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NO. 43104-1-II

COURT OF APPEALS FOR DIVISION II

STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent,

v.

APCOMPOWER, INC.,

Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

APComPower Inc. is incorporated in Delaware and is a wholly owned subsidiary of Alstom Power Inc., also a Delaware corporation. APCom has worked as a non-asbestos maintenance sub-contractor at the TransAlta Centralia Steam Plant for over 10 years and has never had any prior WISHA asbestos citations.

II. CITATION TO COURT OF APPEALS DECISION

Petitioner seeks review under RAP 13.3(a)(1) and RAP 13.4(b) of the Unpublished Opinion filed December 17, 2013 by Division II of the Washington Court of Appeals, No. 43104-1-II, reversing the Superior Court's judgment dismissing the WISHA citations and finding reasonable diligence by APCom. Appendix A at pages A-1 through A-18 contains a copy of the decision. The Decision terminated review.[1]

III. ISSUES PRESENTED FOR REVIEW

Issue 1: Did the Court of Appeals apply the wrong standard

[1] Petitioner filed a Motion for Reconsideration on January 6, 2014, but it may have been untimely, and files this Petition as a precaution in view of the importance of the issues.

of review when it failed to apply the WISHA statute's required "substantial evidence" test under RCW 49.17.150(1) and used the inapplicable Administrative Procedures Act procedure in violation with this Court's decision in Cobra Roofing?

Issue 2: The building owner and its agent designed a specific work area and represented it to be clean and asbestos-free. Did the Court of Appeals erroneously apply Washington law by shifting the burden of proof, in direct conflict with the WISHA Act and case law, when the Court "presumed" a designated clean, asbestos-free work area material was asbestos, together with the Court's resulting presumption of employer knowledge of a violation and that the employer's failure to exercise reasonable diligence? The undisputed findings below at the Board found that all of the asbestos thermal insulation had been removed and replaced with non-asbestos mineral wool in the designated work area. The Court of Appeals, presumption has never before been applied to non-asbestos contractors subject to WISHA or OSHA. Is the Court's new presumptions likely to cause confusion?

IV. STATEMENT OF THE CASE

A. THE BUILDING OWNER AGREED WITH APCOM'S FINDING OF NO ASBESTOS HAZARD IN THE DESIGNATED WORK AREA. STATED IT WAS CLEAN -- FREE OF ANY ASBESTOS.

The Board's Industrial Appeals Judge's ("IAJ") Proposed Decision and Order at page 6, lines 6-7, recognizes this undisputed fact and see the Department's Response Brief, page 3, lines 3-4.

> "The **area between the preheaters** had been modified in the past, and the [asbestos-containing material] **had been removed at that time**. (IAJ's Proposed Decision and Order at page 6, lines 6-7) (emphasis added).

The Departments own witness, Keith Ortis of Performance Abatement Services, responsible for all asbestos abatement services at this TransAlta Plant Site testified:

Q: Okay. But you abated any asbestos in the middle: is that correct?
A: Yes.
(May 17, 2010, CABR at page 37, lines 21-23) (emphasis added.)

In 2009, APCom was repairing parts of the TransAlta plant. Before starting the job, craft foremen and safety coordinators looked at the scope of the work and wrote a job safety analysis (JSA) for each part. The JSA lists each hazard employees might encounter and states how the hazard will be handled. The air preheater JSA is Employer Exhibit No. 7. It is extremely detailed and thorough, and it does not list asbestos anywhere. That is because asbestos was removed by TransAlta's asbestos abatement contractor before APCom starts its work. (TR of May 18, 2010, CABR at page 30). TransAlta reviewed and approved the JSA without changes. (TR of May 18, 2010, CABR at pages 28-30).

APCom relied upon TransAlta and PAS' "no asbestos" designation of the areas between #11 and #12 preheaters.

Before beginning work APCom's Area Supervisor Ralph Mitchell had the Centralia plant asbestos designated removal experts NAES Company and its subcontractor PAS check the TransAlta designated work area to be worked on by APCom.

> "I went to the proper asbestos removal. In this case it would be NAES and they brought in PCS or PAS, Scott Gaffkey, and **they did a check of the area.**
> Q. Did you accompany them up to that area?
> A. Yes, I did.
> Q. Who was with you when you went up there?
> A. Keith Ortis and Scott Gaffkey."

(Ralph Mitchell, TR of May 18, 2010, CABR at page 55). (emphasis added)

Mr. Ortis has worked at the plant for 25 years. (Keith Ortis, TR of May 17, 2010, CABR at page 7). TransAlta's asbestos policy lists him as the Washington State Certified Asbestos Inspector. (Employer Exhibit No. 3, p. 3), Mr. Ortis testified that part of his job was is telling people where asbestos is. "Since I have the knowledge of asbestos, the only person on site." (Keith Ortis, TR May 17, 2010 CABR at page 9).

Mr. Mitchell was comfortable with the information he received. He relied on the map (Ralph Mitchell, TR of May 18, 2010, CABR at page 57, and Exhibit 1). He had worked with Mr. Ortis in that area before and knew that asbestos had been previously abated (Ralph Mitchell, TR of May 18, 2010, CABR at

page 56). Mr. Ortis had abated the asbestos between the preheater #11 and #12 and replaced it with non-asbestos (mineral rock wool). (Keith Ortis, TR of May17, 2010, CABR at page 512 and 37)

B. THE AREA BETWEEN THE PREHEATERS HAD BEEN MODIFIED IN THE PAST: THE ASBESTOS-CONTAINING MATERIAL HAD BEEN REMOVED AND REPLACED AT THE TIME.

The Department's own witness, Keith Ortis of Performance Abatement Services, responsible for all asbestos abatement service at this TransAlta Plant Site and the admitted only person who knew of where it had been removed and replaced with non-asbestos mineral wool stated to APCom managers testified

Q: Okay. But you abated any asbestos in the middle: is that correct?
A: Yes.
(K. Ortis May 17, 2010 CABR at p. 37, lines 21-23).

Q. All right. In between 11 and 12 where there had been, where asbestos had been removed was there any block material?
A. No.
(K. Ortis May 17, 2010 CABR at p. 12, lines 22-24) (emphasis added)

All asbestos thermal insulation material between #11 and #12 preheaters had been removed by PAS for TransAlta after 1985, when Mr. Ortis began his 25 years of asbestos removal and

replacement with non-asbestos mineral wool for the Centralia Steam Plant. He described himself as the only person on-site to have this asbestos and asbestos removal area on-site. (K. Ortis May 17, 2010 CABR at pp. 7-9)

C. APCOM RECEIVED REPEATED ASSURANCES THAT ALL THE ASBESTOS THERMAL INSULATION HAD BEEN REMOVED AND REPLACED WITH NON-ASBESTOS MINERAL WOOL, AND THAT THERE WAS NO ASBESTOS BLOCK TYPE INSULATION BETWEEN THE #11 AND #12 PREHEATERS.

Before performing any work, APCom's diligent safety efforts included requesting and receiving assurances that from TransAlta, the building owner, and TransAlta's agent for asbestos insulation removal and replacement, performance abatement services, that the designated work area was clean and free of asbestos. APCom received repeated assurances that all the asbestos thermal insulation had been removed and replaced with non-asbestos mineral wool, and that there was no asbestos block type insulation between the #11 and #12 preheaters.

APCom's efforts included:

a) Contractually required an asbestos free work area

b) Contractually obtained the owner's promise that all areas of asbestos were identified and did not include where APCom was allowed to work

c) Performed a detailed Job Safety Analysis (JSA) to identify make sure that any hazards in the work area did not include asbestos

d) Obtained the building owner-operator TransAlta's agreement that all areas had to be all-clear and free of any asbestos materials (Kersandra Puderbaugh, TR of May 18, 2010, CABR at pages 30-31)

e) Walked the area with two certified asbestos abatement representatives of the owner's exclusive designated asbestos abatement contractor, PAS, and verified no asbestos existed between the two preheaters #11 and #12. One of these PAS representatives the "competent person", Keith Ortis, has worked at the Centralia Power Plant for 25 years removing insulation and asbestos. Mr. Ortis testified that he is the "only onsite person with knowledge of its asbestos-containing material (ACM) whereabouts." (P.D. &O., at page 5; Keith Ortis, May 17, 2010 TR, CABR at page 9, lines 8-13)

f) Obtained information from Mr. Ortis that the asbestos insulation which previously existed in between preheaters #11 and #12

- Had been removed and
- Had been replaced with non-asbestos mineral wool insulation and
- That there was no asbestos block type insulation in between #11 and #12 (Keith Ortis, TR of May 17, 2010, CABR at page 12, lines 2-11 and 22-24)

D. THE SUPERIOR COURT REVERSED AND FOUND IN FAVOR OF APCOM

The Superior Court Judge James Lawler conducted an exhaustive review of the testimony and exhibits and under the WISHA Act's judicial review section, RCW 49.17.159(1) issued an

Order reversing the Board IAJ Decision and made these missing findings of fact (Appendix D):

- The employer did not know of the violative condition and there is no evidence to show that they knew that there was asbestos-containing material in the area where they were working.

- APComPower exercised reasonable diligence to try to determine whether there was asbestos there or not.

- APComPower did everything that they could to avoid the ACM.

- APComPower did the job safety analysis prior to commencing work to ensure that they were in a safe area.
- APComPower walked the area with a Pacific Abatement Services employee, Mr. Ortis, the only one who knew where asbestos is. He pointed out that the work area for APComPower was asbestos-free.

- Mr. Ortis is the only person who knows where everything is out there. He has worked there for 25 years and he is the only one who knows. The problem is that his knowledge is not quite as accurate as it should be based on the fact that he does not keep any records. This is not something that APCom knew at the time.

- APComPower did take reasonable steps to make sure they did not contact asbestos. They specifically tried to stay away from asbestos and took a number of steps to try to have it confirmed by the certified asbestos removal contractor that there was no asbestos in the area.

- APComPower's reliance on Mr. Ortis and their actions were reasonable.

- Substantial evidence does not support the Board's finding that APComPower Inc. had knowledge of the violative conditions. APComPower Inc. exercised reasonable diligence to obtain an asbestos-free worksite at the Company's TransAlta Steam Plant in Centralia, Washington.

E. THE COURT OF APPEALS DIVISION TWO APPLIED AS A PRESUMPTION

The Court of Appeals applied a presumption, nowhere applied below, that the work area material was asbestos, and imputed knowledge to the employer used the new presumption to decide reasonable diligence without review of the Superior Court's findings. APCom contends this presumption is contrary and in direct conflict with established OSHA and WISHA case law and statutes.

V. ARGUMENT

A. THE COURT SHOULD GRANT REVIEW TO CORRECT THE COURT OF APPEALS' ERRONEOUS STANDARD OF REVIEW USING RCW 34.05 WHICH DOES NOT APPLY TO WISHA PROCEEDINGS UNDER RCW 49.17.150 AND WHICH IS IN DIRECT CONFLICT WITH THE WELL ESTABLISHED STANDARD OF REVIEW AND THE *COBRA ROOFING CO.* DEISION OF THIS COURT

On page 14 of its Unpublished Opinion, instead of using the required "substantial evidence" test to review the Superior Court's Findings of Fact which were missing from the IAJ's decision, the Court adopted a presumption scope on review and ignored the

Superior Court's proper modification of the Board IAJ decision "under RCW 34.05.562(2)(a)." (Op. p. 14)

This Court in *Cobra Roofing v. Dep't. of Labor & Indus.*, 122 Wn. App. 402, 409, 97 P.3d 17 (2004), aff'd, 157 Wn. 2d 990, 135 P.3d 913 (2006) (citing *Stuckey v. Dep't of Labor & Indus.*, 129 Wn.2d 289, 295, 916 P.2d 399 (1996)) at p. 5 specifically ruled that the APA does not apply to judicial review of WISHA cases.

> "However, the APA's provisions governing judicial review do not apply to the adjudicative proceedings of the Board of Industrial Insurance Appeals or to the Department of Labor and Industries where another statute expressly provides for review of adjudicative proceedings. RCW 34.05.030(2)(a), (c)." (emphasis supplied)

By ignoring the mandated focus and statutory requirements for "serious" citations -- knowledge and reasonable diligent efforts of the employer -- the Court of Appeals decision applied the wrong standard of review.

The Department and the Secretary of Labor under OSHA or WISHA must always show that the employer had actual or constructive knowledge of the violative conditions. See *Sec'y of Labor v. Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, *4 (Jul. 30. 1981) (aff'd in part and remanded in part, *Astra Pharm. Prods., Inc.,*

v. OSHA, 681 F.2d 69 (1st Cir. 1982)) ("In order to prove a violation of section 5(a)(2) of the [Occupational Safety and Health] Act, 29 U.S.C. § 654(a)(2), the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence.") (emphasis added).

Such requirements place limits on the types of work and on the employers that can be held accountable for an asbestos violation.

The Court of Appeals' decision is in conflict with the proper, longstanding recognized standard of review observed in *Secretary of Labor v. OSHRC and Milliken & Co.*, 947 F.2d 14983, 15 BNA 1373 at 1374 (11th Cir. 1991):

> "We also reject the Secretary's second argument. We hold that the Commission's **finding with respect to reasonable diligence is a question of fact, subject to substantial evidence review, and not a mixed question of law and fact. The relevant provision of the statute defines a "serious violation"** as follows:
> For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which

> exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.
> 29 U.S.C.A. §666(k). What constitutes reasonable diligence will vary with the facts of each case. We think that **this determination is appropriately considered to be question of fact, and that the substantial evidence standard of review is appropriate.** In so holding, we follow the binding precedent in *Atlas Roofing Co. v. Occupational S. & H. Rev. Com'n*, 518 F.2d 990, 1013 [3 OSHC § 490] (5th Cir. 1975), aff'd on other grounds, 430 U.S. 442, 97 S.Ct. 1261, 51 L.Ed.2d 464 [5 OSHC 1105] (1977)..." (emphasis added)

The Superior Court findings of fact on missing issues, under RCW 49.17.150(1), should have been given deference and reviewed under the WISHA substantial evidence standard of review. The Board IAJ's decision clearly omitted any findings on the required threshold issues of constructive knowledge or reasonable diligence.

The Court of Appeals decision is in direct conflict with case law and statutory review requirements and imposed an inapplicable presumption only analysis. The Superior Court made findings of fact and should have been given deference and review under the substantial evidence standard.

The proper standard of review, had it been applied, would have led to affirmance. These WISHA administrative cases are cases routinely reviewed by the Superior Court which has expertise in applying the WISHA law and determining findings of fact when they are absent on required statutory issues such as reasonable employer diligence.

The Court of Appeals' blanket presumption application conflicts with the proper role of a reviewing court.

B. THIS COURT SHOULD GRANT REVIEW UNDER RAP 13.4(B)(1) AND (2) TO CORRECT THE COURT OF APPEALS DEPARTED FROM EXISTING PRECEDENT WHEN IT PRESUMED ALL BURDEN OF PROOF ELEMENTS BASED UPON AN UNCITED, INAPPLICABLE PRESUMPTION FROM A DEFINITION SECTION

1. *Inapplicable Definition By Its Terms.*

The Court of Appeals reversed the Superior Court using the following single definition section in WAC 296-62-07703:

> Presumed asbestos-containing material means thermal system insulation and surfacing material found in buildings, vessels, and vessel sections construction no later than 1980. The designation of a material as "PACM" may be rebutted pursuant to WAC 296-62-07721.

This definition is inapplicable on its face: All of the asbestos thermal insulation material in APCom's building owner designated

limited work area between #11 and #12 preheaters was removed and replaced with non-asbestos thermal insulation. The owner's exclusive asbestos abatement contractor, Performance Abatement Services and its supervisor Mr. Ortis, performed this remodeling after 1985 when he was first hired by the building owner. The undisputed testimony of Mr. Ortis, "the only person" who knows where the asbestos has been removed or exists, conflicts and refutes any application of this definition. This "presumption" has never been applied to any removed and replaced non-asbestos material, work area, or employer who received assurances of a clean, asbestos-free, designated work area, as APCom received and worked in. By its own terms, the WAC 296-62-07703 designation of a material as PACM is rebutted pursuant to WAC 296-62-07721. Under WAC 296-62-07721(b) (Appendix C), no inspection of material needs to be performed by a building owner or its asbestos abatement agent whenever they indicate what TransAlta and Mr. Ortis of Performance Abatement Services assured to APCom here. The facility owner or its agent must conduct a good faith inspection prior to any work and they were exempt here because they knew the asbestos had been removed from this work area and assured APCom of that.

(ii) Before authorizing or allowing any construction ... maintenance ... project a building/vessel and facility owner or agent must perform ... good faith inspection to determine whether materials to be worked on or removed contain asbestos...documented by a written report.

(A) By an accredited inspector

(B) Such good faith inspection is not required if ... building/vessel and facility owner or owner's agent assumes that **... the owner or the owner's agent is reasonably certain that asbestos will not be disturbed by the project.**

The IAJ in the Court of Appeals placed the duty to make a good faith inspection on APCom instead of on TransAlta or its agent.

1. *The Court of Appeals' Presumption Applied Against APCom Conflicts With Prior Case Law And The Washington Statute.*

Case law including a Division III precedent reject the use of such presumptions of hazards or serious violation elements. See *WA Dept. of Labor & Industries v. Kaiser Aluminum & Chemical Corp.,* 111 Wn. App. 771, at 780, 19 BNA-OSHC 1862, at 1966 (Div. 3, 2002), rejecting the Department's reliance on a presumption to meet its burden-of-proof elements.

Obtaining assurances by the contractor of the facility owner of the safety of the contractor's work area condition, as APCom

clearly did here, is a determining factor of "reasonable diligence." See *Secretary of Labor v. Midwest Generation, LLC*, 19 BNA-OSHC 11502, at 1523, 1527, 1528 (ALJ Barkley 2001) when a single, unexplained piece of material showed up during a non-asbestos construction contractor's project work, the presumed asbestos material citation was rejected and dismissed because

(1) The record does not show that Midwest failed to exercise due diligence in determining the presence, location and quantity of ACM or PACM at the site, and

(2) "The Secretary's argument, that here she did not need to show that employer had actual or constructive knowledge, **would impose strict liability on employers, and has long been rejected.**" (emphasis supplied.

The imposition of strict liability imposed here by the Court of Appeals inapplicable presumptions imposed strict liability here against APCom. No Federal OSHA or State WISHA case allows such presumptions of the Department's burden-of-proof elements or of the required RCW 49.17.180(1) statutory requirements for "serious" violations or citations.

A employer's duty is to take reasonably diligent measures to detect hazardous conditions through inspection of worksites; it is

not obligated to detect or become aware of every instance of existence of a hazard. *Secretary v. Ragnar Benson*, at 18 BNA at 1940, 1999 CCH OSHC at p. 47,373 (citing *Texas A.C.A., Inc.*, 17 BNA OSHC 1048, 1050, 1993-95 CCH OSHD ¶ 30,652, p. 42,527 (No. 91-3467, 1995)) See also *Eagle Marine Services*, Dkt. Nos. 95-W189, 95-W190 and 95-W191 (BIIA, 3/27/96).

If the building owner, TransAlta, is relieved if its good faith survey responsibility when it is "reasonably certain" no asbestos is in the area and certifies that verbally and in map of the specific work area between preheaters #11 and #12 as not containing any asbestos, because it had been removed, then respectfully, no presumption arises. No OSHA or WISHA case relies on the presumption to negate the Department's burden of proof elements. No OSHA or WISHA case uphold asbestos standard citations where a building owner's exclusive asbestos abatement agent (a specialty contractor) assures a recognized non-asbestos contractor that asbestos material insulation no longer exists in the particular work area at the start of the project. This would be directly in conflict with WAC 296-62-07721(1)(a) (Appendix C) which instructs employers that: "Building owners are often the only and/or best

source of information concerning the present of previously installed asbestos-containing building materials."

When the owner's agent represents to a contractor that no asbestos exists in the designated work area, then the contractor should have no reason to doubt the information. The contractor should have a reasonable expectation that such information from the owner's agent is accurate, especially when, as here, APCom went to the "only person who knew" and received that clean designated work area assurance.

The duty to notify contractors and sub-contractors belongs to the owner and owner's agent, as the WAC 296-62-07721(1)(a) mandates. They "are often the only and/or best source..." That's the due diligence called for under WISHA's asbestos regulations ... and APCom sought and obtained their assurances of an asbestos-free work area. They even obtained an all-removed, all replaced assurance for APCom's limited work area. Then APCom even had two of Performance Abatement's certified supervisors "check the work area" and were given the same assurances.

RCW 49.17.180(6) (Appendix B) defines the statutory requirements the statutory requirements of a "serious" violation:

> (6) For the purposes of this section, a serious violation shall be deemed to exist in a work place if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use in such work place, unless the employer did not, and could not with the exercise of reasonable diligence, known of the presence of the violation.

No statutory required findings were made of "employer knowledge of the violative condition" or the employer's failure to "exercise" "reasonable diligence" for any of the citations. The IAJ did not make a single finding of the RCW 49.17.180(6) statutory requirements for a "serious" violation of any WISHA regulation. In the Board's Significant Decision on this issue, the Board determined in *The Erection Company* (II) case, BIIA Docket No. 88-W142 (1990) that:

"In order for a violation to be classified as "serious" there must be a showing that the employer had knowledge of the hazardous conduct or condition and that there was a substantial probability that death or harm could result from the violation." (emphasis added)

Federal OSHA cases require the same findings. Under OSHA, the Secretary must always show that the employer had

actual or constructive knowledge of the violative conditions. See *Sec'y of Labor v. Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, *4 (Jul. 30, 1981) (aff'd in part and remanded in part, *Astra Pharm. Prods., Inc. v. OSHA*, 681 F.2d 69 (1st Cir. 1982)).

VI. CONCLUSION

For the foregoing reasons, APCom respectfully requests that pursuant to RAP 13.4(b), this Court review the Court of Appeals' decision of applying multiple presumptions which are inapplicable and have never been applied to employers who have inspected their designated work area and been given multiple assurances that the replaced insulation materials in their designated work location were non-asbestos and that all asbestos material had been removed. The decision is in conflict with established OSHA and WISHA case law and the WISHA Act.

RESPECTFULLY SUBMITTED this 16th day of January, 2014.

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CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the State of Washington that I caused to be served in the manner indicated a true and accurate copy of the foregoing ***Petition For Review With Appendices*** to the following:

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And also to

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Signed and Dated in Federal Way, Washington this 16th day of January, 2014.

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APPENDIX A

Unpublished Opinion

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

APCOMPOWER INC., Respondent, v. STATE OF WASHINGTON, DEPARTMENT OF LABOR AND INDUSTRIES, Appellant.	No. 43104-1-II UNPUBLISHED OPINION

BJORGEN, J. — The Washington State Department of Labor and Industries (Department) cited APComPower Inc. (APC) for violations of the Washington Industrial Safety and Health Act (WISHA), chapter 49.17 RCW, related to asbestos removal while performing work at the Centralia steam plant. After an industrial appeals judge (IAJ) found that APC had committed the violations, and the Washington State Board of Industrial Insurance Appeals (Board) affirmed that decision by order, APC appealed the Board's order to the superior court. The superior court vacated the order after determining that APC's intent to avoid asbestos work and reliance on statements that no asbestos was present in the work area excused its lack of compliance. The

superior court also determined that the Department failed to show that APC knew of the presence of asbestos or that the work exposed APC's employees to asbestos.

The Department appeals the superior court's decision. Rejecting APC's arguments that its subjective intent governed the applicability of the regulations, that it could rely on the plant owner's statements about the absence of asbestos to discharge its duty to comply with the regulations, that it could not have known of the regulatory violations through the exercise of the reasonable diligence, and that the Department needed to show its employees were exposed to asbestos, we reverse the superior court and reinstate the Board's order affirming the citation.

FACTS

APC contracted to perform boiler maintenance work at TransAlta's steam plant in Centralia, Washington. In the course of performing these services, APC assigned employees to work on two boiler air preheaters, numbers 11 and 12, during a scheduled maintenance period in May 2009.

The preheaters are large mechanical units that pipe hot gas emerging from the boilers in close proximity to cold air entering the boilers. This allows for a heat exchange that warms the incoming air, reducing thermal shock and stress on the boilers. To achieve an efficient heat exchange, the preheaters are heavily insulated. To work on the underlying equipment, workers must first remove this insulation.

Because the plant was built in 1972, its construction involved the extensive use of asbestos products, especially in its insulation. APC's contract with TransAlta states that APC will not perform any asbestos abatement as part of the services it provides. APC is not a

certified asbestos contractor, and the employees assigned to the work on the preheaters were not certified asbestos workers.

In preparation for the work on preheaters 11 and 12, APC asked TransAlta whether the insulation it needed to remove contained asbestos. Keith Ortis, the on-site supervisor of TransAlta's asbestos consultant, informed Ralph Mitchell, APC's foreman for the boiler work, that the insulation in APC's work area did not contain asbestos. However, Ortis did mention that the plant used asbestos block material in the vicinity of preheaters 11 and 12. Ortis drew Mitchell a map laying out his recollection of the location of asbestos-containing insulation. Based on the map and Mitchell's discussion with Ortis, a job safety analysis prepared by APC and approved by TransAlta does not list asbestos as a safety concern.

On May 25, 2009, APC began removing insulation between preheaters 11 and 12. The work site was not demarcated and controlled as a regulated area, nor did it have a negative pressure enclosure or a decontamination area. APC's employees worked without high efficiency particulate air (HEPA) respirators,[1] and APC never performed initial or continuing monitoring of its workers' asbestos exposure.

After removing a thick layer of fiberglass wool insulation, APC employees encountered dry white block insulation in one-foot by one-foot by two-inch pieces. One employee estimated that he and his partner removed between 8 and 15 of the blocks from the preheaters before stopping work. After removing the block insulation, APC's employees broke up the blocks and

[1] One of the employees testified he may have had a HEPA respirator at one point in his testimony, although he later stated that even if the respirator had a HEPA filter, it had no positive air supply as required by WAC 296-62-07715(4)(a)(ii).

placed the pieces into 50- or 60-gallon clear plastic garbage bags. They later disposed of these bags in the plant's dumpsters.

After APC's employees had finished removing the insulation from the work area, Mitchell walked by. One of the employees picked up a small piece of the block insulation lying nearby and asked Mitchell if he should have any safety concerns. Mitchell told the employee to wait while he summoned Ortis to examine the material. When Ortis arrived, he informed Mitchell and the worker that the block contained asbestos.

APC's safety coordinator then directed the employees to proceed to the nearest bathroom, where they placed their clothing and boots in sealed contamination bags. The safety coordinator did not use a HEPA vacuum to decontaminate the men before asking them to leave the work area.

In order to test whether the insulation the APC employees handled actually contained asbestos, Ortis later retrieved a small sample of the white block material from one of the clear plastic bags placed in a dumpster. A laboratory tested this piece of material, as well as material sampled from the vicinity of preheaters 11 and 12. All of the materials contained asbestos.

The Department investigated the incident and cited APC for serious violations of Washington Administrative Code (WAC) regulations related to working with asbestos containing materials.[2] APC appealed the citation, and the parties contested the violations before

[2] Specifically, the citation alleged that APC performed an asbestos abatement project without obtaining the necessary certification in violation of WAC 296-65-030(1); failed to establish a regulated area, negative pressure enclosure, and decontamination area surrounding or adjacent to the work area in violation of WAC 296-62-07711(1), -07712(7)(a), and -07719(3)(b)(i); failed to employ certified asbestos workers to perform a class I abatement project in violation of WAC 296-62-07722(3)(a); failed to wet the asbestos before disturbing it in violation of WAC 296-62-07712(2)(c); failed to decontaminate workers with a HEPA vacuum before allowing them to

an IAJ.

The IAJ determined that in the performance of its contract APC had performed asbestos work under the governing regulatory scheme. The IAJ determined that APC's intent was irrelevant to the applicability of the regulations. The IAJ also concluded that APC could not rely on Ortis's statements regarding the presence of asbestos, or the "confusing" map that he drew, in order to excuse its lack of compliance with the asbestos related regulations.[3] Board of Industrial Insurance Appeals Record (BR) at 45. The IAJ rejected APC's argument that the Department could not show any worker exposure to asbestos after finding the Department adequately showed chain-of-custody. The IAJ reached this conclusion by noting that the bag containing the sample Ortis removed was distinctively clear, as opposed to the normal bags used to dispose of asbestos containing material, and also that the contents of the bag matched the materials APC's workers claimed to have disposed of. After rejecting APC's arguments, the IAJ upheld the citation in its entirety in the proposed decision and order.

APC appealed this proposed decision and order to the Board. The Board denied APC's petition for review and adopted the proposed decision and order as its own order.

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leave the work area and remove their clothing in violation of WAC 296-62-07719(3)(b)(iii); failed to supply workers the proper positive air pressure HEPA respirators in violation of WAC 296-62-07715(4)(a)(ii); failed to employ an asbestos trained competent person on site in violation of WAC 296-62-07728(1); and failed to perform and initial exposure assessment or daily monitoring in violation of WAC 296-62-07709(3)(a)(ii) and (c)(i).

[3] The Board record is partially sequentially paginated, but this pagination does not include the hearing transcripts and exhibits. Consequently, we cite to testimony from the hearing by transcript date and page number and cite to exhibits solely by hearing exhibit number.

APC then appealed the Board's order to the superior court, which reversed the order and vacated the citation in its entirety. The superior court determined that the regulations the Department cited APC for violating only applied if APC intended to perform asbestos abatement work. The superior court determined that APC had no such intent and that it had taken steps to ensure it did not do any asbestos abatement work. The superior court also determined that the Department could not show the employees were exposed to asbestos because it could not show the samples tested for asbestos were from the insulation the employees had handled.

The Department appeals, asking us to reverse the superior court and reinstate the Board's order.

ANALYSIS

The legislature enacted WISHA "'to assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington.'" *Adkins v. Aluminum Co.*, 110 Wn.2d 128, 146, 750 P.2d 1257, 756 P.2d 142 (1988) (quoting RCW 49.17.010). Under WISHA, the Department both promulgates administrative rules to effectuate WISHA's aim of ensuring workplace safety and enforces these regulations through its power to impose civil penalties and to request the prosecuting attorney to commence criminal prosecutions. RCW 49.17.040, .180, .190.

RCW 49.17.180 divides civil violations of WISHA, or regulations the Department promulgates under WISHA's authority, into three categories: willful or repeat, serious, and not serious. RCW 49.17.180(1), (2), (3). A serious violation occurs

> in a workplace if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use

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

RCW 49.17.180(6). To prove a serious regulatory violation under RCW 49.17.180(6), the Department must show that (1) the regulation applies, (2) a regulatory violation occurred, (3) employees were exposed to the regulatory violation, (4) the employer knew or could have known of the regulatory violation with reasonable diligence, and (5) there is a substantial probability the violation could result in death or serious physical harm *Wash. Cedar & Supply Co., Inc. v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 914, 83 P.3d 1012 (2004) (quoting *D.A. Collins Constr. Co. v. Sec'y of Labor*, 117 F.3d 691, 694 (2d Cir. 1997).

A. Standard of Review

We review a decision by the Board directly based on the record before it when it made the decision. *J.E. Dunn Nw., Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 35, 42, 156 P.3d 250 (2007). In that review, "[t]he findings of the board or the hearing examiner where the board has denied a petition or petitions for review with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive." RCW 49.17.150(1). Substantial evidence is evidence "sufficient to persuade a fair-minded person of the truth of the matter asserted." *Katare v. Katare*, 175 Wn.2d 23, 35, 283 P.3d 546 (2012), *cert. denied*, 133 S. Ct. 889, 184 L. Ed. 2d 661 (2013). If we determine substantial evidence supports the findings of fact, we then look to whether the findings support the Board's conclusions of law. *J.E. Dunn*, 139 Wn. App. at 42.

We review de novo the interpretation of a statute or regulation. *Roller v. Dep't of Labor & Indus.*, 128 Wn. App. 922, 926, 117 P.3d 385 (2005) (quoting *Cobra Roofing Serv., Inc. v. Dep't of Labor & Indus.*, 122 Wn. App. 402, 409, 97 P.3d 17 (2004)). We review the Board's

interpretation of a statute or regulation under an error of law standard. *Roller*, 128 Wn. App. at 926 (quoting *Cobra Roofing*, 122 Wn. App. at 409). Under this standard, we may substitute our interpretation for the Board's if we determine the Board erred. *Roller*, 128 Wn. App. at 926 (quoting *Cobra Roofing*, 122 Wn. App. at 409).

B. APC violated the cited regulations in chapters 296-62 and 296-65 WAC

The Department cited APC for violating several WAC regulations governing asbestos work, and the Board affirmed the citation in its entirety. APC challenges (1) the Department's showing on the first element of a serious violation by claiming that the asbestos related regulations did not apply because APC did not intend to perform asbestos abatement work and relied on TransAlta's assurances of an asbestos-free work site; (2) the Department's showing on the fourth element of a serious violation by claiming APC had no knowledge of the presence of asbestos at the site; and (3) the Department's showing on the fifth element of a serious violation by claiming the Department could not show serious physical harm or death could result from the incident because the Department could not show the regulatory violation exposed the workers to asbestos. *See Wash. Cedar*, 119 Wn. App. at 914 (discussing the five elements of a serious violation). APC's arguments regarding the first element find no support in the text of the regulations at issue and controlling case law requires us to reject the arguments it makes with respect to the fourth and fifth elements.

1. APC's intent to avoid asbestos abatement work and its reliance on Ortis's statement that no asbestos was present in the work site did not render the requirements of WAC chapters 296-62 and 296-65 inapplicable to APC's work.

APC argues that its intention to avoid asbestos abatement work and the steps it took to ensure it performed no such work rendered the WAC provisions governing asbestos abatement work inapplicable. It cites to its contract with TransAlta, which states that it will not perform asbestos work, its supervisor's conversation with Ortis about the absence of asbestos at the work site, and the job safety analysis it did with TransAlta in support of these contentions. Although APC did make efforts to ensure that its work site contained no asbestos, and did rely on TransAlta's assurance of an asbestos free work site, it in fact performed class I asbestos work, and its discharge of its contractual duties constituted an asbestos abatement project. The regulations applied regardless of APC's intent or reliance on TransAlta's assurances.

i. APC's intent to avoid asbestos work does not make the regulations inapplicable

We interpret agency regulations in the same manner we interpret statutes. *Potelco, Inc. v. Dep't of Labor & Indus.*, 166 Wn. App. 647, 653, 272 P.3d 262 (2012). We attempt to give effect to the promulgating agency's intent by discerning the regulation's plain meaning. *See Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-12, 43 P.3d 4 (2002). We discern the regulation's plain meaning by examining its plain text as well as any related regulations. *See Campbell & Gwinn*, 146 Wn.2d at 10-12. If the regulation is ambiguous after this plain meaning analysis, we apply canons of construction in order to interpret the regulation. *See Jongeward v. BNSF Ry. Co.*, 174 Wn.2d 586, 600, 278 P.3d 157 (2012).

The plain text of the regulations at issue provides no support to APC's argument that the regulations did not apply to its actions. Each regulation, by its text, applies where the individual performs class I asbestos work or an asbestos abatement project, regardless of the employer's intent. Further, the Department has stated its intent to regulate all workplace exposure to asbestos. WAC 296-62-07701(1) ("WAC 296-62-07701 through 296-62-07753 applies to all occupational exposures to asbestos in all industries covered by chapter 49.17 and chapter 49.26 RCW."). Exposure is exposure, intentional or not. We must give effect to the plain meaning of the statute and the purpose of the regulatory structure expressed by the WACs. This requires us to reject APC's argument.

Even if we accepted APC's argument that the omission of any type of intent element from the regulations at issue left them ambiguous, and thus susceptible to construction, several canons of construction require us to reject the reading offered by APC.

First, WISHA is a remedial statute, and we construe both the statute itself and any regulations promulgated under its authority liberally. *Adkins*, 110 Wn.2d at 146 (quoting RCW 49.17.010). WISHA aims to secure a "safe and healthful" work environment for all Washington workers. RCW 49.17.010. Reading these regulations to apply regardless of employer intent furthers WISHA's goal by prompting employers to guard against mistakes in identifying asbestos containing material, as happened here.

Second, the Department has expertise with WISHA and the regulations at issue. We give "substantial weight" to the Department's interpretation of regulations with which it has expertise and will uphold that interpretation if "'it reflects a plausible construction of the language of the statute and is not contrary to the legislative intent.'" *Cobra Roofing*, 122 Wn. App. at 409

(quoting *Seatome Convalescent Ctr. v. Dep't of Soc. & Health Servs.*, 82 Wn. App. 495, 518, 919 P.2d 602 (1996)). The Department reads the omission of an intent element in these regulations to mean that there is no such element. This is a plausible interpretation of the regulations and does not run counter to the legislative intent behind WISHA. Our deference to the Department requires us to adopt its plausible interpretation of these regulations.

Third, APC asks us to determine that a serious violation must be willful. The legislature expressly made willful WISHA violations distinct from serious WISHA violations, providing greater penalties for willful violations. RCW 49.17.180(1), (2). We find no definition for "willful" in the statutes or regulations at issue and therefore give the term its ordinary dictionary meaning. *State v. Gonzalez*, 168 Wn.2d 256, 263, 226 P.3d 131 (2010). "Willful" is defined as "2: done deliberately: not accidental or without purpose: INTENTIONAL." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2617 (1966). APC's argument, that its intent mattered as to whether it committed a serious violation, thus asks us to hold that the Department must prove a willful violation in order to prove a serious one. This argument asks us to conflate serious and willful violations and render portions of RCW 49.17.180(1) superfluous, which we decline to do. *Jongeward*, 174 Wn.2d at 601.

Finally, the legislature has specifically recognized the dangers posed by asbestos and required the Department to reduce that threat under WISHA. RCW 49.26.010, .140. APC's interpretation allows companies to easily evade regulations governing asbestos abatement projects by ignoring their possible existence. This is a strained and absurd reading of regulations promulgated to give effect to the legislature's concern about workplace asbestos exposure, and we avoid such readings. *See City of Seattle v. Fuller*, 177 Wn.2d 263, 270, 300 P.3d 340 (2013).

With our rejection of APC's intent argument, substantial evidence supports the Board's conclusion that the regulations applied. The WAC requires employers to assume that the type of material at issue here, thermal system insulation present in a building constructed before 1980, contains asbestos unless the employer rebuts this presumption. WAC 296-62-07703 (definition of presumed asbestos containing material and asbestos).[4] Removal of thermal system insulation is considered class I asbestos work, and its removal is, by definition, an asbestos project. WAC 296-62-07703 (definition of class I asbestos work); WAC 296-62-07722(3)(a) ("Class I [asbestos] work must be considered an asbestos project."). An asbestos project involving three or more square or linear feet of material is an asbestos abatement project, and undisputed testimony indicated that APC's employees removed three or more square feet of thermal system insulation. WAC 296-62-07703 (definition of an asbestos abatement project). The regulations at issue applied to APC's actions.

ii. Any reliance on Ortis's statement that the work area had no asbestos does not render the regulations inapplicable.

As APC notes, WAC 296-62-07721(1)(c)(ii) required TransAlta to perform a good faith inspection of the work site to determine the presence of asbestos before soliciting subcontracting bids. TransAlta could avoid this good faith inspection if its agent, Ortis, was "reasonably certain that asbestos will not be disturbed by the project" or "assume[d] that the suspect material contain[ed] asbestos and handl[ed] the material in accordance" with chapter 296-62 WAC. WAC 296-62-07721(1)(c)(ii)(B). TransAlta was also required by WAC 296-62-07721 to give

[4] Ignoring this presumption could itself be considered "willful" but the Department has not made this argument.

contractors a written statement either of the reasonable certainty of nondisturbance of asbestos or of assumption of the presence of asbestos if a good faith inspection was not carried out.

APC had a duty to treat the thermal system insulation it contracted to remove as asbestos containing material unless it rebutted the presumption that the insulation contained asbestos. WAC 296-62-07703 (definition of "[p]resumed asbestos-containing material"), -07721(1)(b). This duty existed apart from TransAlta's duty to perform a good faith analysis. *See* RCW 49.17.180(6) (employers must exercise reasonable diligence to learn of regulatory violations); WAC 296-62-07721(1)(b).

WAC 296-62-07721(3) provides two methods for rebutting the presumption that the insulation contained asbestos; both require analytical testing. *See* WAC 296-62-07721(3)(b)(i), (ii). By enumerating only these two methods, the legislature excluded the good faith inspection by the owner under WAC 296-62-07721(1)(c)(ii) and the owner's statement that asbestos will not be disturbed under WAC 296-62-07721(1)(c)(ii)(B) as a means of rebutting the presumption that thermal system insulation in a building constructed before 1980 contains asbestos. *See State v. Ortega*, 177 Wn.2d 116, 124, 297 P.3d 57 (2013) ("'to express or include one thing implies the exclusion of the other.'") (quoting BLACK'S LAW DICTIONARY 661 (9th ed. 2009)). Ortis's statement thus could not relieve APC of its duty to either assume the insulation contained asbestos or demonstrate that it did not. Since APC did not rebut the presumption under WAC 296-62-07721(3)(b)(i) or (ii), it had a duty to treat the insulation as asbestos containing material and comply with the regulations governing class I asbestos work and asbestos abatement projects. APC failed to do so.

2. APC had actual or constructive knowledge that its workers performed work on an asbestos abatement project without complying with the regulations found in chapters 296-62 and 296-65 WAC.

Next, APC urges us to hold that it had no knowledge that its workers did or would encounter asbestos during the work on preheaters 11 and 12. The Department accepts this framing of the issue and claims that APC knew or could have known through reasonable diligence that the workers would encounter asbestos.

To establish a serious violation, RCW 49.17.180(6) requires the Department to show that the employer knew, or could have known through the exercise of reasonable diligence, of a regulatory violation. *See, e.g.*, *Erection Co., Inc. v. Dep't of Labor & Indus.*, 160 Wn. App. 194, 203, 248 P.3d 1085, *review denied*, 171 Wn.2d 1033, 251 P.3d 664 (2011); *Wash. Cedar*, 119 Wn. App. at 914, 916. The Board made no explicit findings regarding APC's knowledge of a violation or its ability to know of a violation with reasonable diligence. APC contends that the failure to make these findings requires reversal, citing state and federal cases concerning a lack of administrative fact finding.

Under RCW 34.05.562(2)(a) the appropriate response to the absence of findings is not dismissal, but remand for the Board to make the necessary factual determinations. However, where the evidence is uncontroverted, we are in as good a position to find facts as the lower tribunal and any remand for the entry of findings of fact would be a useless act. *Cogswell v. Cogswell*, 50 Wn.2d 597, 601-02, 313 P.2d 364 (1957). APC's appeal presents a case where a remand would be a useless act.

"The principle that ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation." *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563, 91 S. Ct. 1697, 29 L. Ed. 2d 178 (1971). We may apply this principle, especially when the law imposes a duty of investigation. *Cf. Samuelson v. Cmty. Coll. Dist. No. 2*, 75 Wn. App. 340, 347-48, 877 P.2d 734 (1994). RCW 49.17.180(6), by requiring that employers exercise reasonable diligence to learn of regulatory violations, imposes a duty of investigation.

Because we charge APC with knowledge of the WAC, we presume it knew that the preheater project was class I asbestos work and an asbestos abatement project, given the volume of presumed asbestos containing insulation involved. We also presume that APC understood it needed to comply with the WAC provisions governing this work unless it rebutted the presumption that the insulation contained asbestos. Given this knowledge, and APC's duty to exercise reasonable diligence to know of regulatory violations under RCW 49.17.180(6), we find that APC could have known of these violations with reasonable diligence. APC simply would have needed to see its employees performing the work to know they were not using respirators, negative pressure enclosures, regulated areas, HEPA vacuum decontamination procedures, or exposure monitoring as required by chapters 296-62 and 296-65 WAC. *See Erection Co.*, 160 Wn. App. at 206-07 (employer could know of readily apparent violations in work area with reasonable diligence). A simple check of APC's files would show that APC was not a certified asbestos contractor, that its employees were not certified asbestos workers, and that APC did not employ a competent person within the meaning of WAC 296-62-07703 for the preheater work. Given this finding, we affirm the Board's conclusion that APC committed serious violations

because we find that APC could have, with reasonable diligence, known of the regulatory violations.

3. APC's violations could have resulted in death or serious injury.

Finally, APC challenges the showing the Department made with respect to whether its violation could have resulted in death or serious physical injury, the fifth element the Department must prove to demonstrate a serious violation. APC contends that the Department failed to show its employees had any exposure to asbestos because, it claims, the Department cannot trace the samples it took, and which tested positive for asbestos, to the insulation APC's employees removed from the preheaters. APC also maintains that, even assuming the employees had contact with asbestos, their limited exposure carried no risk of death or substantial harm.

We have adopted the majority federal interpretation of the language in RCW 49.17.180(6) requiring a "substantial probability that death or serious physical harm could result". *Lee Cook Trucking & Logging v. Dep't of Labor & Indus.*, 109 Wn. App. 471, 478-82, 36 P.3d 558 (2001). Under *Lee Cook*, if the Department shows that death or serious physical injury *could* result from a regulatory violation, the Department has made the necessary showing for the fifth element of its case. *Lee Cook*, 109 Wn. App. at 482. Thus, "[i]f the harm that the regulation was intended to prevent is death or serious physical injury, then its violation is serious per se." *Lee Cook*, 109 Wn. App. at 479 (quoting *California Stevedore & Ballast Co. v. Occupational Safety & Health Review Comm'n*, 517 F.2d 986, 988 n.1 (9th Cir. 1975)) (emphasis omitted) (internal quotations omitted). We apply this standard because

> [w]here violation of a regulation renders an accident resulting in death or serious injury possible, however, even if not probable, [the legislature] could not have intended to encourage employers to guess at the probability of an accident in

> deciding whether to obey the regulation. When human life or limb is at stake, any violation of a regulation is serious.

Lee Cook, 109 Wn. App. at 478-79 (quoting *California Stevedore & Ballast*, 517 F.2d at 988) (emphasis omitted).

As the Department points out, under *Lee Cook*, it did not need to show APC's workers in fact had exposure to asbestos to show a serious violation. Undisputed testimony before the Board indicated that asbestos exposure can result in "lung disease, asbestosis, inflammation of the pleura, mesothelioma, [and] cancers of the lung" and that these conditions "ultimately can result in death." BR (May 17, 2010 Transcript) at 102, 114. APC allowed its workers to perform an asbestos abatement project without complying with the regulations promulgated to protect its workers from these dangers. The Board's findings support its conclusion that APC committed serious violations. *Accord Sec'y of Labor v. Trinity Indus., Inc.*, 504 F.3d 397, 401 (3d Cir. 2007) ("Given that the violations made it possible that the workers could unwittingly stumble into large amounts of asbestos without adequate protection, there was no need to show [the contractor's] employees suffered any actual exposure to asbestos, much less . . . 'significant exposure'" in order to show a serious violation).[5] We affirm the Board's decision based on our holding in *Lee Cook*.

APC argues also that "isolated" exposure does not lead to a "substantial probability of death or serious physical harm." Br. of Resp't at 47. In support, APC cites decisions under WISHA and the Occupational Safety and Health Act (OSHA) that hold that isolated exposure to asbestos cannot constitute a serious violation. Each of these cases predates *Lee Cook*, which

[5] Because WISHA parallels the Occupational Safety and Health Act (OSHA), we may look to federal cases interpreting OSHA as persuasive authority. *Lee Cook*, 109 Wn. App. at 478.

overruled their reasoning. APC cannot rely on them to contest the fifth element of the Department's case. So long as exposure to asbestos *could* lead to serious physical injury or death, and unchallenged testimony indicates that it could, a serious violation occurred.[6]

CONCLUSION

We reverse the superior court's decision and reinstate the Board's order affirming APC's citation for violations of regulations governing asbestos related work.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

BJORGEN, J.

We concur:

PENOYAR, J.

JOHANSON, A.C.J.

[6] Scientific research has, as yet, failed to discover any safe exposure level for asbestos. *Hernandez v. Amcord, Inc.*, 156 Cal. Rptr.3d 90, 94 (Cal Ct. App. 2013).

APPENDIX B

WISHA Statutory Definition Of Requirements For A "Serious" Citation

[illegible] Statutory [illegible]

[illegible] 49.17.180 (6) Definition of a "Serious Violation"

(6) For the purposes of this section, a serious violation shall be deemed to exist in a work place if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use in such work place, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

APPENDIX C

WISHA Regulations

WAC 296-62-07721(1)(a) instructs employers that:

"Building owners are often the only and/or best source of information concerning the presence of previously installed asbestos-containing building materials."

[illegible]-62-07721(b) Rules [illegible] Building Owners and Agents:

Before authorizing or allowing any construction... maintenance... project a building/vessel and facility owner or agent must perform... good faith inspection to determine whether materials to be worked on or removed contain asbestos... documented by a written repot.

(A)... By an accredited inspector

(B) Such good faith inspection is not required if... **building/vessel and facility owner or owner's agent assumes that... the owner or the owner's agent is reasonably certain that asbestos will not be disturbed by the project.**

APPENDIX D

JUDGE JAMES LAWLER'S JUDGMENT AND ORDER

SUPERIOR COURT OF WASHINGTON FOR LEWIS COUNTY

APCOMPOWER INC., Plaintiff, v. STATE OF WASHINGTON, DEPARTMENT OF LABOR AND INDUSTRIES, Defendant.	No. 10-2-01573-4 **PROPOSED** JUDGMENT AND ORDER

JUDGMENT SUMMARY (RCW 4.64.030)

1. Judgment Creditor:	APCOMPOWER, INC.
2. Judgment Debtor:	State of Washington Department of Labor and Industries
3. Principal Amount of Judgment:	0.00
4. Interest to Date of Judgment:	0.00

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5. Attorney Fees: 200.00

6. Costs

7. Other Recovery Amount:

8. Principal Judgment Amount shall bear interest at 0% per annum.

9. Attorney Fees, Costs and Other Recovery Amounts shall bear interest at 12% per annum.

10. Attorney for Judgment Creditor: Douglas B.M. Ehlke

11. Attorney for Judgment Debtor: Sarah E. Kortokrax

THIS MATTER came on regularly for argument on November 12, 2011, and the Court having considered the arguments presented by the parties and the records and files herein, including:

1. Certified Appeal Board Record provided by the Washington State Board of Industrial Insurance Appeals;

2. APComPower's Trial Brief;

3. Department's Response to APComPower's Trial Brief;

4. APComPower's Reply Brief;

and the pleadings on file in this case, and otherwise being fully advised on the matter, the Court now makes the following

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I. FINDINGS OF FACT

1. On October 5, 2009, the Department of Labor and Industries (Department) issued Citation and Notice No. 313173155 to APComPower, Inc.

2. APComPower, Inc. filed a timely appeal from the Citation with the Board of Industrial Insurance Appeals (Board). Hearings on APComPower, Inc.'s appeal were held before a Board-appointed Industrial Appeals Judge (IAJ).

3. The IAJ issued a Proposed Decision and Order (PD&O) dated August 24, 2010, which affirmed the Citation in its entirety.

4. On September 20, 2010, APComPower, Inc. filed a petition for review from the PD&O).

5. The Board issued an Order Denying the Petition and adopting the PD&O without review as the Decision and Order of the Board on October 7, 2010.

6. On November 8, 2011, APComPower, Inc. filed a timely notice of appeal from the Board's Decision and Order.

7. The Department's case fails on the knowledge prong, specifically that the employer knew or through the exercise of reasonable diligence should have known the violative condition.

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8. The employer did not know of the violative condition and there is no evidence to show that they knew that there was asbestos-containing material in the area where they were working.

9. APComPower exercised reasonable diligence to try to determine whether there was asbestos there or not.

10. APComPower did everything that they could to avoid the ACM. They contracted not to do asbestos removal.

11. APComPower did the job safety analysis prior to commencing work to ensure that they were in a safe area.

12. APComPower walked the area with a Pacific Abatement Services employee, Mr. Ortis, the only one who knew where asbestos is. He pointed out that the work area for APComPower was asbestos-free.

13. Mr. Ortis is the person who knows where everything is out there. He has worked there for 25 years and he is the only one who knows. The problem is that his knowledge is not quite as accurate as it should be based on the fact that he does not keep any records. This is not something that APComPower knew at that time.

14. The hand-drawn map Mr. Ortis gave APComPower gave them written confirmation of what he had pointed out and told them verbally. The fact that the map had east and west reversed is a

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meaningless mistake. It did not have any impact on this, especially when Mr. Ortis had been there and walked the area and pointed it out to them.

15. I find that APComPower did take reasonable steps to make sure they did not contact asbestos. They specifically tried to stay away from asbestos and took a number of steps to try to have it confirmed by the certified asbestos removal contractor that there was no asbestos in the area. Therefore, I do not accept the Department's argument that they should have known the block material was asbestos because it had no red or green tag on it.

16. The chain of custody of the tested material fails. The block material that was placed on the welder was lost. It was never tested, and it is unknown if that block was in fact asbestos. The material that was taken out of the dumpster, a day or two later, cannot be traced back to this job nor to APComPower. There are far too many assumptions that have to be made to connect it with APComPower.

17. Mr. Ortis did not treat the material as asbestos. He did not bag it or wet it or secure the area. Mr. Ortis did nothing but go home. Since he is the certified abatement contractor, his conduct is something that APComPower could reasonably rely on.

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18. APComPower should not receive violations for not doing all the things they are not certified to do. When they called Mr. Ortis, he did not do anything about them. APComPower's reliance on Mr. Ortis and their actions were reasonable.

19. APComPower was not a certified asbestos removal contractor. They were not intending to remove asbestos. The citations that were given were for steps that a contractor would take prior to beginning an asbestos removal project if it intended to remove asbestos and knew asbestos was going to be present.

20. The citations for failing to create a negative air pressure work zone, for not having an asbestos contractor certification, for not establishing an equipment room, for not ensuring that all workers were certified, for not ensuring that ACM was removed in a wet state, and for not using full face respirators do not make sense under these facts.

21. Substantial evidence does not support the Board's finding that APComPower, Inc. had knowledge of the violative conditions. APComPower, Inc. exercised reasonable diligence to obtain an asbestos-free worksite at the Company's TransAlta steam plant in Centralia, Washington.

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22. Substantial evidence does not support the Board's finding that APComPower, Inc. was performing an asbestos abatement project because the proper chain of custody was not shown to establish the presence of asbestos containing material in the area where APComPower, Inc. employees worked.

Based upon the foregoing Findings of Fact, the Court now makes the following

II. CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this appeal.

2. As to Citation and Notice No. 31317355, APComPower did not violate WAC 296-65-030(1). Item 1-1 is vacated.

3. As to Citation and Notice No. 31317355, APComPower did not violate WAC 296-62-07712(7)(a). Item 1-2a is vacated.

4. As to Citation and Notice No. 31317355, APComPower did not violate WAC 296-62-07711(1). Item 1-2b is vacated.

5. As to Citation and Notice No. 31317355, APComPower did not violate WAC 296-62-07719(3)(b)(i). Item 1-2c is vacated.

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6. As to Citation and Notice No. 31317355, APComPower did not violate WAC 296-62-07722(3)(a). Item 1-3 is vacated.

7. As to Citation and Notice No. 31317355, APComPower did not violate WAC 296-62-07712(2)(c). Item 1-4 is vacated.

8. As to Citation and Notice No. 31317355, APComPower did not violate WAC 296-62-07719(3)(b)(iii). Item 1-5 is vacated.

9. As to Citation and Notice No. 31317355, APComPower did not violate WAC 296-62-07715(4)(a)(ii). Item 1-6 is vacated.

10. As to Citation and Notice No. 31317355, APComPower did not violate WAC 296-62-07728(1). Item 1-7 is vacated.

11. As to Citation and Notice No. 31317355, APComPower did not violate WAC 296-62-07709(3)(a)(ii). Item 1-8a is vacated.

12. As to Citation and Notice No. 31317355, APComPower did not violate WAC 296-62-07709(3)(c)(i). Item 1-8b is vacated.

13. The Board's Decision and Order should be reversed.

Based on the foregoing Findings of Fact and Conclusions of Law, the Court enters judgment as follows:

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III. JUDGMENT AND ORDER

IT IS HEREBY ORDERED AND ADJUDGED:

3.1 The Board's October 7, 2010 Decision and Order adopting the August 24, 2010 Proposed Decision & Order is incorrect and is hereby reversed and Citation and Notice No. 31373155 is vacated.

3.2 The Plaintiff is awarded, and the Respondent is ordered to pay, a statutory attorney fee of $200.00

3.3 The Plaintiff is awarded interest from the date of entry of this judgment as provided by RCW 4.56.110.

Dated this 27 day of January, 2012.

Judge James Lawler

Presented by:
EHLKE LAW OFFICES

Douglas B.M. Ehlke
DOUGLAS B.M. EHLKE
WSBA #3160
Attorney for APComPower, Inc.

Approved for Entry: to form only

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