i>Stratton v. Dep't of Labor & Indus.</i> 1 Wn. App. 77, 459 P.2d 651 (1969).....	14
<i>Wash. Cedar & Supply Co. v. Dep't of Labor & Indus.</i> 119 Wn. App. 906, 83 P.3d 1012 (2003).....	16, 17, 37
<i>William Dickson Co.</i> 99 W0381, 2001 WL 1755665 (Wash. Bd. Indus. Ins. Appeals Dec. 18, 2001).....	4, 27, 34
<i>Zavala v. Twin City Foods</i> 185 Wn. App. 838, 343 P.3d 761 (2015).....	14

Statutes

RCW 49.17	3
RCW 49.17.010	15
RCW 49.17.120(5)(a)(i)-(iv)	45
RCW 49.17.120(5)(a)(iv).....	47
RCW 49.17.150	14, 24

RCW 49.26	3, 15
RCW 49.26.010	3, 4
RCW 49.26.013	5

Other Authorities

https://lni.wa.gov/safety-health/preventing-injuries-illnesses/request-consultation/	7
---	---

Regulations

WAC 296-155-110(2).....	45
WAC 296-155-110(3).....	45
WAC 296-155-110(7).....	45
WAC 296-155-110(9)(b)	45
WAC 296-155-24611.....	20
WAC 296-155-24611(1)(a)	19
WAC 296-155-24615(4)(a)(i)(A)	20
WAC 296-155-24622(1).....	40
WAC 296-155-305.....	22, 23
WAC 296-62.....	27
WAC 296-62-077 to -07755	3
WAC 296-62-07701.....	27
WAC 296-62-07703.....	4
WAC 296-62-07712.....	4

WAC 296-62-07712(10)(b)(v).....	31
WAC 296-62-07712(10)(b)(v)(A).....	30
WAC 296-62-07712(4)(c)	28
WAC 296-62-07715.....	4
WAC 296-62-07717(4)(b)	32
WAC 296-62-07719(3)(b)(i)	32
WAC 296-62-07719(3)(b)(iii)	32
WAC 296-62-07721.....	26
WAC 296-62-07723(2).....	35
WAC 296-62-07728(4)(f).....	32
WAC 296-65.....	27
WAC 296-65-020.....	26
WAC 296-800-370.....	40
WAC 296-842-15005(1)(c)	35

I. INTRODUCTION

Under the substantial evidence standard of review, the losing party at the Board of Industrial Insurance Appeals cannot ask the Court to view evidence in its favor and reweigh the evidence. Yet, that's exactly what Northwest Abatement Services, Inc. has done when challenging the 19 citations for unsafe workplace safety behavior.

Northwest Abatement, a company hired by other companies to perform the safe removal of asbestos, violated multiple asbestos requirements, as well as other safety requirements, when performing demolition work on an asbestos roof removal project in Tacoma. So the Department of Labor & Industries cited it for failing to follow proper asbestos procedures for demolition work, for failing to follow the established fall protection rules, and for failing to abide by flagging regulations.

Northwest Abatement raises three primary arguments as to each of the cited violations, but it fails to show how substantial evidence is lacking to support any of the violations it wants this Court to vacate. First, Northwest Abatement's claim that the Department failed to show employee exposure is without merit. Here, the Department showed actual exposure or access exposure to all the hazards identified. Second, substantial evidence supports employer knowledge as all the violations

were in plain view and a foreman participated in the violations. Finally, Northwest Abatement's claims that the violations were the result of unpreventable employee misconduct are also unsupported because Northwest Abatement failed to present evidence to show that its safety program was effective in practice.

The Board of Industrial Insurance Appeals and superior court correctly found that Northwest Abatement committed multiple safety violations related to the removal of the asbestos containing materials (ACMs), including flagging and fall protection. Because substantial evidence supports the Board's findings, this Court should affirm.

II. STATEMENT OF THE ISSUES

1. Employee exposure is established when workers are exposed to or have access to a violative condition. An employee was standing in active bus lane with a stop paddle, but without any warning signage or any personal protective gear. Another employee was working on the edge of multi-story roof without fall protection. And multiple employees worked around asbestos materials without following the proper protocols for asbestos work. Does substantial evidence support the Board's finding that Northwest Abatement exposed its employees to the hazards associated with flagging violations, fall protection violations, and asbestos violations?
2. The Department can establish constructive knowledge of a violation if a supervisor knew about the violation or if the violation was in plain view. The site supervisor participated in the violations and they were in plain view from a public building. Does

substantial evidence show that Northwest Abatement knew about the violations?

3. Unpreventable employee misconduct is an affirmative defense that the employer must establish by showing that it has effectively enforced its safety program in practice and not just in theory. Northwest Abatement failed to offer its safety program into the record, a supervisor participated in the violations, and Northwest Abatement communicated the incorrect safety standard to its employees in its safety manual. Does substantial evidence show that Northwest Abatement failed to prove its safety program is effective in practice?

III. STATEMENT OF FACTS

A. Regulatory Background for Asbestos Containing Materials

The Legislature has recognized the inherent dangers of asbestos. RCW 49.26.010. Because of the known danger from asbestos exposure, the Legislature adopted a comprehensive set of statutory provisions regarding exposure to asbestos and ordered the Department to enact asbestos regulations to protect workers from asbestos exposure. RCW 49.26.

Under this legislative mandate, the Department enacted rules for all occupational exposures to asbestos in all industries covered by RCW 49.17. WAC 296-62-077 to -07755. The asbestos regulatory scheme is rigorous. This rigor is commensurate with the hazards associated with asbestos. The Legislature has provided special protections against asbestos when it enacted the Asbestos Safety Act to protect the public against “irreversible lung damage and bronchogenic carcinoma” caused by

asbestos. RCW 49.26.010. “Our Legislature has recognized that certain material are inherently dangerous. Asbestos was deemed to be sufficient dangerous that it was singled out and declared a public health hazard by statute.” *William Dickson Co.*, 99 W0381, 2001 WL 1755665, at *2 (Wash. Bd. Indus. Ins. Appeals Dec. 18, 2001). This is because one in every four Americans dying in the urban areas of the United States has asbestos particles in his or her lungs. RCW 49.26.010. This is a “hazard to the public health and safety” and requires careful regulation. *Id.*

Asbestos precautions are divided into four classes—Classes I-IV. Class I work requires the greatest safety precautions, such as covering all work areas in impermeable materials, using respirators and protective coveralls (“Tyvek” suits), creating negative pressure by enclosing the regulated work area, and establishing separate enclosed cleaning rooms for workers to clean off friable asbestos materials with HEPA vacuums. WAC 296-62-07712. Class II work—which includes “the removal of asbestos-containing . . . , roofing . . .”—requires significant safety protections, such as the use of fitted respirators and Tyvek suits, using wet methods to reduce the risk of asbestos becoming airborne, and establishing a cleaning area with HEPA vacuum for workers to clean their suits. WAC 296-62-07703; *see* WAC 296-62-07712; WAC 296-62-07715. Classes III and IV require less stringent work requirements.

Projects that might involve asbestos require inspections in order to determine what safety precautions are necessary. RCW 49.26.013. An owner or employer must either be reasonably certain that asbestos will not be disturbed, provide a good faith inspection that shows none is present, or assume asbestos is present and follow the maximum precautions. *See Id.*¹

B. Northwest Abatement Was Hired to Remove the Asbestos Materials Identified in the Good Faith Survey So Another Contractor Could Replace the Roof

Northwest Abatement is an asbestos removal company hired for the sole purpose of removing asbestos-containing roofing materials at a “built-up” rooftop replacement project located at 955 Tacoma Ave S, Tacoma, WA. *See* CP 549, 1127. The project involved the removal of 12,000 sq. ft. of asbestos containing roofing material. CP 1127. Northwest Abatement removed the materials in 2,000 sq. ft. chunks down to concrete. CP 1127; CP 526. Fields Roofing installed the new roof on those sections after Northwest Abatement employees removed the old materials. *See* CP 551, 709. The roof consisted of 13 layers of roofing material, including multiple layers of black asphaltic material containing chrysotile.

¹ As John Stebbins, an industrial hygiene technical specialist for the Department, explained once asbestos has been identified by a good faith survey, the site must be treated as though it contains asbestos—which for Class II work requires continuing use of safety precautions such as those described above—until the area is cleaned and a visual inspection confirms that the materials containing asbestos have been completely removed. *See* CP 800-02, 819-20, 828-830.

CP 725; CP 1267. Chrysotile is a fibrous asbestos-containing material historically used in built-up roofing materials. CP 725. The top twelve layers were asphaltic material and the bottom two layers of "brown fibrous material." CP 552 1267. The workers used mechanized saws and hand tools to break the asphaltic materials into moveable pieces. CP 551-52, 615. The asphaltic layers generally adhered together so were removed together leaving the crumbly "brown fibrous material" containing "Filler, Perlite" and "Cellulose," which was pulled up separately. *See* CP 574; CP 1267.

In its required notice to the Department, Northwest Abatement represented it would use the following control measures to avoid asbestos exposure, including wet methods, a high-efficiency particulate arrestor (HEPA) vacuum, critical barriers, manual methods, and a regulated area. CP 1268-69.

C. The Department Initiated a Safety Inspection After a Department Employee Witnessed Potential Fall Protection Violations on a Nearby Roof

The Department initiated the investigation after Andrew Baga, a Department employee working at his desk at Tacoma's L&I office, witnessed workers working on a roof close to the edge without fall protection through his office window. CP 763-64. Baga approached the Division of Occupational Safety and Health (DOSH) consultation section

first and followed them out to the job site. CP 764.² Baga later approached the DOSH enforcement section after he witnessed the same employees remove their fall protection again after consultation departed. CP 769-70. Maili Jonkman, a DOSH compliance inspector, returned to the jobsite with Baga to open an inspection. CP 769-70. When Inspector Jonkman and Baga approached the job site, Inspector Jonkman witnessed Richard Crakes, a Northwest Abatement employee, standing in front of the unguarded chute area without fall protection. CP 1090-91; CP 880-84; CP 842-43. The chute was used to remove materials from the roof. CP 559.

Inspector Jonkman took several photographs of Crakes' exposure to the fall hazard. CP 1090-91. Baga and Inspector Jonkman also walked around the base of the chute and one of them took pictures of the chute, which they saw had a tear in the plastic sheeting connecting it to the dumpster. CP 770-72, 883. They also saw a worker use the chute to dispose of the roofing materials, which caused a cloud of dust to escape from the tear in the plastic. CP 881-82.

During the course of her investigation, Inspector Jonkman also saw another Northwest Abatement worker, who she later learned was Doug

² DOSH consultation provides no risk consultation without any fines or penalties, so does not assess fines or penalties. See <https://lni.wa.gov/safety-health/preventing-injuries-illnesses/request-consultation/>

Murphy, performing flagging duties. CP 889-90. He was standing in an active bus lane with a stop paddle as Northwest Abatement's truck removed the dumpster. CP 890; CP 621-622. He was not wearing the required high visibility vest or hardhat and no warning signage for flagging had been posted. CP 905-06, 1097. When he was approached, Inspector Jonkman asked for a flagger card, but he did not have one, so he had not been trained how to be a flagger. CP 891.

When Inspector Jonkman entered the roof area, she recognized the asbestos hazard and contacted Industrial Hygienist Lisa Van Loo, who also came to the jobsite to open the inspection. CP 889; CP 512. Inspector Van Loo opened her inspection in the early afternoon. CP 512.

D. The Department's Industrial Hygienist Identified Numerous Violations of the Asbestos Rules When She Conducted Her Inspection

When the Department hygiene inspection began, Northwest Abatement had a "regulated area" set up on the opposite side of the roof from the chute, but no decontamination area set aside. CP 528-29; CP 619, 964-65. Class II asbestos work requires a decontamination area set up with plastic sheeting where workers doff their suits and use a HEPA vacuum to remove any asbestos fibers that may be present on the workers' clothing. CP 964; CP 798. Some workers doffed their protective Tyvek suits within the regulated area itself and others doffed their suits just outside the

barrier. CP 569-70, 620. There was no HEPA vacuum on the roof available for employees to use at the time of the inspection. CP 620, 969-71. When Inspector Van Loo arrived, Northwest Abatement workers were also not saturating the materials being removed with water. CP 534; CP 620-21. As one Northwest Abatement worker explained, the employees “were not using water in the first section of the project” because the fiberboard material was saturated and they did not want to cause further problems of leaking. CP 620-21.

As Inspector Van Loo surveyed the scene, she watched the workers scrapping along the edges of the asphaltic layers, which loosens the asbestos fibers. CP 541; CP 1025.³

As she performed her inspection, Inspector Van Loo also saw one of the workers, who she later identified as Richard Crakes, working with a 6-8” tear in his Tyvek suit. CP 537. She asked the foreman to have him fix or replace the suit to abate the hazard. CP 537. As part of her inspection, she also checked respirator fit test cards and looked at the workers’ respirators to see if they matched the cards. *See* CP 539. Richard Crakes’

³ As Inspector Van Loo explained in her testimony when Northwest Abatement’s workers “were initially cutting the material, they used the roof saw, and they made what’s called a cut line and then removed the roofing in sections. When [she] arrived, they had removed several layers down. How many, [she] did not know, but the cut line was observable. And in order for them to establish that there is no asbestos exposure would have to, then, seal off that cut line in some fashion or encapsulate all along that cut line, and that had not taken place.” CP 1024.

card did not match the type of respirator he was using. CP 979-981; CP 863. He was fitted for a full mask, but was wearing a half mask at the time of inspection. CP 863, 979-80.

Ultimately, the Department issued multiple violation items as part of the safety and hygiene inspections. The safety inspection resulted in the following violations:

- Violation 1-1—Failure to wear fall protection while being exposed to hazards of 10 feet or greater while engaged in roofing;
- Violation 2-1—Failure to wear high visibility clothes while flagging, including a vest and hardhat;
- Violation 2-2—Failure to possess flagger training certification before flagging;
- Item 2-3—Failure to place advance warning signs while flagging;
- Violation 3-1—Failure of the accident prevention plan to include flagging activities;
- Violation 3-2—Failure to document safety meetings;
- Violation 3-3—Failure to document walk-around inspections.

CP 437-40. The violations and penalties were affirmed in the Corrective Notice of Redetermination after Northwest Abatement asked for review by DOSH. CP 422-24.

The hygiene inspection resulted in the following asbestos violations:

- Violation 1-1a—Failure to use wet methods to control asbestos dust during roof removal;
- Violation 1-1(b)—Engaging in dry shoveling and dry clean-up of asbestos containing debris;
- Violation 1-2—Failure to ensure asbestos-containing roofing material was stored in wet condition;
- Violation 1-3—Failure to ensure that asbestos material lowered to the ground in dust-tight chute;
- Violation 1-4—Failure to ensure protective clothing was replaced or repaired immediately when torn;
- Violation 1-5(a)—Failure to establish a decontamination area;
- Violation 1-5(b)—Failure to ensure workers entered and exited the regulated area through decontamination area;
- Violation 1-5(c)—Failure to ensure competent person (Certified Asbestos Supervisor) supervised employees in a manner that would ensure employees used all necessary asbestos engineering controls, work practices, and personal protective equipment;
- Violation 1-6—Failure to provide HEPA vacuum to decontaminate protective coveralls;

- Violation 1-7—Failure to ensure proper labeling of asbestos waste;
- Violation 1-8—Failure to ensure asbestos-material is cleaned up as soon as possible;
- Violation 1-9—Failure to ensure fit-testing of the correct respirator type;
- Violation 1-10—Failure to ensure that sealing problems with a tight-fitting respirator were prevented (cited for allowing employee to have facial hair sufficient to break seal); and,
- Violation 2-1—Repeat General—Failure to notify the Department of Labor & Industries of a change of start dates and times for asbestos removal activities.

CP 474-489. The Citation No. 317941568 became the final decision of the Department. Northwest Abatement appealed both to the Board. CP 333-35, 380.⁴

E. The Board Affirmed All But Two of the Items in the Department's Citation and the Superior Court Affirmed the Board's Order

The Department presented Department employees, including John Stebbins, an industrial hygiene specialist with an expertise in asbestos, the

⁴ At the Board, Northwest Abatement withdrew its appeal of Violation 2-1—the repeat violation for its failure to notify the Department of Labor & Industries of a change of start dates and times for asbestos removal activities—so that violation item is final and binding and no longer at issue here. CP 21.

two Department inspectors, and Andrew Baga; and a number of the Northwest Abatement employees as part of its case-in-chief. CP 123-50. Northwest Abatement largely relied on the cross-examination of the Department's witnesses, but also presented an environmental consultant, Douglas Henry. CP 57.

The industrial appeals judge issued a lengthy decision addressing both citations, which affirmed all the violations, except two violations in Citation and Notice of Assessment No. 317941568. CP 128-62. She vacated Violation 1-1(a), a violation for failing to use wet methods during the asbestos removal, and Violation 1-10, a violation for failing to ensure that an employee did not have facial hair that interfered with creating a correct seal of his respirator mask. CP 151-52. Northwest Abatement petitioned for review, but the Department did not challenge the two vacated items so they are no longer at issue. The Board granted review to adjust the penalty calculations, but otherwise affirmed the proposed order in a final decision & order. CP 40-56. Northwest Abatement appealed to Pierce County superior court. CP 3-5.

The superior court affirmed the Board. CP 1648-59. The court reasoned that substantial evidence supported each of the violations and it adopted the Board's analysis. CP 1648-59. This appeal follows.

IV. STANDARD OF REVIEW

RCW 49.17.150 governs review of a Board decision in a Washington Industrial Safety and Health Act (WISHA) appeal, where the court directly reviews the Board's decision based on the Board record. *Mowat Constr. Co. v. Dep't of Labor & Indus.*, 148 Wn. App. 920, 925, 201 P.3d 407 (2009). Courts review the Board's decision, not the industrial appeals judge's proposed decision. *Stratton v. Dep't of Labor & Indus.*, 1 Wn. App. 77, 79–80, 459 P.2d 651 (1969). If substantial evidence supports the Board's findings of fact, the findings stand. *See* RCW 49.17.150; *Mowat Constr. Co.*, 148 Wn. App. at 925. Evidence is substantial if it could convince a fair-minded person of the truth of the declared premise. *Id.* Under substantial evidence review, the court does not reweigh the evidence even though it “might have resolved the factual dispute differently.” *Zavala v. Twin City Foods*, 185 Wn. App. 838, 867, 343 P.3d 761 (2015). Rather, the court views the evidence in the light most favorable to the prevailing party at the Board—here, the Department. *See Frank Coluccio Constr. Co., Inc. v. Dep't of Labor & Indus.*, 181 Wn. App. 25, 35, 329 P.3d 91 (2014).

Courts “construe WISHA statutes and regulations liberally to achieve their purpose of providing safe working conditions for workers” and give substantial weight to the Department's interpretation of WISHA.

See *Frank Coluccio Constr. Co., Inc.* 181 Wn. App. at 36; see also RCW 49.17.010. In interpreting WISHA, courts look to federal decisions under the federal Occupational Safety & Health Act (OSHA). *Asplundh Tree Expert Co. v. Dep't of Labor & Indus.*, 145 Wn. App. 52, 60, 185 P.3d 646 (2008). But courts do not resort to federal case law if Washington provides precedent. *Express Constr. Co. v. Dep't of Labor & Indus.*, 151 Wn. App. 589, 599 n.8, 215 P.3d 951 (2009).

V. ARGUMENT

The Department adopted work place safety rules designed to prevent workers from being exposed to the dangerous hazards of asbestos exposure, the risk of falls from height, and exposure to injury by vehicles when engaged in flagging. These rules require employers to take precautions to prevent injuries, but Northwest Abatement failed to do so, so the Department cited it with multiple serious violations.

Here, critically, a good faith survey showed the presence of asbestos in roofing materials, so Northwest Abatement was required to take special precautions to ensure that its workers are not exposed to the hazards of asbestos. This is because the Legislature recognized the unique hazards of asbestos removal—placing workers at risk for cancer and other serious diseases—when it passed the Asbestos Act (RCW 49.26).

To prove a serious violation, the Department must show: (1) the cited standard applies; (2) the employer did not meet the standard; (3) employees were exposed to, or had access to, the violative condition; (4) the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition; and (5) there is a substantial probability that death or serious physical harm could result from the violative condition. *Wash. Cedar & Supply Co. v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 914, 83 P.3d 1012 (2003).

Northwest Abatement challenges whether the flagging or asbestos requirements applied to it, whether workers were exposed to the hazards, whether the employer had knowledge for the 19 citations.⁵ Its arguments turn on its reweighing of the facts and its misconstruction of the law.

A. Substantial Evidence Supports the Board's Findings That Northwest Abatement's Exposed its Employees to the Cited Hazards

The Board found that Northwest Abatement exposed its workers to fall hazards, risk of injury by vehicles, and to serious disease caused by asbestos, and substantial evidence supports its findings. CP 40-56.

The Department may satisfy the employee exposure element by showing either actual exposure or access exposure. *Mid Mountain*

⁵ Because its arguments about whether the standards applied to Northwest Abatement are intertwined with Northwest Abatement's exposure arguments, the Department will consider both issues together.

Contractors, Inc. v. Dep't of Labor & Indus., 136 Wn. App. 1, 6, 146 P.3d 1212 (2006); *Wash. Cedar*, 119 Wn. App. at 914; *see also Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255, 1264 (4th Cir. 1974) (remanding for an express decision regarding access exposure). Actual exposure occurs when there is “specific evidence of employee presence in the zone of danger.” *Brennan*, 504 F.2d at 1263.⁶ The access exposure analysis asks “whether the employees had access to the hazard posed” by the violative condition. *Mid Mountain*, 136 Wn. App. at 6.

On appeal, Mid Mountain argued that the Department failed to prove the exposure element because its employees worked “in a portion of the trench that was less than four feet deep and more than five feet away from the zone of danger.” *Id.* at 5.⁷ The court rejected Mid Mountain’s argument, finding that it was “irrelevant that Mid Mountain’s employees were in a portion of the trench less than four feet in depth.” *Id.* at 6.

The court held that the Department proved the exposure element because Mid Mountain’s employee had access to the zone of danger. *Id.* at

⁶ Washington often looks to the OSHA laws and consistent federal decisions under OSHA. *See Elder Demolition, Inc. v. Dep't of Labor & Indus.*, 149 Wn. App. 799, 806, 207 P.3d 453 (2009) (citations omitted); *Wash. Cedar*, 119 Wn. App. at 911–12.

⁷ So access exposure occurs if during the course of employees’ assigned working duties, “their personal comfort activities on the job, or their normal ingress-egress to and from their assigned workplaces, employees have been in a zone of danger or that it is reasonably predictable that they will be in the zone of danger.” *Sec’y of Labor v. Evergreen Tech., Inc.*, 18 BNA OSHC 1528, 1998 WL 518250, at *7 (Occup. Safety Health Review Comm’n Aug. 17, 1998) (internal quotations omitted).

7. The court reasoned that “[a]lthough [the employee] was not actually within the zone of danger, he was working within close proximity, and it is reasonably likely that he could have walked the short distance and been within the zone of danger.” *Id.* The court further reasoned that “[t]here was nothing to prevent entering the zone during the conduct of his normal duties.” *Id.*; compare *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 148, 750 P.2d 1257 (1988) (a worker has neither exposure nor access to a violative condition when the worker must “consciously and deliberately remove[]” a protective barrier to reach the violative condition.”). The only question for this Court to consider for the exposure element for each violation is whether substantial evidence supports the findings that Northwest Abatement exposed crewmembers to the hazards associated with fall hazards, flagging violations, and asbestos exposure.⁸ For the reasons discussed below, substantial evidence supports the Board’s findings.

1. Substantial evidence shows that Northwest Abatement exposed an employee to a fall hazard when its employee approached the unguarded chute area

⁸ Northwest Abatement cites three federal OSHA cases—*Secretary of Labor v. Rockwell International Corporation*, *Secretary of Labor v. Kokosing Construction Co., Inc.*, and *Secretary of Labor v. Fabricated Metal Products*—to argue that for employee exposure the Secretary of the federal Department of Labor must prove more than just the possibility an employee may be injured, but that the Secretary must show these “may well occur.” AB 11. These cases do not aid Northwest Abatement here, because while the Department had to prove its case by the preponderance of the evidence at the Board, this standard no longer applies and this Court now reviews for substantial evidence. In any event, these federal cases are distinguishable.

Northwest Abatement agrees that WAC 296-155-24611(1)(a) requires an employer to ensure that appropriate fall protection system is provided, installed, and implemented when an employee is engaged in roofing work on a low pitched roof and it does not dispute that fall protection was necessary here because the work involved a fall hazard of 10 feet or more. AB 14-15. Instead it claims that substantial evidence does not support that its workers were exposed to the hazard. It is wrong.

Northwest Abatement argues that there was not a fall protection violation because the Department did not prove the worker was less than six feet from the edge. AB 15. Substantial evidence shows that Northwest Abatement employees were exposed to the hazard because eyewitness testimony and photographic evidence show Crakes standing on the flat roof *directly* in front of the unguarded chute area without fall protection. CP 1090-91; CP 880-84. The chute lead several stories down to the street level and could result in serious injury or death. CP 880-84. Northwest Abatement's employees confirmed that they "were loading out down the chute without being tied off," while the safety railing was incomplete. CP 618. Baga saw multiple workers walking around without fall protection when he reported the fall protection issues to DOSH consultation initially and he witnessed a worker immediately remove a fall

protection harness as soon as DOSH consultation left. CP 763-67; CP 769-70.

Northwest Abatement asks this Court to apply a six-foot rule and then reweigh the evidence. AB 11. Although Northwest Abatement fails to explain the significance of its claim that Crakes was not six-feet from the edge, the Department assumes it conflates the safety line requirements with the general requirement to provide fall protection. *See* WAC 296-155-24615(4)(a)(i)(A). There are two problems with this analysis.

First, Northwest Abatement is incorrect that there is no hazard because the warning line or other barrier “must be erected no less than 6 feet nor more than 25 feet from the leading edge.” WAC 296-155-24615(4)(a)(i)(A). The alternative fall protection plan established at the work site on the first day involved two parts—warning lines set up at least six feet from the building’s edge and a full body harness to tie off to a cable and rope line system “anybody working beyond the delineators.” CP 703-704, 730. This violation does not involve a warning line because the Department did not cite Northwest Abatement for putting its warning line too close to the edge and the work performed by the chute was outside any warning line, so reading WAC 296-155-24611 and WAC 296-155-24615(4)(a)(i)(A) together does not aide Northwest Abatement. CP 560, 590. As the foreman confirmed, if anyone went beyond the “yellow barrier

tape” they needed fall protection in the form of “the body harness, the lanyards, and vertical lines.” CP 590.

Second, this reading of the rules together is not supported by the access exposure analysis from *Mid Mountain*, 136 Wn. App. at 6. Like the employees in *Mid Mountain*, who were working in close proximity to the dangerous part of the trench, the Northwest Abatement employees were in the zone of danger because they were working in close proximity to the unprotected chute—indeed they used the chute to drop the asbestos-containing roof materials down to street-level. CP 880-84. Even if the “six-foot rule” applied to determining exposure, Jonkman testified that she believed Crake was within six feet of the edge when she saw him—which is also confirmed by multiple photographs showing Crake standing by the exposed side the chute. CP 880-84; CP 8-9. Substantial evidence supports that Crakes was in the zone of danger when he came to the edge to empty the wheelbarrow—and the Board weighed this evidence and rejected Northwest Abatement’s claims. CP 880-84; CP 8-9; CP 12 (FF 3, 4, 5).

2. **Substantial evidence supports that Northwest Abatement violated the flagging requirements when an employee conducted flagging without proper flagging equipment, training, or a three-sign warning system**

Northwest Abatement's claims that its employee was not flagging and that there is not substantial evidence of exposure to the hazard are unsupported.

WAC 296-155-305 sets forth requirements for flagging: “[a] flagger is a person who provides temporary traffic control.” Subsection 5(a) requires that an employer ensures a flagger wears a high-visibility safety garment and high visibility hard hat while conducting flagging activities. Subsection (6)(a) requires that an employee conducting flagging operation possess a valid Washington traffic control flagger card or its equivalent. Subsection (8)(a) requires a three-sign warning system in advance of a flagger. The photograph in Exhibit 1 shows Northwest Abatement worker Douglas Murphy “standing in the road with a stop/slow sign. The stop is towards oncoming traffic.” CP 890, 1047. Murphy did not have a high visibility vest or a hard hat. CP 905-06. Murphy did not have a flagging card. CP 891. And Inspector Jonkman walked around the jobsite and did not see any of the signs required as part of the three-sign warning system described in the rule and denoted on the City's plan. CP 1097; CP 949-51.

Northwest Abatement claims Murphy was “spotting” rather than flagging, but substantial evidence (and common sense) defeat this claim under the definition of flagger—a “person who provides temporary traffic

control.” AB 12. First, the project scope specifically states that Northwest Abatement’s employees will need to “flag for [the Northwest Abatement truck driver] to place can,” which is what Murphy was doing. CP 1127; CP 890. Second, the city’s traffic control plan called for signage and a lane closure. CP 949-50. Third, Murphy explained that he was there because that “was right where the bus came in and out container truck had to go against traffic and back into our disposal site[...]. CP 621. He was present “to hold up a stop sign so nobody would run into him when he was pulling into the job site” CP 621. This is “temporary traffic control” under the flagging rule. *See* WAC 296-155-305. Northwest Abatement claim that “[i]t is undisputed that the area where Mr. Murphy was standing was closed due to construction activities” misconstrues the record. AB 13. Rather, Inspector Jonkman testified he was in an active bus lane where he could be injured by a bus. CP 889-90; CP 891 (“That particular location is a combination of the through traffic and the bus stop”). Murphy testified he thought it was an active bus stop. CP 635-36.

Substantial evidence supports that Murphy was in the zone of danger. CP 46-47 (FOF 10, 12, 14); *Mid Mountain*, 136 Wn. App. at 6. Although the duration of traffic control was short, it was part of the regular work pattern at the work site because Northwest Abatement workers removed materials twice a day during the course of the project.

Contra AB 12-14.⁹ Murphy reported that “[they did] it every time the truck came in and out,” which would have been a once or twice per day. CP 622. As the Board recognized, the foreman testified: “I think we were given that sign to keep people from driving in, because there was people that would come and drop people off on the corner there while we were trying to do what we were doing.” CP 597; CP 41. These facts establish exposure. *Mid Mountain*, 136 Wn. App. at 6.

Northwest Abatement asserts that there was no exposure because there was no bus present at the time of the inspection. AB 13. But the exposure analysis turns on the potential for exposure to a hazard. *See Potelco, Inc. v. Dep’t of Labor & Indus.*, 191 Wn. App. 9, 27, 361 P.3d 767 (2015). What Northwest Abatement is really contesting is the likelihood of exposure—but this goes to a different element under calculation of a penalty.

3. Substantial evidence shows that the crew members were exposed to asbestos fibers when they removed asbestos containing roof materials without following proper procedures

Northwest Abatement asks this Court to create a new standard requiring the Department to show *actual* exposure to asbestos fibers by

⁹ WISHA penalties take into consideration the duration of an event by reducing the penalty based on the probability of harm. *See* WAC 296-900-140. But in any event Northwest Abatement does not challenge the penalty calculations here. *See* AB 12-14, 36-37.

workers and then asks this Court to reweigh the evidence to determine that there was no exposure. AB 16-18. But Northwest Abatement's argument fails because actual exposure is not required, and substantial evidence supports access exposure. *Mid Mountain*, 136 Wn. App. at 6.

- a. **Northwest Abatement was required to follow asbestos abatement protocols once the good faith survey established the presence of ACMs and substantial evidence supports the presence of ACMs**

Substantial evidence supports that asbestos was on-site at the time of inspection because the good faith inspection sample report shows there was asbestos present. CP 1024; CP 1267. Northwest Abatement's claim that all the asbestos containing materials were removed before the Department investigator observed its violations is misleading. AB 17. The roof was removed in sections and when the Department started its investigation the Northwest Abatement workers had not removed all the asphaltic materials because it had removed asphalt from only a quarter of the roof. CP 616. And, the workers were actively scrapping along the asphaltic edges of the next section, so the site was not free of asbestos containing materials as Northwest Abatement asserts. CP 541, 1025.

The Board correctly relied on the good faith inspection sample report to establish that asbestos was present. CP 1267; CP 9-20.¹⁰ That is the purpose of good faith survey—to establish whether asbestos precautions are necessary or not. WAC 296-62-07721; *see also* WAC 296-65-020 (notification to the Department about the details of the removal). The good faith survey report (supported by laboratory testing of the core sample) showed that there were black asphaltic materials contained in multiple layers the workers removed, including layers 3, 5, 7, 9, and 11, with brown, fibrous materials underneath. CP 1267. Now, Northwest Abatement asks this Court to reweigh the evidence and assume that there was no exposure established based on the testimony of some that the workers were working with the last brown layer when the inspector arrived. *See* AB 16-18. But Inspector Van Loo testified that she watched the workers scrapping along the edges of the asphaltic layers, which “would loosen any fibers that were in that asbestos-containing layers that were adjacent to where they were removing the materials.” CP 1025.

While Northwest Abatement says that it has never argued that the Department needed to “measure” the amount of asbestos, it goes on to

¹⁰ Inspector Van Loo testified that she tested two small pieces of materials near the entrance to the jobsite, but did not take more samples because she already “had the results from the core sample that was taken that showed that asbestos was present in the material.” CP 1023.

argue that because the Department took two loose bulk samples (from near the entry to the site) that later turned up negative that there is no substantial evidence of the presence of asbestos. AB 17. But as Inspector Van Loo explained, she did not take additional bulk samples, wipe samples, or air samples to find friable asbestos because there was a core sample that showed the presence of asbestos and she viewed activities that would release asbestos when she arrived, so she did not need to. CP 1023-1024.

Finally, Northwest Abatement's reading of the exposure requirement as applied the asbestos rules is also wrong. Special rules apply to asbestos exposure. WAC 296-62 and WAC 296-65, which apply to all occupational exposures to asbestos, do so without reference to quantity or duration. *See* WAC 296-62-07701. The Board has long recognized that "[a]irborne asbestos fibers present a sufficiently serious risk to worker health that it is imperative that employers follow known, preventative methodology with respect to asbestos abatement" when asbestos has been identified on-site. *William Dickson*, 2001 WL 1755665, at *3. The Board also agrees that the Department is not required to show measurable exposure to asbestos fibers to demonstrate a "serious" violation: "We disagree with any suggestion that proof of a serious violation of WISHA regulations requires a showing of the actual extent of

exposure to asbestos fibers together with medical testimony establishing a substantial probability that death or serious harm could result from such exposure.” *Id.* at *4. The Board found that the risk of death or serious harm (and proof of a “serious” violation) comes from the conditions that existed on the worksite and the employer’s practices, methods, and processes. *Id.* Although the work in *Dickson* was Class I, the same rationale applies in this matter because the removal of ACM roofing materials using non-intact removal methods also results in airborne fibers. Here, the Board applied the same correct reasoning.

b. Substantial evidence shows that Northwest Abatement workers violated WAC 296-62-07712(4)(c) by dry shoveling and scrapping ACMs (Item 1-1(b))

Employers who remove asbestos containing materials must refrain from dry shoveling and scrapping. WAC 296-62-07712(4)(c). This regulation ensures that friable material does not become airborne. As the Department’s expert explained, once a good faith survey has established the presence of asbestos containing materials, an employer must use all the proper asbestos removal materials until the entire area is cleaned, and a further inspection establishes that the area no longer contains such asbestos. CP 800-02. That did not happen here and Northwest Abatement does not claim it did. AB 19-21. Rather, it asks this Court to reweigh the

evidence and conclude that the only materials the inspector saw being removed (in Item 1-1(b)) were the brown materials identified in the good faith survey as containing no asbestos at the time the core sample was taken (and before the ACMs were disturbed by Northwest Abatement removal process). But substantial evidence supports that the materials at issue in 1-1(b) contained asbestos and must be treated as such and Northwest Abatement failed to do so. *See* CP 800-01.

When the Inspector Van Loo arrived on-site the materials were in a dry state and had not been saturated. CP 534. She saw the workers scrapping and shoveling dry asphaltic materials, including along the cut line. CP 534, 1024-25. Although several workers claimed they had used water, one of the former workers confirmed that the Northwest Abatement employees “were not using water in the first section of the project” because they believed the material was already wet (and because it was in the area of the roof leak and they did not want to cause further problems). CP 620-21. But as Van Loo explained, to prevent the hazard the materials must be in a saturated state. CP 534-35, 541-42. Northwest Abatement’s lengthy discussion about its expert’s opinion is immaterial because the Board weighed this testimony and did not accept it. AB 20-22.

c. Substantial evidence shows that Northwest Abatement failed to properly dispose of asbestos materials (Items 1-2 and 1-3)

Northwest Abatement also asks this Court to reweigh the testimony regarding these violations and conclude that the material was not the asphaltic materials and, therefore, that particular layer did not contain asbestos. AB 19-24. Substantial evidence shows that asphaltic materials were transported without the proper means. For the reasons discussed above, even if none of the material was the asphaltic materials, substantial evidence supports that it still contains asbestos because mechanical means were used to remove the materials and once disturbed all the materials contain ACMs and must be treated as such.

WAC 296-62-07712(10)(b)(v)(A) requires that any asbestos materials that are stored be wet, placed in a plastic bag, or covered by plastic sheeting while they are still in the work area. When Inspector Van Loo arrived, Northwest Abatement workers were not saturating materials and dry materials were sitting in a wheelbarrow. CP 534, 545; CP 620-21; CP 1359. The materials in the wheelbarrow were dry. CP 534. Dry materials containing asbestos can result in exposure and exposure to asbestos causes serious disease or death, because it causes serious illness or injury. CP 543.

WAC 296-62-07712(10)(b)(v) requires that if asbestos lowered to the ground using a chute, it must be “dust-tight.” *See* WAC 296-62-07712(10)(b)(v)(“Asbestos-containing material that has been removed from a roof must not be dropped or thrown to the ground. Unless the material is carried or passed to the ground by hand, it must be lowered to the ground via covered, dust-tight chute, crane or hoist[.]”). Baga and Inspector Jonkman walked around the base of the chute and took pictures of the chute, which they saw was torn. CP 770-72, 883,1073. They saw the chute being used only minutes before they took pictures of the torn sheeting and saw debris spraying out. CP 771. Baga testified that he saw a cloud of dust come out from the torn area he saw. CP 772. Inspector Van Loo relied on these photographs and discussions with Inspector Jonkman. CP 957-58. Northwest Abatement employees were exposed to the hazard because they were working in the immediate area during the course of the project, including its flagger who worked at the street level, and that would be a “serious violation because any dust raised would contain asbestos fibers, which would be a hazard to employees.” *See* CP 959.

- d. **Substantial evidence shows Northwest Abatement exposed its employees to asbestos by failing to follow the appropriate protective clothing practices (Items 1-4, 1-5(a), 1-5(b), 1-5(c))**

WAC 296-62-07717(4)(b) requires an employer to ensure that protective coveralls remain intact during the removal of asbestos or are immediately replaced when damaged. WAC 296-62-07719(3)(b)(i) requires an employer to establish an area where employees and equipment can be decontaminated. WAC 296-62-07719(3)(b)(v) requires employers ensure that employees enter and exit the regulated area through that area. WAC 296-62-07728(4)(f) requires an employer to ensure that the competent person (i.e. the certified asbestos supervisor) supervises employees in a manner that would ensure employees used engineering controls, work practices, and personal protective equipment in a manner that is in compliance with all requirements. And WAC 296-62-07719(3)(b)(iii) requires that the employer provide a HEPA vacuum for employees to decontaminate their work clothing.

The inspector saw the 6-8" tear in Crakes' Tyvek suit shortly after she began her inspection. CP 536-37. She asked the foreman to have Crakes fix or replace and he complied. CP 536-37. WAC 296-62-07717(4)(b) requires 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." The foreman was working on the jobsite along with Crakes and did not ask Crakes to repair it until after Inspector Van Loo identified the tear. It is more likely than not that the

tear occurred before Inspector Van Loo entered the worksite and was present for a period of time before she asked foreman to make him repair it. Such a tear exposes a worker to hazard because if asbestos “contaminate[s] the employees street clothes and then they take the asbestos fibers home with them or are exposed to them when they clean off at the end of the day.” CP 538.

Northwest Abatement had a “regulated area” set up on the opposite side of the roof from the chute, but it is undisputed that there was no decontamination area set aside when inspection began. CP 528-29; CP 619, 964-65. Class II asbestos work requires that there be an area set up with plastic sheeting where workers doff their suits and use a HEPA vacuum to remove any asbestos fibers that may be present on the workers’ clothing. CP 964-65; *see* CP 798. Some workers doffed their protective Tyvek suits within the regulated area itself and others doffed just outside the barrier. CP 569-70, 620. Photographs confirm that Northwest Abatement had no consistent practice and that employees were not using a decontamination area. CP 1110. There was no HEPA vacuum on the roof available for employees to use at the time of the inspection. CP 968-69. Inspector Van Loo looked for a HEPA vacuum when she performed the inspection and checked the photographs and confirmed that none was present. CP 620, 969-71. A HEPA vacuum is necessary to clean off

asbestos materials when workers remove coveralls. *See* CP 969-70; CP 538.

The hazard and exposure are the same as the other asbestos citations, so substantial evidence supports these violations. CP 593-94.

4. Substantial evidence shows that Northwest Abatement exposed its workers to additional risk by failing to properly handle the asbestos materials after removal (Items 1-7 and 1-8)

For the reasons discussed above, substantial evidence shows that the materials at issue contained asbestos: a good faith survey established the presence of asbestos, Northwest Abatement used mechanical means to cut up the materials so it did not remove the materials intact. CP 1267; *see* CP 19-21; CP 800-01; *contra* AB 16-19. The Department was not required to test all the materials present to establish how much asbestos was present while they were engaging in asbestos removal activities subject to the notice Northwest Abatement provided to the Department, because that is not the standard for asbestos. *William Dickson*, 2001 WL 1755665, at *3.

WAC 296-62-07721(5)(c) requires employers to ensure that bags containing asbestos scrap or waste were labeled with warnings about asbestos. The Department cited Northwest Abatement for failing to label plastic bags and dumpsters containing asbestos. CP 971-72. Bagging is not always necessary, but if an employer chooses to do so then it must make

sure that asbestos materials are labeled so workers are not inadvertently exposed. *See* CP 972-73. When you bag materials that contain asbestos without proper labeling then there is risk that employees and other workers will not be aware that the bags contain asbestos material and risk exposure. *See* CP 973-74. At least one bag was outside the regulated area and near where another contractor's workers were working. CP 973.

WAC 296-62-07723(2) requires employers to ensure that all spills of asbestos-containing material are cleaned up as soon as possible. Northwest Abatement was cited for failing to clean up loose asbestos-containing material located near the chute, including the materials at the base of the chute and the materials in the wheelbarrow. CP 977-78, 1141-42. The chute was outside the regulated area, so any worker could go to that area during the course of the day.

5. Substantial evidence shows that Northwest Abatement did not provide fit testing for the respirator used by Crakes (Item 1-10)

WAC 296-842-15005(1)(c) requires the employer to provide fit testing for the type of mask an employee is wearing. That is because to have tight seal, the person must have been fit tested for the type of mask that the person is using. CP 980-81. Without a good fit, Crakes would be exposed to asbestos fibers. CP 981. Here, it is undisputed that Crakes was only medically certified to wear a full-face respirator and was wearing a

half-respirator. CP 980; AB 32. Northwest Abatement instead claims that he did not need to wear one because asbestos was not present. AB 31. For the reasons discussed above, it is wrong, and substantial evidence supports the Board's findings.

B. Northwest Abatement's Violations Were in Plain View and a Supervisor Participated So Substantial Evidence Supports the Board's Constructive Knowledge Finding for All the Violations

Substantial evidence supports the Board's findings that Northwest Abatement knew or could have known about the dangerous conditions associated with fall hazards, flagging violations, and Northwest Abatement's faulty asbestos practices. *See* CP 12-22 (FF 7, 10, 14, 16, 29); *see* RCW 49.17.180(b).

To establish a prima facie case of a serious WISHA violation, the Department must show that "the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition." RCW 49.17.180(6); *Potelco, Inc.*, 191 Wn. App. at 34. On appeal, the Court reviews only for substantial evidence, with the burden on Northwest Abatement as the appellant to disprove the Board's knowledge finding. *See Elder Demolition*, 149 Wn. App. at 806. Northwest Abatement's claim that the Board's decision lacks substantial evidence is unsupported and this Court should reject Northwest Abatement's request to reweigh the evidence supporting the knowledge element. AB at 32-37.

To prove the knowledge element for a serious violation at the Board, the Department need only show that the employer knew or, through exercising reasonable diligence, could have known, about the violative condition. RCW 49.17.180; *Wash. Cedar*, 119 Wn. App. at 914. Reasonable diligence involves several factors, including “an employer’s obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence.” *Erection Co. v. Dep’t of Labor & Indus.*, 160 Wn. App. 194, 206-07, 248 P.3d 1085 (2011) (quotation omitted). Additionally, the Department may show knowledge at the Board in at least two other ways: by establishing that the violative condition was in plain view or by showing that a supervisory agent was present.

1. Northwest Abatement’s fall protection violations were in plain view so it had constructive knowledge

Substantial evidence supports the Board’s conclusion that Northwest Abatement had at least constructive knowledge for the fall protection violations because the worker was standing in plain view and his supervisor was on the job-site so Northwest Abatement could have discovered this behavior with reasonable diligence. CP 12 (FF 7); *see Potelco, Inc. v. Dep’t of Labor & Indus.*, 194 Wn. App. 428, 440, 377 P.3d

251 (2016); *Erection Co.*, 160 Wn. App. at 207; *BD Roofing, Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 98, 110, 161 P.3d 387 (2007).

First, the foreman Forrest Hamilton was present on the job site during the time the fall protection violations occurred because he was working alongside the workers on the project. *See* CP 549-50. Knowledge may be imputed to the employer through a supervisory agent—such as a crew foreperson. *Potelco, Inc.*, 194 Wn. App. at 440; *Potelco, Inc. v. Dep't of Labor & Indus.*, 7 Wn. App. 2d 236, 245-46, 433 P.3d 513 (2018). “A management official need not be present to witness the violation.” *Potelco*, 7 Wn. App. 2d at 245-46 (citation omitted). So, even if he did not engage in the violations himself, Northwest Abatement could have learned of the violations with reasonable diligence.

Second, the violation occurred in plain view as demonstrated by the photographs and eyewitness testimony. Constructive knowledge is established if a violation is readily observable or in a conspicuous location in the area of the employer's crews—in “plain view.” *BD Roofing, Inc.*, 139 Wn. App. at 109; *see Erection Co.*, 160 Wn. App. at 207. When a violation is in the open and the violation is visible to any bystander, an employer has constructive knowledge of that violation. *Potelco, Inc.*, 194 Wn. App. at 440. In one plain view case, this Court concluded that a utility contractor knew or should have known of a violative condition because a

single violation occurred in an area where any bystander could have observed it. *Potelco, Inc.*, 194 Wn. App. at 440. Like *Potelco*, anyone in the work area could have observed this violation. *Id.*

Finally, Northwest Abatement claims that the duration of Crakes' behavior should be weighed in the analysis is without support. The frequency and duration of the fall protection violations that Baga witnessed from his office window—which caused him to contact DOSH in the first place—means that Northwest Abatement could have known of the hazard with reasonable diligence, but it is unnecessary to establish that Crakes' violations were of long duration to establish knowledge under the plain view case law. *Pro-Active Home Builders, Inc., v. Dep't of Labor & Indus.*, 7 Wn. App. 2d 10, 19-20, 432 P.3d 404 (2019); *see also BD Roofing, Inc.*, 139 Wn. App. at 109. No Washington court has imported the “reasonable amount of time” standard to WISHA cases. To the contrary, Washington courts have concluded that a *single* event of short duration is enough to show constructive knowledge to prove a serious WISHA violation. *See Pro-Active*, 432 P.3d at 409 (declining to consider duration as an element in establishing constructive knowledge); *see Potelco, Inc.*, 194 Wn. App. at 440 (single violative event visible to a bystander sufficient to establish knowledge); *see also BD Roofing, Inc.*, 139 Wn. App. at 110 (Department inspector saw roofing violation for

short duration when drove by site). And Northwest Abatement's claim to the contrary is without support. Substantial evidence supports constructive knowledge here.¹¹

**2. Northwest Abatement knew or should have known
Murphy was engaging in flagging activities**

Substantial evidence supports the Board's conclusion that Northwest Abatement had at least constructive knowledge for flagging violations because the foreman knew employees were engaging in flagging, Murphy was standing in plain view, and his supervisor was on the job-site so Northwest Abatement could have discovered this behavior with reasonable diligence. *See Potelco, Inc.*, 194 Wn. App. at 440; *Erection Co.*, 160 Wn. App. at 207; *BD Roofing*, 139 Wn. App. at 110.

First, the foreman knew employees were engaging in flagging, so whether or not foreman knew Murphy was flagging is immaterial because he knew that "spotting" was a responsibility for the crew on the job. CP 565-67. His knowledge can be imputed to Northwest Abatement. *Potelco, Inc.*, 194 Wn. App. at 440; *Potelco, Inc.*, 7 Wn. App.2d at 245-46. Second,

¹¹ Exhibit 14 and the testimony of Mark Stephens establishes a prior violation of the identical regulation related to Northwest Abatement Services /dba Stetz Construction in September 17, 2015. CP 1348-58. A repeat violation occurs when the "the employer has been cited one or more times previously for a substantially similar hazard"—here "falling from a height of 10 feet or more because they lacked adequate fall protection." WAC 296-800-370 (definition of repeat violation); WAC 296-155-24622(1). Northwest Abatement has abandoned its argument below that this was not a repeat violation, but similar past behavior is also weighed when establishing constructive knowledge under the case law.

Murphy's flagging activities were "readily observable" "in the area of the employer's crews," so plain view doctrine applies. *See Erection Co., Inc.*, 160 Wn. App. at 207; CP 881-905. The duration of his flagging is immaterial under Washington case law. *Pro-Active*, 7 Wn. App. 2d at 19-20. Finally, Northwest Abatement could have discovered this behavior with reasonable diligence since the flagging duties were actually documented in the City's traffic plan. *See Potelco, Inc.*, 194 Wn. App. at 440; CP 910, 949-51.

3. Northwest Abatement knew of the hazards associated with the asbestos work at issue here and it had constructive knowledge of the asbestos violations

Northwest Abatement assigns err to the Board's Finding of Fact No. 29 and claims that "the Department failed to establish employer knowledge for any alleged violations," but fails to provide any argument in support of any claim that substantial evidence does not support knowledge of the hazardous conditions associated with the asbestos violations. AB at 3, 32. Where a party purports to assign error to a finding of fact but fails to present argument that substantial evidence does not support the finding, the finding is a verity. *See Estate of Lint*, 135 Wn.2d 518, 531-33, 957 P.2d 755 (1998). "It is incumbent on counsel to present the court with argument as to why specific findings of the trial court are not supported by the evidence and to cite to the record to support that

argument.” *Id.* at 532. Northwest Abatement has waived its argument. But, in any case, substantial evidence supports the Board’s conclusion that knowledge for each of the asbestos violations for multiple reasons.

First, Northwest Abatement had actual knowledge that asbestos was present on the jobsite since it posted a good faith survey showing asbestos was present (and it was the very reason it was hired).

CP 549, 1127, 1267. So, it was aware of the hazard and with the exercise of reasonable diligence it could have learned of the violations. Second, since a supervisor was involved in many of the violations, the knowledge can be imputed. *Potelco, Inc.*, 194 Wn. App. at 440; *Potelco, Inc.*, 7 Wn. App. 2d at 245-46. And third, all the violations were also in plain view of the Department’s inspector, so the plain view doctrine applies. *See Erection Co., Inc.*, 160 Wn. App. at 207.

Substantial evidence supports knowledge of the violations by the plain view doctrine and by imputing employer knowledge in the following ways:

- Violation 1-1(b)—Inspector Van Loo witnessed the dry shoveling and dry clean-up of asbestos containing debris so it was in plain view. CP 544.

- Violation 1-2—Inspector Van Loo witnessed improper storage of asbestos-containing roofing material in a wheelbarrow and plastic bags. CP 536, 541 (plain view).
- Violation 1-3—Inspector Jonkman and L&I employee Baga saw that the asbestos material was not lowered to the ground in a dust-tight chute when they witnessed a torn chute in use. CP 770-72, 881-83, 957 (plain view).
- Violation 1-4—Inspector Van Loo witnessed the worker's torn protective clothing, and a supervisor was present. CP 537 (plain view).
- Violation 1-5(a)—Knowledge can be imputed because the foreman was responsible for establishing a decontamination area and the lack of one was in plain view when Inspector Van Loo performed a visual inspection of the work area. CP 964.
- Violation 1-5(b)—Knowledge can be imputed because it was foreman's responsibility to ensure workers entered and exited the regulated area through decontamination area he was required to establish, and because it was also in plain view. CP 966-67.
- Violation 1-5(c)—Knowledge can be imputed because the foreman was the designated competent person (Certified Asbestos Supervisor) and failed to establish the necessary asbestos

engineering controls, work practices, and personal protective equipment, and those failures were in plain view of the Department inspector. CP 966-68.

- Violation 1-6—Inspector Van Loo did not see a HEPA vacuum to decontaminate protective coveralls. CP 969-71 (plain view).
- Violation 1-7—Inspector Van Loo saw that Northwest Abatement failed to label the plastic bags containing asbestos waste as such. CP 971-72 (plain view).
- Violation 1-8—Inspector Van Loo saw crumbly material lying adjacent to the chute where asbestos material was dumped. CP 977 (plain view).
- Violation 1-9—Northwest Abatement’s failure to ensure fit-testing of the correct respirator type would be readily apparent when comparing the fit test documentation, which is in its possession, with the type of mask being worn. CP 539; 979-980 (plain view).

C. Northwest Abatement Failed to Tailor Its Accident Prevention Program to its Work Site and Document Safety Meetings and Walk-around Inspections

Northwest Abatement took exception to the Board’s findings that it failed to document safety meetings and walk-around inspections, but failed to provide argument so those findings are verities. AB 3; CP 14-15 (FF 16-21); *see Estate of Lint*, 135 Wn.2d at 531-33.

In any case, Violation 3-1 is supported by substantial evidence. WAC 296-155-110(2) and (3) require an accident prevention program (APP) to be tailored to a specific work site and for those standards to be communicated to the employees. Here, substantial evidence shows that the APP “did not include flagging activity, and the hazards associated with that” as Inspector Jonkman reviewed the entire accident prevention plan and testified it contained no such information. CP 912-913.

Violations 3-2 and 3-3 are likewise supported by substantial evidence. WAC 296-155-110(7) requires that safety meetings be documented and WAC 296-155-110(9)(b) requires that employers document walk around inspections and ensure that they are available for inspection. Substantial evidence shows that Northwest Abatement did not have documentation of safety meetings and did not provide documentation of toolbox meetings until July 28th, which is after the inspection occurred. CP 913-914; CP 1293-1297.

D. Substantial Evidence Supports Finding That Northwest Abatement’s Safety Program Was Not Effective in Practice, Because It Failed to Put on Any Meaningful Evidence About the Application of Its Program

Northwest Abatement failed to meet its burden of proving the defense of unpreventable employee misconduct at the Board. CP 45-55. RCW 49.17.120(5)(a)(i)-(iv) provides employers with a statutory

affirmative unpreventable employee misconduct defense to certain WISHA violations. *BD Roofing*, 139 Wn. App. at 111. After the Department establishes a prima facie case that a violation has occurred, as it did here, the employer may be relieved of responsibility for the violation by raising that defense, but only if the employer can prove it has:

1. Established a thorough safety program, including work rules, training, and equipment designed to prevent the violation;
2. Adequately communicated these rules to its employees;
3. Tried to discover and correct safety rule violations; *and*,
4. Effectively enforced its safety program as written, in practice, and not just in theory.

RCW 49.17.120(5)(a); *BD Roofing*, 139 Wn. App. at 111.¹² The defense applies only in “situations in which employees disobey safety rules despite the employer’s diligent communication and enforcement.” *See Asplundh Tree Expert*, 145 Wn. App. at 62.

Here, the Board concluded that “[a]lthough 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*

¹² Although the Board focused primarily on Northwest Abatement’s failure to show an effective safety program, there is also reason to doubt its thoroughness as it failed to include the flagging requirements in its safety program. *Contra* AB 39; CP 912-913.

employee misconduct.” CP 44 (emphasis added). Northwest Abatement failed to establish the “effective enforcement of its safety program as written in practice and not just in theory.” RCW 49.17.120(5)(a)(iv); CP 44. Substantial evidence supports this conclusion for multiple reasons.

First, an employer shows an effective program only if the violation is an isolated occurrence and not foreseeable. *See BD Roofing*, 139 Wn. App. at 111. But here, the fall protection violation was a repeat violation for the same type of conduct, so it was not an isolated occurrence. CP 1315. Likewise, the types of misconduct were foreseeable since they are the types of work the Northwest Abatement regularly conducts.

Second, Northwest Abatement has provided no documentary evidence that it punished any employees for violating safety rules before the violations at issue. In *BD Roofing*, the court noted “showing a good paper program does not demonstrate effectiveness in practice.” *BD Roofing*, 139 Wn. App. at 113. The court found that when there was no evidence that an employer had fired employees for violating safety rules, the evidence of unpreventable employee misconduct fails, even though there was testimony that the employer’s policy allowed for dismissal when a violation occurred. *Id.* at 113-14. In *BD Roofing*, there was no documentary evidence that it disciplined its employees or implemented its written discipline policy, and the court held that the employer did not

show its safety program was effective in practice. *Id.*; *see also Legacy Roofing, Inc. v. Dep't of Labor & Indus.*, 129 Wn. App. 356, 366, 119 P.3d 366 (2005) (inadequate documentation of discipline supported Board determination of no unpreventable employee misconduct). Without showing actual enforcement of a company's disciplinary policy, the employer cannot meet its burden to show unpreventable employee misconduct. And the Board can rely on the lack of documented evidence to determine whether the program is effective in practice. *BD Roofing*, 139 Wn. App. at 113-14.

Third, while Northwest Abatement put on self-serving testimony to describe its disciplinary program, it did not submit written evidence that it had ever disciplined any employee for a safety violation and none of the workers, including the foreman, were aware of *anyone* being disciplined for a safety violation, or how it worked. AB 40; CP 576-78; CP 660; CP 680. The foreman had never written anyone up and appeared unfamiliar with how the discipline process worked. CP 577-78. Northwest Abatement did not produce evidence that any employee had ever received anything other than a verbal correction for safety violations prior to this inspection. And there is no evidence of discipline ever being communicated to employees, so there is no deterrent effect. *See* CP 576-78; CP 660;

CP 680. None of the above-cited cases have accepted a verbal warning as “discipline,” because it does not carry any consequences.

Finally, Northwest Abatement’s cursory safety meetings and irregular inspections support the Board’s conclusion. Indeed, it was cited for failing to keep such documentation. CP 913-914; CP 1293-1297. Northwest Abatement’s safety director conducted safety inspections only “one to two times per month” and had never disciplined a worker other than bringing a safety violation to the workers’ attention and no one else conducted audits. CP 747-48. Northwest Abatement provided only a handful of examples of on-site safety checklists in support of its position, so the Board was correct to reject its claim.

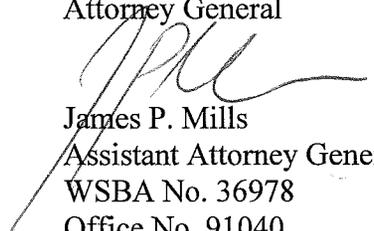
Holding employers—such as Northwest Abatement—to their burden to establish an affirmative defense is critical to enforcing safety rules. To do otherwise creates an unacceptable public health risk contrary to the purposes of WISHA and the Asbestos Safety Act.

VI. CONCLUSION

The Board properly affirmed the Department's work place safety citations. The Board correctly recognized that Northwest Abatement committed multiple safety violations related to the removal of the ACMs, including flagging and fall protection. Because substantial evidence supports the Board's findings, this Court should affirm.

RESPECTFULLY SUBMITTED this 25th day of November, 2019.

ROBERT W. FERGUSON
Attorney General



James P. Mills
Assistant Attorney General
WSBA No. 36978
Office No. 91040
1250 Pacific Avenue, Suite 105
Tacoma WA 98402
(253) 597-3896

PROOF OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that the Brief Of Respondent, to which this proof of service is attached, was delivered as follows:

Original via E-filing to:
<https://ac.courts.wa.gov/>
Derek Byrne, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300 M.S. TB-06
Tacoma, WA 98402-4427

Via US Mail and Electronic Service to:

aaron.owada@owadalaw.net
richard.skeen@amslaw.net
sean.walsh@owadalaw.net
Aaron K. Owada
Richard I. Skeen
Sean Walsh
Owada Law, PC
975 Carpenter Road NE, Suite 204
Lacey, WA 98516-5560

DATED this 25th day of November, 2019, at Tacoma, WA.



MELANIE PENNINGTON
Legal Assistant

ATTORNEY GENERAL OF WASHINGTON - TACOMA LNI

November 25, 2019 - 11:58 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53439-8
Appellate Court Case Title: Northwest Abatement Services Inc, Appellant v WA State Dept L&I, Respondent
Superior Court Case Number: 18-2-07203-0

The following documents have been uploaded:

- 534398_Briefs_20191125115735D2971001_7003.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Dr3-Northwest AbatementFINAL.pdf

A copy of the uploaded files will be sent to:

- Sean.Walsh@owadalaw.net
- aaron.owada@owadalaw.net
- richard.skeen@owadalaw.net

Comments:

Sender Name: Melanie Pennington - Email: melaniep2@atg.wa.gov

Filing on Behalf of: James P Mills - Email: jamesm7@atg.wa.gov (Alternate Email: LITacCal@atg.wa.gov)

Address:
PO Box 2317
Tacoma, WA, 98401
Phone: (253) 593-5243

Note: The Filing Id is 20191125115735D2971001