NO. 43104-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

APCOMPOWER INC.,

Respondent,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Appellant.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

I. INTRODUCTION

The Board of Industrial Insurance Appeals (Board) affirmed the Department's citation that found APComPower, Inc., (APC) in violation of several asbestos regulations. In so doing, it correctly decided that the Department established all the facts necessary to establish APC's serious violations, including that APC knew or should have known of the violative conditions associated with the work being performed by its employees. The Board also correctly decided that APC's employees performed an asbestos project. APC's arguments to the contrary fail.

II. ARGUMENT

A. Substantial Evidence Supports The Board's Finding That APC Employees Removed Asbestos At The TransAlta Plant

1. The Cited Asbestos Regulations Apply To APC When Thermal Insulation Is Removed

APC argues that the cited regulations do not apply to it because it did not perform an "asbestos project" that was "likely" to release asbestos fibers into the air. Resp. Br. 19, 20, 22-23. APC argues that because it was assured that the scope of work did not include removing asbestos, there was not a reasonable likelihood that asbestos fibers would actually be released. Resp. Br. 20. However, the regulations neither state, nor

imply, that a project is only considered an asbestos project if the employer knew the material contained asbestos.[1]

APC's employees did, in fact, remove thermal insulation and other surfacing material that contained asbestos, or at the very least, likely contained asbestos. BR Ortis 10, 44. Presumed asbestos containing material (PACM) is thermal insulation found in a building built before 1980. WAC 296-62-07703. The removal of such material is defined as class I asbestos work, and any job that involves the completion of class I work is, as a matter of law, an asbestos project. WAC 296-62-07703; WAC 296-62-07722(3)(a). An asbestos project is one that is likely to release asbestos fibers into the air. WAC 296-62-07703. Thus, the regulations presume that asbestos fibers are likely to be released when employees remove thermal insulation.

Furthermore, there is substantial evidence that APC's employees performed work that, in fact, released asbestos fibers into the air. Three employees testified that as they removed the dry insulation, fibers were in the air. BR Ketzenberg 50; BR Fierro 66-67; BR Johnson 84-85. Given that the material removed by APC's employees was dry insulation material, viewing the facts in the light most favorable to the Department,

[1] APC also argues that the regulations cited do not provide notice to an employer of its obligations under WISHA. Resp. Br. 24. However, the regulations plainly outline an employer's responsibilities during construction activities where asbestos might be encountered. WAC 296-62.

the record permits the inference it was likely that asbestos fibers were released.

APC states that because there were no records kept, they had to rely on Mr. Ortis' memory. Resp. Br. 33-34. However, APC never requested any records, and if it had, APC would have known it could not reasonably rely solely on Mr. Ortis' memory. BR Mitchell 55; BR Ortis 12.[2] While Mr. Ortis may have been the asbestos expert at the plant, this fact in and of itself does not make reliance on his statements per se reasonable, especially given the significant amount of asbestos throughout the plant. *See Bianchi Trison Corp. v. Chao*, 409 F.3d 196, 208-09, n. 21 (3rd Cir. 2005) (court rejected the employer's argument that it was absolved of responsibility because it relied on the advice of a hired safety consultant). Instead, APC could have, and under the circumstances, should have, insisted that a good faith survey or some other testing be completed prior to commencing work. WAC 296-62-07721(2)(c)(iv)(e).

APC responds that the regulations are inapplicable and that a good faith survey or other objective verification is not required when "the owner or owner's agent is reasonably certain that asbestos will not be

[2] APC states that the Department inspector testified that he was not aware of any records an asbestos contractor must keep. Resp. Br. 34. However, he also stated that he would expect them to keep some records. BR Gore 133. In any event, this statement is irrelevant to whether APC should have obtained written confirmation that asbestos was not present because record retention is different from written confirmation from a good faith survey. WAC 296-62-07721(2)(b)(ii)(B).

disturbed." Resp. Br. 23; RCW 49.26.013(1). However, in order to have a reasonable basis for being certain that asbestos would not be disturbed, APC would have to receive objective data concerning the location of the asbestos. WAC 296-62-07709(2)(a)(iii) ("where employer has relied upon *objective* data that demonstrates that asbestos is not capable of being released . . . .") (emphasis added).[3] Here, APC relied on a job safety analysis that was generated based on an unsupported assumption that no asbestos would be present, and on Mr. Ortis' verbal statements and hand drawn map that he made based on his memory. BR Larson 4-6; BR Mitchell 55-57. In addition, the insulation was not readily visible and had not been tested for asbestos, thus, APC had no reliable information as to what its employees would encounter. BR Schreiner 65; BR Ortis 11; BR Fierro 63-64.[4] Having failed to obtain objective information of any kind, APC was not "reasonably certain" that asbestos was not present.

APC relies on *Secretary of Labor v. Duquesne Light Co.* to argue that the asbestos regulations do not apply because asbestos fibers would

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[3] APC states that the monitoring regulation cited under WAC 296-62-07709(3)(a)(ii) does not apply when there has been a "negative exposure assessment." Resp. Br. 22. It implies that the information Mr. Ortis conveyed to APC was a negative exposure assessment. Resp. Br. 23. However, there is no evidence that a negative exposure assessment was done and an assessment requires more than conveying information. WAC 296-62-07709(3)(b).

[4] APC also states that the monitoring standard does not apply when the building owner has given "information" of no asbestos in the work area. Resp. Br. 21. However, APC cites no authority for this assertion, and as discussed above, it was not given "information" upon which it could reasonably rely.

not be "ordinarily" released in the workplace. Resp. Br. 23-24 (citing *Sec'y of Labor v. Duquesne Light Co.*, Dkt. No. 79-1682, 11 BNA-OSHC 2033, 1984 WL 34880 (1984)). However, unlike in *Duquesne*, Washington regulations presume that asbestos fibers are likely to be released when the work is class I asbestos work. WAC 296-62-07722(3)(a); WAC 296-62-07703. Also, the court's decision, in *Duquesne* pertained only to monitoring and medical exam standards, and stated that reading them as a whole nothing suggested they applied to a one day operation. *Duquesne*, 1984 WL 34880 at *6. This is different from Washington's regulations because they do not suggest, as a whole, that there is a minimum acceptable exposure.[5] The asbestos regulations "applies to *all occupational exposures* to asbestos *in all industries* covered by chapter 49.17 RCW[.]" WAC 296-62-07701(1) (emphasis added). The monitoring standards apply when the employer has a work place or work operation covered by the standard. WAC 296-62-07709(2)(a).

2. The Chain Of Custody Was Adequately Established

There is substantial evidence in the record that the Board properly found that APC's employees removed material that contained asbestos. BR 46, 50, Finding of Fact (FF) 2. In the alternative, even assuming the material did not contain asbestos, there is substantial evidence that the

[5] Further, Washington's regulations may be more restrictive than its federal counterpart, 29 U.S.C. §667(c)(3).

material was presumed asbestos containing material. Therefore the cited regulations apply. WAC 296-62-07703.

APC argues that the Department cannot show a chain of custody between the tested material and the material removed by APC's employees, and thus, there is not substantial evidence of exposure to asbestos. Resp. Br. 36-41. However, the Department does not need to prove every step in the chain of custody. *See State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984) (minor discrepancies in the chain of custody go to weight, not admissibility).

The sample that was taken from the dumpster was tested by Pacific Rim Environmental. BR Galloway 18-19; BR Ortis 21. Mr. Ortis testified that he removed a sample of the insulation from a clear plastic bag in the dumpster and that sample was given to Karen Lewis. BR Ortis 20-22, 42. This sample was then tested at Pacific Rim Environmental, which tested positive for asbestos. BR Galloway 12, 18-19. A reasonable trier of fact could conclude that the sample tested by Pacific Rim was the very sample that was removed from the dumpster. Furthermore, Mr. Ortis testified that based on his experience, he knows what asbestos containing material at the plant looks like and that the block material that was removed by APC's employees contained asbestos. BR Ortis 44.

It may be reasonably inferred that the material found in the dumpster was the same material removed by APC. *See Harrison v. Whitt*, 40 Wn. App. 175, 177, 698 P.2d 87 (1985) (a decision does not rest on speculation or conjecture when it is based upon reasonable inferences drawn from circumstantial facts). Contrary to APC's suggestion (Resp. Br. 39), the Department does not need to eliminate every alternative inference from circumstantial evidence for there to be substantial evidence that the tested material was removed by APC's employees. *See Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006) (the Court of Appeals views the evidence and all reasonable inferences from the evidence in the light most favorable to the prevailing party); *Fox v. Dep't of Ret. Sys.*, 154 Wn. App. 517, 527, 225 P.3d 1018 (2009) (the Court of Appeals does not reweigh the evidence).

Here, viewing the evidence and inferences from that evidence in the light most favorable to the Department, substantial evidence shows that the bags of material found in the dumpster were removed by APC's employees. Mr. Fierro and Mr. Johnson encountered and removed block material. BR Fierro 62-65; BR Johnson 85, 92. They filled 50-60-gallon clear garbage bags with the block material and other insulation and took them to the dumpster on site. BR Fierro 66; BR Johnson 85-86. Mr. Ortis looked in those same dumpsters and found clear plastic bags of insulation

and asbestos. BR Ortis 20, 29. This is substantial evidence that the bags located in the dumpster contained the material that APC's employees had removed..

APC argues that the bags found in the dumpsters had to come from Mr. Ortis' abatement team because the team was also doing insulation work at the plant. Resp. Br 36, n. 8. However, there is no evidence that any other subcontractor was removing insulation material at the plant during the relevant time frame. Mr. Ortis did not testify that any of his workers placed any bags of insulation in the dumpster. Mr. Ortis did testify that when his team went in to start the abatement project, it discovered more material missing and went to the dumpster to see where it might be. BR Ortis 20. It can be inferred from this, that the abatement team had not started its abatement work when it discovered the bags in the dumpster. Mr. Ortis also testified that asbestos that was abated by his team was placed in a yellow containment bag, not clear plastic bags like the ones that were found in the dumpster. BR Ortis 38, 43.

Finally, Mr. Ortis testified that his team had to perform abatement around the dumpsters due to contamination from the bags. BR Ortis 29. This further strengthens the inference that the clear bags that were placed in the dumpster were not placed there by Mr. Ortis or his team. Thus,

substantial evidence supports the Board's finding that APC's employees removed asbestos. *See* BR 50; *see also* BR 42.

B. Substantial Evidence Supports That APC Had Knowledge Of The Violative Conditions

1. There Is Substantial Evidence That APC Had Constructive Knowledge Of The Violative Conditions

APC argues that it did not have either actual or constructive knowledge because it made reasonably diligent efforts to determine the location of asbestos. Resp. Br. 30, 32. A court considers several factors to determine whether an employer could have discovered a violative condition through the exercise of reasonable diligence, "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) (quoting *Kokosing Constr. Co. v. Occupational Safety & Hazard Review Comm'n*, 232 Fed. Appx. 510, 512 (6th Cir. 2007), *review denied*, 171 Wn.2d 1033 (2011)). Unless an employer takes the steps required by the applicable regulations to determine if a hazard is present, the employer has not exercised reasonable diligence. *Id.*

Here, APC did not appropriately inspect the work area, anticipate potential exposure to asbestos, or take other, necessary measures to

prevent an exposure to asbestos. APC relied on one person's memory as to the probable location of asbestos at the worksite. Resp. Br. 33. APC states that employers can rely on the assurances of another contractor and does not need to duplicate safety efforts. Resp. Br. 32 (citing *Sec'y of Labor v. Sasser Elec. & Mfg. Co.*, 11 O.S.H. Cas. (BNA) 2133, 1984 WL 34886 (1984)). However, this is not correct. The commission in *Sasser* stated only that there may be instances where it may not be feasible or would be wasteful to require the employer to duplicate safety efforts, not that it is the general rule. *Sasser Elec.*, 1984 WL 34886 at *3. Whether safety efforts would be duplicated does not absolve APC of its statutory obligation to provide employees with a safe and healthy work environment. *See Myers v. Little Church by the Side of the Road*, 37 Wn.2d 897, 904, 227 P.2d 165 (1951) (master has a nondelegable duty to provide a reasonably safe place to work). Also, neither APC nor any other contractor undertook any safety efforts to prevent asbestos exposure, therefore, no efforts would have been duplicated. Furthermore, in *Sasser* the cited employer's employees were not involved in the violative conditions. *Sasser Elec.*, 1984 WL 34886 at *2. Here, APC's employees were directly performing the work that was the basis of the citation, and therefore, APC was responsible for their safety. *See Bianchi Trison Corp.*, 409 F.3d 19, n.21 (distinguishing *Sasser*, noting that the hired

subcontractor performed the work, as opposed to the employer's own employees).

Ultimate responsibility for an employee's safety rests with the employer. RCW 49.17.060(1); *see Cent. of Georgia R. Co. v. Occupational Safety & Health Review Comm'n*, 576 F.2d 620, 625 (5th Cir. 1978) (court rejected the employer's argument that its contract with a subcontractor absolved it of responsibility stating, "the Act, not the contract, is the source of responsibility"); *see also Jones v. Halverson-Berg*, 69 Wn. App. 117, 124, 847 P.2d 945 (1993). In *Jones*, the court ruled that a subcontractor is responsible for safety violations when it "controls or creates a dangerous condition" and is responsible for "work areas under its control." *Jones*, 69 Wn. App. at 124. The court went on to rule that "[l]iability may arise if the subcontractor . . . is shown to have been in control of the method of performing the work." *Id.* Here, APC's employees were exposed to asbestos while performing work in areas that were within the scope of APC's contract and APC retained control for the safety precautions at the work site. BR Larson 6.

APC's reliance on Mr. Ortis' statements was not reasonable. APC knew there was asbestos throughout the plant. BR Larson 4; BR Puderbaugh 35, 40; BR Mitchell 55. Ralph Mitchell, an APC supervisor, knew asbestos had been in the relevant area and that only part

of it had been removed. BR Mitchell 56. APC knew that in most cases asbestos is only partially removed to the extent necessary for work to be performed, thus it knew asbestos could still be in the area even though it had been removed. BR Puderbaugh 43. Further, the insulation that employees would be removing was not readily visible because it was underneath tin sheeting, so APC did not ¶know what material its employees would encounter. BR Schreiner 65; BR Ortis 11; BR Fierro 63-64. APC nonetheless relied on a brief conversation with Mr. Ortis and a map that did not clearly indicate where asbestos was located. BR Mitchell 57; BR Ortis 12; BR Ex. 1. This information could not, and did not, adequately inform APC of the hazards to which its employees might be exposed.[6] In addition, the map, which was one of the few items of information APC did have, was not communicated to its employees.[7] BR Fierro 72; BR Johnson 92; BR Mitchell 61. Thus, APC did not exercise reasonable diligence.

APC argues that because the job safety analysis did not list asbestos as a hazard, it reasonably presumed that its employees would not

[6] APC states that the Department inspector testified that asking the asbestos abatement contractor if there was asbestos in the area would meet the Department's requirement. Resp. Br. 26. However, while the inspector testified an employer could do this, he did not say that an employer need only ask the abatement contractor without getting written confirmation. The inspector clearly testified that some sort of testing would need to be done to verify. BR Gore 134, 136.

[7] The record suggests that APC employees may have exceeded their scope of work, contributing to this exposure. BR Gore 144; BR Puderbaugh 27.

be exposed to it. Resp. Br. 27-28. However, there is no evidence that APC investigated whether asbestos was present when it created the job safety analysis. BR Larson 6; BR Puderbaugh 30. Rather, APC excluded asbestos as a hazard on the job safety analysis simply because its contract stated that it would not work with asbestos. BR Larson 4-5. Indeed, the job safety analysis was created before Ralph Mitchell discussed with Mr. Ortis whether asbestos was in the area where APC's employees would be working. BR Larson 6; BR Mitchell 55-56. As it was not created based on any meaningful assessment as to the presence of asbestos, it was not reasonable to rely on it.

APC also argues that it trained its employees to stop and report any unidentified material. Resp. Br. 13, 28, 48. However, it rendered any training regarding asbestos meaningless by assuring its employees that asbestos was not in the area where they would be working, and by not identifying it as a potential hazard. BR Ketzenberg 51. Furthermore, the training was not effective in practice given that the employees had nearly completed their work before they thought to ask a supervisor about an unidentified material that they had uncovered. BR Fierro 67. APC's own investigation report indicates that its employees did not follow the requirements of the asbestos control program. BR Gore 136. When one employee did question whether the material might be asbestos, APC

management told him to continue working and that he did not need to worry about encountering asbestos. BR Ketzenberg 51.

2. Substantial Evidence Supports That APC Had Actual Knowledge Of Violative Working Conditions Once It Determined That Its Employees Removed PACM

In the alternative, if this Court determines that there is not substantial evidence of constructive knowledge, there is, nonetheless, substantial evidence that APC had actual knowledge of at least some of the violative working conditions.

Specifically, once an APC employee removed the insulation and APC determined it to be PACM, APC had actual knowledge that PACM was present at its jobsite. BR Ortis 15-16; BR Puderbaugh 23. Even after APC knew of the presence of PACM, it continued to expose its employees to violative working conditions. BR Larson 10-11, 19; BR Puderbaugh 23; BR Mitchell 57; BR Gore 136. Although APC took some measures to contain the asbestos contamination, at that point it failed to take all of the measures required by the regulations, and, therefore, violated the regulations with actual knowledge of the violative working conditions. BR Larson 10-11; 19; BR Puderbaugh; BR. Mitchell 57.

Once APC discovered employees had encountered PACM, it was required to: 1) set up a regulated area to keep people out, *see* WAC 296-62-07711(1); 2) set up a decontamination area to minimize the spread of

asbestos fibers, WAC 296-62-07719(3)(b)(i); 3) use a HEPA vacuum to remove particles or debris that might contain asbestos from the workers' clothes, WAC 296-62-07719(3)(b)(iii); 4) establish a decontamination area for employees and equipment, WAC 296-62-07719(3)(b)(i). APC took none of these actions.

APC also argues that the absence of a red or green tag in the work area does not prove actual knowledge because tags were only located on piping. Resp. Br. 31. However, Mr. Ortis testified that the area should have been tagged. BR Ortis 34. He further admitted that because it was not tagged Performance Abatement Services should have removed the asbestos from the area before APC began its work. BR Ortis 34; BR Puderbaugh 42. On the question of whether tags were required in the area, the record permits an inference that the absence of a tag meant the material should have been treated as containing asbestos. *See Cantu v. Dep't of Labor & Indus.*, 168 Wn. App. 14, 21-22, 277 P.3d 685 (2012) (inferences drawn in the light most favorable to the prevailing party). In any event, this evidence is not the sole evidence of APC's knowledge.

C. The Board Made Adequate Findings

APC argues that the Board did not make an express finding of fact that APC had knowledge of the violative conditions or that the violation could result in a substantial probability of death or serious physical harm,

and because of this, the Court must vacate all of the citations that the Department issued in this case, regardless of whether the record amply shows that APC had such knowledge and that its violations created a substantial probability of death or serious physical harm. Resp. Br. 25-27. While the Board may not have entered a finding of fact that used the word "knowledge," the Board did find that:

> APC *permitted* two workers, Mr. Vincent Fierro and Mr. Randall Johnson, to undertake a Class I asbestos abatement project during a planned outage at the TransAlta power generating facility at 913 Big Hanaford Street, in Centralia, WA.

Finding of Fact (FF) 3 (emphasis added). The use of the term "permitted" shows that APC had knowledge that its employees undertook a class I asbestos project: APC cannot properly be said to have "permitted" an employee to take a given action unless it had awareness of the fact that the employee took that action. Awareness is knowledge. The Board further determined:

> APC did not have a safety program that was effective in practice. The employer did not take adequate steps to inspect, identify, and correct violations of its safety program and safety rules, and the misconduct identified on May 26, 2009, was not unforeseeable, isolated instances

FF 37. By finding that the "misconduct" that occurred on May 26, 2009 "was not unforeseeable", the Board determined that APC could have, through the exercise of reasonable diligence, become aware of the

violative working conditions. This supports that the Board found that APC had constructive knowledge of the fact that it exposed its employees to violative working conditions.

Furthermore, by finding that APC violated regulations that were designed to prevent exposure to asbestos, the Board determined that APC's violations could create substantial risk of death or serious bodily injury because, as discussed below in Part II.D, it is well-settled that asbestos exposure can result in such harm.

Even if the Board had not made the findings of fact, a finding of knowledge and substantial probability of death or serious physical harm is inherent in the Board's conclusion that APC committed a serious violation of the asbestos regulations, especially when the findings are read in the context of the accompanying written opinion that explains the basis of the proposed decision. *See* BR 20-49; *cf. Guy v. Cornwall*, 6 Wn. App. 595, 599, 494 P.2d 1371 (1972) (where the trial court has not made express finding of material fact, an appellate court may look to the court's oral opinion). Furthermore, a court may imply the necessary finding for the purposes of affirming a judgment if the evidence is not in conflict with the judgment. *Mfg. Acceptance Corp., v. Irving Gelb Wholesale Jewelers, Inc.*, 17 Wn. App. 886, 893 n.4, 565 P.2d 1235 (1977).

APC's reliance on *Austin Road* for the conclusion that the citation must be vacated for any purported defect in the findings is misplaced. Resp. Br. 6 (citing *Austin Road v. Occupational Safety & Health Review Comm'n*, 683 F.2d 905, 908 (1982)). Lack of specific findings does not warrant vacating the citation. *See Zink v. City of Mesa*, 140 Wn. App. 328, 340, 166 P.3d 738 (2007); *In re Breedlove*, 138 Wn.2d 298, 311, 979 P.2d 417. (1999). At most, the appropriate remedy would be to remand to the Board to make express findings as to those issues. Moreover, the key issue in *Austin Road* was whether substantial evidence supported the administrative law judge's findings, not whether a necessary finding of fact was missing, let alone whether the failure to enter a specific finding of fact would warrant vacating the citations. *Austin Road*, 683 F.2d at 908.

APC further argues that no finding as to a material fact constitutes a negative finding. Resp. Br. 7 (citing *McCutcheon v. Brownfield*, 2 Wn. App. 348, 467 P.2d 868 (1970)).[8] This principle is not determinative on a material issue, when ample evidence supports the findings, and the findings, as a whole, support that the purported omission of the finding was not intentional. *See Douglas Nw, Inc., v. Bill O'Brien & Sons Const., Inc.*, 64 Wn. App. 661, 682, 828 P.2d 565 (1992). In *McCutcheon*, the

[8] APC's reliance on *In re Firestorm*, 129 Wn.2d 130, 135, 916 P.2d 411(1996) (Resp. Br. 7) is also misplaced. The trial court in *Firestorm* failed to enter *any* findings. *Id.*

trial court inferred that there was a factual finding as to the plaintiff's competence from the trial court's conclusion that the defendant was guilty of undue influence. *McCutcheon*, 2 Wn. App at 355-56. Here, the Board's conclusion that APC violated the regulations can be construed as a factual finding of knowledge and death or serious physical harm and any purported omission was not intentional.

D. Substantial Evidence Supports The Board's Finding That APC's Violations Of The Asbestos Regulations Were Serious

APC argues that the Department did not establish that it committed a serious violation. Resp. Br. 46. In determining whether a violation is serious, a reviewing court must determine "the harm the regulation was intended to prevent, and if that harm is death or serious physical injury a violation of the regulation is serious *per se*." *Phelps Dodge v. OSHRC,* 725 F.2d 1237, 1240 (9th Cir. 1984); *see Lee Cook Trucking & Logging, v. Dep't of Labor & Indus.*, 109 Wn. App. 471, 479, 36 P.3d 558 (2001). Therefore, if the Department can show that the regulation was intended to prevent death or serious physical injury, any violation of those regulations is per se serious.

Here, the evidence amply supports that APC violated regulations that are designed to protect employees from asbestos exposure. As it cannot be seriously disputed that asbestos exposure can cause death or

serious bodily injury, the violations are properly classified as "serious" regardless of whether there is any evidence that any APC employees were actually exposed to harmful amounts of asbestos. *See* RCW 49.26.010; BR Gore 102, 114; *Phelps Dodge*, 725 F.2d at 1240. APC's suggestion that the Department was required to prove that its employees were actually exposed to harmful levels of asbestos as a result of its violation of the rules lacks merit.

Asbestos violations are "serious violations" under WISHA. RCW 49.26.010; *see* RCW 49.17.180(6); *In re Walkenhauer & Assoc., Inc.*, BIIA Dec. 91 W088, 1993 WL 453607, (1993) ("The Washington Administrative Codes relating to safety standards for carcinogens were not written in the abstract. The fundamental reason for their promulgation was to protect workers from serious injury or death."); *see also Anaconda Aluminum Co.*, 9 OSHC 1460, 1477, 1981 WL 18874, *20 (1981) (the Review Commission stated, "in determining whether a violation is Serious, we must look to the hazard against which the standard is intended to protect."); *see also Phelps Dodge*, 725 F.2d at 1240. Asbestos rules violations relating to mandatory work practices, therefore, may properly be classified as serious, whether or not the Department can prove exposure above the permissible exposure limit. It is important to note that the applicable asbestos regulations place the burden of proof on APC to show,

as an initial matter, that employees *are not* exposed in excess of the permissible exposure limit. The Department's regulations provide:

> For Class I asbestos work, until the employer conducts exposure monitoring and documents that employees on that job will not be exposed in excess of the [permissible exposure limit], or otherwise makes a negative exposure assessment . . . the employer shall presume that employees are exposed in excess of the [time weighted average] and excursion limit.

WAC 296-62-07709(3)(a)(ii).[9]

Moreover, a serious violation under RCW 49.17.180(6) exists when there is a showing that the violation "*could* result" in death or serious physical injury. The courts have consistently held that it is not necessary to prove substantial probability that an accident will occur; it is only necessary to prove that an accident is possible and that death or serious physical harm could result if such an accident occurred. *See, e.g.*, *Potelco v. Dep't of Labor & Indus.*, 166 Wn. App 647, 656, 272 P.3d 262 (2012) (quoting *Lee Cook Trucking*, 109 Wn. App. at 482). The likelihood that violating a regulation will actually result in serious or fatal

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[9] This same provision was promulgated by OSHA. *See* 29 C.F.R. §1926.1101(f)(2)(ii). One ALJ at the Federal Review Commission concluded:

> Where "Class I asbestos work" is being performed, until the employer demonstrates otherwise, employees are presumed to have been exposed to asbestos in amounts exceeding the permissible exposure limits under both the eight hour time-weighted average and the thirty minute "excursion" limit requirements.

Sec'y of Labor v. Odyssey Capital Group III, 1999 WL 1278190, at *2.

harm is accounted for in the penalty amount, and is irrelevant to whether the violation is serious. *See Lee Cook Trucking*, 109 Wn. App. at 481. The legislature has recognized the dangers posed by asbestos. RCW 49.26.010. Additionally, the preamble to the 1994 OSHA asbestos regulations, upon which WISHA regulations are based, gives a thorough explanation of the risks posed by airborne asbestos and the rationale for adopting mandatory work practices for asbestos removal in the construction industry. *See* 59 Fed. Reg. 40964 (August 10, 1994).

APC argues that the Department did not prove the violations were serious because the Department did not take any readings to confirm that asbestos fibers were released. Resp. Br. 23. It was unnecessary for the Department to prove that actual exposure to asbestos at harmful levels occurred in order for serious citations to be upheld. *See Lee Cook Trucking*, 109 Wn. App. at 481; *Supervalu Inc., v. Dep't of Labor & Indus.*, 158 Wn.2d 422, 434, 144 P.3d 1160 (2006) ("if the violation concerns a specific standard, it is not necessary to *even* prove that a hazard exists, just that the specific standard was violated").

In addition, when no testing has been done, thermal insulation is to be considered *presumed* asbestos containing material. WAC 296-62-07701. Moreover, class I asbestos work is automatically considered an asbestos project, which presumes that it is likely asbestos fibers will be

released. WAC 296-62-07703; WAC 296-62-07722. Thus, the fact that no testing was done to determine whether APC's employees would be exposed to levels of asbestos that are either above or below the permissible exposure limit establishes that APC was subject to the asbestos regulations.

Here, APC's employees were working in a plant that was built prior to 1980 that was known to have asbestos throughout, and removed thermal insulation without wetting it. BR Ortis 6; BR Fierro 66-67, 71. Even if the length of potential exposure to asbestos were relevant, there is, contrary to APC's argument, (Resp. Br. 48), substantial evidence that its employees experienced significantly more than one hour's worth of exposure to material containing asbestos. APC's employees removed approximately ten garbage bags full of insulation that filled at least one dumpster. BR Fierro 67; BR Ortis 24. The employees were near the end of their shift and done with their work when Mr. Fierro finally asked a supervisor about the material. BR Fierro 77. Additionally, other APC employees removed similar PACM both before and after the May 26 incident. BR Ketzenberg 49-52; BR Ortis 20.

APC's reliance on *Duquesne* that evidence of a one-time exposure to asbestos is not adequate to support a serious violation is misplaced. Resp. Br. 46-47. Here, APC's employees were working in a plant with

asbestos throughout, and the evidence supports that the exposure occurred over more than one hour. Also, WISHA's regulations do not suggest that there is any acceptable time period for exposure to asbestos, such that a violation would not be serious. As asbestos is an inherently dangerous substance and any exposure can cause death or substantial bodily harm, a violation of a regulation that is designed to prevent asbestos exposure is properly classified as serious. *See* RCW 49.26.010; *Phelps Dodge*, 725 F.2d at 1240.

APC also relies on *Usery v. Hermitage Concrete Pipe Co.*, 584 F.2d 127 (6th Cir. 1978), to argue there was only an isolated event. Resp. Br. 47. First, this is a decision under OSHA, not WISHA. Under WISHA, the legislature has declared that airborne asbestos particles are known to produce irreversible lung damage. RCW 49.26.010. Second, the court in *Usery* determined that the Commission had applied too stringent of a standard on the Secretary. *Usery*, 584 F.2d at 132. The court noted that the standard is not that serious physical harm would result, but that it could result from the violative condition. *Id*; *see also Lee Cook Trucking*, 109 Wn. App. at 480-81 (noting the *Usery* court's distinction between could and would result).[10]

[10] APC also relies on a Board decision *In re Properties 2001 Inc.*, BIIA Dkt. No. 97 W566, 199 WL 1489680 (1999). Resp. Br 49. First, this is not a Board significant decision. RCW 51.52.160. Second, the facts of this case are wholly different and thus

As there is substantial evidence that APC's employees removed either actual asbestos or presumed asbestos material, and as asbestos is likely to produce death or serious physical harm, the record amply supports the Board's conclusion that APC committed serious violations of the asbestos rules.

III. CONCLUSION

The Department asks this Court to reverse the superior court order and affirm the Board decision.

RESPECTFULLY SUBMITTED this 2 day of January 2013.

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the reasoning of the Board cannot be applied to these facts because the mitigating factors listed in the finding of fact 23 were not present here, nor were the employees removing thermal insulation, as is the case here.

43104-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES,

Appellant,

v.

APCOMPOWER INC,

Respondent.

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on the below date, I caused to be served the Reply Brief of Appellant, Department of Labor and Industries and this Certificate of Service in the below-described manner.

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