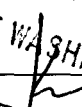


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**COURT OF APPEALS FOR DIVISION II**

**STATE OF WASHINGTON**

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APCOMPOWER INC.,

Respondent,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Appellant.

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**RESPONDENT'S BRIEF**

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## **I. PROCEEDINGS BELOW**

### **A. INDUSTRIAL APPEALS JUDGE (IAJ) PROPOSED DECISION AND ORDER (P.D.&O.)**

On October 5, 2009, the Department of Labor and Industries (Department) issued Citation and Notice No. 313173155 to APComPower, Inc (APC). APC filed a timely appeal, and a hearing was held before a Board-appointed Industrial Appeals Judge (IAJ). The IAJ issued a Proposed Decision and Order (PD&O) dated August 24, 2010, which affirmed the Citation in its entirety. On September 20, 2010, APComPower, Inc. filed a Petition For Review from the (PD&O) to the Board of Industrial Insurance Appeals.

### **B. THE BOARD OF INDUSTRIAL INSURANCE APPEALS**

The Board issued an Order Denying the Petition and adopting the PD&O without review on October 7, 2010. On November 8, 2011, APC filed a timely Notice Of Appeal.

### **C. SUPERIOR COURT JUDICIAL REVIEW AND JUDGMENT**

The Superior Court Judge vacated the citations and penalties. The Superior Court for Lewis County, Judge James Lawler, on January 13, 2012, concluded that there were missing



statutory findings in the PD&O and entered findings on those missing burden-of-proof requirements of (a) employer lack of knowledge, (b) reasonable diligence and (c) substantial probability.

Judge Lawler's Findings and Conclusions included:

"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. They contracted not to do asbestos removal. 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 Performance Abatement Services (PAS) employee, Mr. Ortis, has worked there for 25 years and **he is the only one who knew where asbestos is**. He pointed out that the work area for APComPower was asbestos-free. 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. The hand-drawn map Mr. Ortis gave APComPower gave them written confirmation of what he had pointed out and told them verbally.

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

are far too many assumptions that have to be made to connect it with APC. 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 APC could reasonably rely on. APC's reliance on Mr. Ortis and their actions were reasonable."

## **II. STATEMENT OF THE ISSUES**

1. Is the Board IAJ's Proposed Decision and Order invalid when it omits findings of fact and conclusions of law required under RCW 49.17.180(2), for (a) employer knowledge of the alleged violative act, (b) reasonable diligence efforts of the employer, and (c) any substantial probability of serious physical harm resulting from an alleged exposure event?
2. Is there substantial evidence in the record to support the missing statutory required findings and conclusions entered by the Superior Court that APComPower (APC) had no knowledge of any alleged violation, did exercise reasonable diligence, that the asbestos project standards did not apply, and that the Department failed to prove exposure to asbestos in APC's workplace.
3. Did the Department establish the elements of its prima facie case?
4. Is it reasonable for a maintenance sub-contractor who does no asbestos abatement work to rely on pre-job work area safety audits, owner approvals and the owner's exclusive agent asbestos abatement contractor's, ("the only person who knows") assurance that all asbestos has been previously removed and replaced with non-asbestos rock wool insulation in the sub-contractor employees work area?
5. Without any chain of custody or exposure measurements to tie any material the size of a sugar cube removed 2 days later from a multiple construction site dumpster to APC's work area, has the Department failed to establish substantial probability of exposure?

### **III. THE DEPARTMENT'S BURDEN OF PROOF**

When alleging a “serious” violation of a WISHA regulation, the Department bears the burden of proving both the existence of the elements of the violation itself and the existence of those additional elements of a “serious” violation enumerated in RCW 49.17.180(6). *SuperValu, Inc.*, 158 Wn. (2d) at 433 n.7 (2006); *Wash. Cedar I*, 119 Wn. App. at 914 [7] ¶21 (Div. 2, 2004). Accordingly, to establish its prima facie case in regard to a serious violation of a WISHA regulation, the Department must prove each of the following elements:

“(1) the cited standard applies; (2) the requirements of the standard were not met; (3) employees were exposed to, or had access to, the violative condition; (4) the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition; and (5) there is a substantial probability that death or serious physical harm could result from the violative condition.”

*Wash. Cedar I*, 119 Wn. App at 914 (Div. 2, 2004) (internal quotation marks omitted) (quoting *D.A. Collins Const. Co. v. Sec’y of Labor*, 117 F.3d 691, 694 (2d Cir. 1997)).

### **IV. STANDARD OF REVIEW**

Judicial review of a WISHA citation proceeds in two stages. First, the Industrial Appeals Judge’s (IAJ) findings of fact are

reviewed to determine if substantial evidence supports them. RCW 49.17.150(1); *WA Department of Labor & Industries v. Kaiser Aluminum*, 111 Wn. App. 771 (Div. 3, 2002), 19 BNA-OSHC 1862. Substantial evidence exists if the record contains sufficient evidence to persuade a fair-minded person of the truth of the declared premise. *In re Inland Foundry, Company, Inc., v. Dept. of Labor & Indus.*, 106 Wn. App. at 340, 24 P.3d 424 (Div. 3, 2001). Findings not supported by substantial evidence are rejected. Findings must support the Department's conclusions of law or will be rejected, *Danzer v. Dep't of Labor & Indus.*, 104 Wn. App. 307, 319, 16 P.3d 35 (Div. 2, 2001). Secondly, courts review the conclusions of law and statutory interpretations *de novo*. *Inland Foundry*, 106 Wn. App. at 340, 24 P.3d 424 (Div. 3, 2001). While a court grants deference to an agency's factual findings, applying of the law to a set of facts is a question of law review *de novo*. *Mader*, 149 Wn. (2d) at 470, 70 P.3d 931 (2003). See also *Wash. Cedar & Supply Co., Inc. v. State Dep't of Labor & Indus.*, 137 Wn. App. 592 (Div. 2, 2007).

As WISHA is required to be effective as the federal OSHA counterpart, Washington courts have adopted OSHA case

precedents. *Adkins v. Aluminum Company*, 110 Wn. (2d) 128, 147 (1988).

Missing findings of fact on required burden-of-proof elements in the Department's prima facie case call for citation dismissal upon appellate review. There is a lack of substantial evidence to support OSHA case decisions where missing or inadequate findings exist. See *Austin Road Company v. OSHRC*, 683 F.2d 905 BNA-OSHC 1943, (5<sup>th</sup> Cir. 1982). The Fifth Circuit observed that the absence of required findings is fatal to the validity of an administrative decision regardless of whether there may be in the record evidence to support "proper findings." F.N.4

In Federal OSHA cases, the Review Commission has been reversed where findings of "serious" citations were missing,<sup>1</sup> where the Commission did not adequately explain the basis of its conclusion, and where the evidence clearly supported a finding opposite to the one made by the Commission.<sup>2</sup>

The failure of a trial court to make an express finding on a material fact, as a general rule, requires that the fact be deemed

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<sup>1</sup> *Bethlehem Steel Corp. v. OSHRC*, 607 F.2d 1069, 1073 93d Cir. 1979).

<sup>2</sup> *Daniel Int'l Corp. v. OSHRC*, 683 F.2d 361 (11<sup>th</sup> Cir.1982); *Ray Evers Welding Co. v. OSHRC*, 625 F.2d 726 (6<sup>th</sup> Cir. 1980); *Brennan v. Smoke-Craft, Inc.*, 530 F.2d 843 (9<sup>th</sup> Cir.1976).

to have been found against the party having the burden of proof.<sup>3</sup> No finding as to a material fact constitutes a negative finding, *McCutcheon v. Brownfield*, 2 Wn. App. 348, 467 P.2d 868 (Div. 1, 1970), unless there is undisputed evidence which an appellate court can hold compels a contrary finding. *LaHue v. Keystone Inv. Co.*, 6 Wn. App. 765, 496 P.2d 343 (Div. 1, 1972). When a trial court fails to make any factual finding to support its conclusion, and the only evidence considered consists of written documents, an appellate court may, if necessary, independently review the same evidence and make the required findings. *In re Firestorm 1991*, 129 Wn. (2d) 130, 135, 916 P.2d 411 (Div. 2, 1996) (citing *Bryant v. Joseph Tree, Inc.*, 119 Wn. (2d) 210, 222, 829 P.2d 1099 (Div. 1, 1992)).

## **V. STATEMENT OF THE CASE**

### **A. APC Only Works In Asbestos-Free Areas**

APC has been a boiler maintenance sub-contractor at the Centralia steam plant since 2001. Before this APC 2009 boiler maintenance job started, APC performed a Joint Job Safety

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<sup>3</sup> *Crites v. Koch*, 49 Wn. App. 171, 176; 741 P.2d 1005 (Div. 3 1987). See also *Baillargeon v. Press*, 11 Wn. App. 59, 67, 52, P.2d 746 review denied, 84 Wn. (2d) 1010 (1974).

Analysis (JSA) of the work area with building owner TransAlta's safety review and approval. BR Larson 13, Ex. 7. This work area safety inspection JSA called for identification "of all hazards" in the job area. The 2009 outage project lasted six to eight weeks. BR<sup>4</sup> Ortis 5. This JSA was specifically reviewed and approved by "TransAlta Safety" and "APCom Safety." Ex. 7, BR Puderbaugh 28-29. Such joint JSA's are done for each major TransAlta/APC maintenance project. BR Larson 5-6. Dale Larson, APC's Construction Manager described these pre-job JSA's:

"A: Yes, they are.

Q: Do they review them?

A: They have a final review after everything is completed and they review all of the items and make any changes that they feel are appropriate or necessary.

Q: At the end do they approve it by signing off on it?

A: Yes, they do."

BR Larson 6:14-22.

The JSA lists each hazard employees might encounter and states how each hazard will be handled. The JSA for the preheater

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<sup>4</sup> The certified appeal board record is cited as "BR". Citations to the hearing and deposition transcripts will be listed as BR followed by the name of the witness and the page number of the transcript. "CP" refers to the Clerk's Papers.

area is extremely detailed and thorough. Nowhere is asbestos identified as a job hazard. That is because asbestos is supposed to be removed by TransAlta's designated asbestos abatement contractor before APC starts its work. BR Puderbaugh 30, Ortis 3. TransAlta's exclusive abatement contractor is Performance Abatement Services (PAS). BR Ortis 4, 32. TransAlta reviewed and approved the JSA without changes. BR Puderbaugh 28-30. From the start of the contract and this pre-job joint TransAlta/APCom job safety inspection phase, APC required, and was led to believe, that there was no asbestos hazard or presence in the APC work scope or job work area.

"Q. Now, in all these is there any mention of doing any asbestos work within the scope of work?

A. No.

Q. Is there any mention of asbestos being a hazard?

A. No. It was our understanding that the area was all clear and asbestos was not an issue.

Q. Is that a requirement that the area has to be all clear?

A. Yes. That's part of our maintenance agreement.

Q. If TransAlta wants to make any changes to this, they have the opportunity to do that?

A. Yes.

Q. They didn't make any changes?

A. No."

BR Puderbaugh 30:14-26.

APC does not abate asbestos. BR Puderbaugh 30,31, Larson 12, Ortis 26:11-13. APC contracted with TransAlta to not perform



any asbestos abatement work whatsoever. (Ex. No. 4, Section A 15 (jv)).

#### **B. APC ASSURED THAT THERE WAS NO ASBESTOS BETWEEN THE AIR PREHEATERS**

In addition to the pre-job JSA safety inspections, APC's Foreman, Ralph Mitchell, specifically had TransAlta's designated asbestos removal contractor, PAS, check the area to be worked by APC for asbestos. He was told all asbestos had been removed from APC's work area in-between the preheaters. Ortis 12:22-24..

PAS's two Department-certified abatement asbestos specialists (operator K. Ortis and supervisor S. Gaffety) also drew APC a map which confirmed there was no asbestos in the work area and APC relied on that. BR Mitchell, 57, and Ex. 1. The Department in its Brief, at page 6 admits that **"Mr. Ortis further indicated that the asbestos in the area between pre-heaters 11 and 12, which was the area where employees would be working, had been removed."** BR Ortis 12, 37. (emphasis supplied)

#### **C. THE MAY 25, 2009 INCIDENT**

The appealed citations are all based upon an unexpected, single date, and event at the end of the day work shift, at 4:30p.m.,

on May 25, 2009.<sup>5</sup> The ductwork structure insulation between preheaters 11 and 12 was not in plain view. BR Larson 16. It was hidden under sheet metal. BR Larson 16, Ortis 11.

Behind the sheet metal, non-asbestos rock wool insulation, and attached to the chicken wire Mr. Fierro and Mr. Johnson discovered some pieces of 12" by 12" by 3" thick "gray cotton looking" material. BR Johnson 85,91 and Fierro 66:6. Both Mr. Fierro and Mr. Johnson wore half-face respirators with purple HEPA filters and full Tyvek uniforms to protect them against dust exposure. BR Fierro 74:11-25, Johnson 88:8-18.

Up to that time, Mr. Johnson and Mr. Fierro had removed only (recognized non-asbestos) rock wool, described as a greenish or gray wool type insulation which had "different textures and colors." BR Johnson 85: 6-8. After removal of sheet metal and the rock wool insulation they came upon some chicken wire. When they pulled on it, two or three pieces of gray block material attached to the chicken wire came out with it. BR Johnson 85. Randy

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<sup>5</sup> The citation reference to the work on the 7<sup>th</sup> and/or 7 ½ level refers only to the May 25, 2009 day shift work of Vince Fierro and Randall Johnson who were "working alone" in the "center" between the two preheaters. BR Puderbaugh 38. The Board's IAJ similarly limited his P.D.&O. Findings and Conclusions to May 25, 2009.

Johnson who had himself been a *certified asbestos worker for 5 previous years for other employers*, (BR Johnson 93:8-9) *described that the block material looked like the same type of rock wool insulation they had been removing that day. BR Johnson 91:16-21. When asked if the unknown gray material resembled any of the asbestos containing material that he had seen as an asbestos worker, Mr. Johnson replied: "No, not really." BR Johnson, 93:12-16.*

One piece they removed was placed on top of a welding machine and was pointed out to their supervisor and within moments to Mr. Ortis. Mr. Ortis gave 2 versions of who put that piece into a clear plastic bag: first, one of his unnamed PAS certified asbestos workers and later he said his Supervisor Scott Gaffety, put it into a clear plastic garbage bag just like the two APC workers were using for the rock wool. BR Ortis 16:13-15. ("It was just a regular bag.") Mr. Ortis also claimed that the clear plastic bag used by his unnamed coworker to bag the piece of material was put in a yellow plastic asbestos bag but no yellow bag was ever seen on the 7<sup>th</sup> floor preheater area or during any discussion held when Mr. Ortis was present. BR Puderbaugh 26. And no yellow asbestos bags were ever seen or noted by Mr. Ortis himself

in either of the only two dumpsters on site used by PAS for its asbestos insulation removal -- only clear plastic bags were seen. BR 20, 21, 23, 24. The piece of block on top of the welding machine of which Mr. Ortis took possession, was never seen again. "It is unlikely that a sample from that particular piece of insulation was ever analyzed." (IAJ's Proposed Decision, page 23 at line 11). The unidentified 3 inch gray block material was closer in width to the gray non-asbestos rock wool insulation (2 to 3 inch width) than to block asbestos (5 inches thick) BR Fierro 66:6, BR Ortis 24:14-16.

Through orientation and training on each project, through daily JSA hazard assessment and personal protective equipment instructions and through constant instruction on its safety rules and policies, APC trained its workers to stop and report any unidentified material to their supervisor. Puderbaugh 32, 35-37.

The Department's own witness, Keith Ortis, of PAS who is, responsible for **all** asbestos abatement service at this TransAlta plant site testified:

"Q. Okay. But you abated any asbestos in the middle; is that correct?

A. **Yes.**" BR Ortis 37. (emphasis added).

Mr. Ortis also assured APC that all asbestos block material had been removed in-between preheaters 11 and 12. BR Ortis 12.

Mr. Ortis testified:

“Q. Now... APC is not an asbestos contractor, right, as far as you know?

A. Right.

Q. And as far as you know they weren't there to do any asbestos work; is that right?

A. Right.

Q. Okay. As part of your job was it... well, was it part of your job to talk to APCom about where the asbestos was that they needed to watch out for in the facility as they were doing their work?

A. I believe it is part of my job since **I have the knowledge of asbestos, the only person on-site.**

May 17, 2010, BR Page 9, lines 2-13. (Emphasis added).

Q. PGC Contractor working for NAES. And PGC is made up of Performance Contracting, Inc., that's the company you work for?

A. Yes.

Q. And what does it do?

A. Insulation.

Q. It puts –

A. Installs installation

Q. Okay. Installs insulation. Performance Abatement Services does what?

A. They remove insulation.

Q. Remove. But you work for the installing insulation company?

A. Yes.

Q. But you get involved in the removal as well?

A. Yes. I can work for both companies. I get a check from either one.

Q. Okay. And you have been out there 25 years full time?

A. Yes.

Q. So any asbestos that's been abated in the last 25 years you have been involved in?

A. Yes.

May 17, 2010, BR page 32, lines 2-22 (emphasis added).

Q. So when they... when your company goes in and removes

asbestos and replaces it with non-asbestos insulation there is not a record kept of where the asbestos insulation is and isn't?

A. No.

Q. So do the people have to rely on your memory?

A. Yes.

Q. So they have to come to you to get, to find out where it is and isn't?

A. Yes."

May 17, 2010, BR page 33, lines 1-10 (emphasis added)

Mr. Ortis' further testified:

"Q. So it sounds like by coming to you he did the right thing to find out where there's asbestos, am I correct?

A. Yes."

BR Ortis 33:23-25.

As he does on every morning, every job, on Monday May 25, 2009, the day shift foreman, Larry Schreiner, wrote up his daily JSA and held a safety meeting on it with the two laborers (Mr. Fierro and Mr. Johnson) and he required them to wear protective Tyvek white suits, respirators, gloves and safety glasses. BR Schreiner, 64-65.

At 4:00p.m. near the end of the shift, they found some pieces of 12" by 12" by 2' or 3" block material behind the sheet metal, non-asbestos rock wool insulation, and chicken wire. BR Fierro 66:6. The asbestos insulation that Ortis testified had been on the preheaters was 5 inch block. Ortis 10.9.

The two employees saw their supervisor, Ralph Mitchell, and asked him what the material was. (Fierro 67:18-19). Mr. Mitchell told them to stop work. They did stop work immediately. BR Fierro 67,

Johnson 87. Keith Ortis, Larry Schreiner and Kersandra Puderbaugh were called. BR Mitchell 58:12-13; Puderbaugh 22:24-26.

After the 4:00 p.m. discussion with Mr. Ortis, he did nothing and left the scene to go home. PAS's Ortis and his supervisor Gaffety simply left the area and went home. BR Puderbaugh 48. When Mr. Ortis took no asbestos abatement preventative measures on May 25, Safety Coordinator K. Puderbaugh and Larry Schreiner barricaded and red taped the entire area so no one else would come into the area. BR Johnson 87, Puderbaugh 25-26 and Schreiner 66. Ms. Puderbaugh and Mr. Schreiner had Mr. Fierro and Mr. Johnson place their tools, respirators, PPE equipment and Tyvek suites and boots into a plastic bag and sealed it. BR Puderbaugh 23, Fierro 69.

"Q. When you got out of there, where was Vince Fierro in relation to the air preheaters?

A. He was in the middle of No. 11 and 12.

Q. Mr. Ortis yesterday testified that the -- that he had the two laborers take off their Tyveks and take off their boots and put those and the piece of material in a garbage bag, which was then put into a yellow asbestos bag. Did that happen?

A. No. in fact, I was actually kind of shocked that he really didn't do anything. It's always been my understanding at the plant that if we run into a situation where there's an asbestos release or we are not sure what plant policy is, to contact Keith

Ortis and he handles it. So when someone is exposed from our work force, they are the abatement contractor. They are the ones that are supposed to decontaminate our guys, barricade the area, notify the proper personnel, as far as TransAlta's supervisors, of the situations. None of that was done." BR Puderbaugh 25-26.

APC's Safety Coordinator talked with their night shift supervision to make certain no further APC work was done between the preheaters or in the red danger taped off area. BR Puderbaugh 23. No May 25<sup>th</sup> night shift employees of APC worked in the red taped barricaded area and no APC workers removed any further insulation there. BR Puderbaugh 48.

#### **D. THE PIECE FROM THE WORK AREA IS TAKEN BY PAS AND NOT SEEN AGAIN**

Mr. Ortis gave two versions of who put that piece on top of the welding machine into a clear bag: first, one of his unnamed PAS certified asbestos workers and later he said his Supervisor, Scott Gaffety, put it into a clear plastic garbage bag just like the two APC were using for the rock wool. BR Ortis 16:13-15. ("It was just a regular bag.") Mr. Ortis claimed that the clear plastic bag used by his unnamed coworker to bag the piece of material was put in a yellow plastic asbestos bag but no yellow bag was ever seen on the



7<sup>th</sup> floor preheater area during the discussion held when Mr. Ortis was present. BR Puderbaugh 26. And no yellow asbestos bags were noted by Mr. Ortis in either of the only two dumpsters on site used by PAS for its asbestos insulation removal – only clear plastic bags were seen. BR Ortis 20, 21, 23, 24.

On May 27, 2009, two days later, Pacific Rim Environmental took samples of undisturbed insulation from around the preheaters and had the samples tested. The samples were taken from the northwest side, the northeast side, the south side and the north side. This was all outside the area the employees had worked in.

## **VI. ARGUMENT**

### **A. APC IS NOT AN “ASBESTOS ABATEMENT CONTRACTOR” WORKING ON AN “ASBESTOS PROJECT” SUBJECT TO WAC 296-65-030(1).**

#### **1. Applicable Definitions**

Respondent was cited for violating the WISHA regulation relating to asbestos abatement contractors and projects, WAC 296-65-030(1) project, but the definitions in WAC 296-65-003 which apply throughout the WAC 296-65-003 asbestos standards contains these definitions:

“Asbestos project” includes the construction, demolition, repair, remodeling, maintenance or renovation of any public or private building or structure, mechanical piping equipment or system involving the demolition, removal, encapsulation, salvage, or disposal of material or outdoor activity releasing or likely to release asbestos fibers in the air.

“Certified asbestos contractor” means any partnership, firm, association, corporation or sole proprietorship, registered under chapter 18.27 RCW, that submits a bid, or contracts to remove or encapsulate asbestos for another and is certified by the department to remove or encapsulate asbestos.

On page 24 of Appellant’s Brief, the Department argues that chapter 62 asbestos standards are different in application than chapter 65. An asbestos-free work area where admittedly all asbestos and asbestos block “had been removed” in the “area where APC’s employees would be working,” would clearly not be an “asbestos project” required for applicability of both chapters. See WAC 296-62-07703 Definitions -- “likely to release asbestos fibers into the air.”<sup>6</sup>

Neither of these threshold conditions apply to APC or to TransAlta’s non-asbestos job contract. The plain language of the forward-looking asbestos abatement contract makes it inapplicable

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<sup>6</sup> The identical probability-of-release-of-asbestos-fibers is a condition of applicability under both WAC 296-62 and WAC 296-65.

to APC or its work in job area where the steam plant's Department-certified competent asbestos abatement worker and crew supervisor (the "only person in the plant who knows") "Mr. Ortis further indicated that all the asbestos and asbestos block in the area between pre-heaters 11 and 12, which was the area where their employees would be working had been removed. BR Ortis 12, 37.

All twelve Department citations are premised upon a single inapplicable contention: "an asbestos project." Assured of an asbestos-free job work scope and area by the building owner TransAlta and its exclusive asbestos abatement contractor, PAS, there was no likelihood of asbestos fibers being released.

All items of the citation call for pre-job set up activities and equipment which relate to a planned, identified "asbestos project" (which Mr. Ortis assured was not this project.) Item 1 of the citations calls for a certified "asbestos abatement contractor" who bids and contracts to remove asbestos, which did not exist in this situation. None of this was required or even mentioned in the TransAlta/Alston JSA, in the contract, or in the description of hazards or PPE equipment required for this job. There was never any identification by TransAlta or its PAS asbestos abatement

contractor agent, Keith Ortis, that APC needed to have a Department asbestos contractor certificate (Item 1-1). Nor did Mr. Ortis, PAS, or TransAlta ever advise APC that it needed a “competent person” to stand watch over the certified workers (Item 1-7), certified asbestos abatement workers (Item 1-3) and/or supervisor. There was never any job equipment requirements for negative pressure or regulated area enclosures, or adjacent equipment room (Items 1-2a, 1-2b, 1-2c) be set up for this project. There was never any JSA or work scope which identified any asbestos hazard or PPE needed. There was never any requirement to clean clothes with a HEPA vacuum “before” any insulation removal work begun (Item 1-5) or handle any material wet (Item 1-4). There was never any requirement for a full-face respirator be supplied before work began (Item 1-6). There was never any knowledge or notice to APC that initial pre-job or daily job asbestos project monitoring (Items 1-8a and 1-8b) would be needed.

In fact, those monitoring standards do not even apply where the building owner or its designated asbestos abatement contractor has given “information” of no asbestos in the work area, as Mr. Ortis gave APC’s foreman, Ralph Mitchell.

The Department in its Superior Court Response Brief framed as an issue that all of these citations flowed from the same regulatory threshold, an “asbestos project.” All of the Board IAJ findings that were made were premised on an “asbestos abatement project.”

The initial monitoring OSHA standard, and also the Department’s WISHA regulation [WAC 296-62-07709(3)(a)(ii) cited in Item 1-8a] is based upon an asbestos project where airborne asbestos fibers are likely. The WISHA standards exempt initial monitoring when there is a “negative exposure assessment.” This exempts work areas where airborne asbestos fibers are not likely to be released.

Under a similar OSHA initial monitoring standard, the Review Commission ruled that the monitoring requirement of the asbestos standard, 29 CFR 1910.1001, is not triggered by any “genuine possibility” of release of asbestos airborne fibers. In *Secretary of Labor v. Goodyear Tire & Rubber Co.*, OSHRC Dkt. No. 13442, 5 BNA -- OSHC 1473, at 1475, the Commission established the test of applicability requires OSHA to establish that it is more likely than not that fibers were released.

There is no substantial evidence of likely airborne asbestos fiber release in this APC inspection because (a) no one took any airborne fiber readings, measurements or calculations, (b) the actual job site piece of insulation material was not tested and there is (c) no record of any pre-job asbestos monitoring or good faith survey by TransAlta or PAS, as required by WAC 296-62-07721(c), and RCW 49.26.125. None of their numerous regulatory deficiencies by TransAlta or PAS were cited by the Department.

When can owners avoid performing an asbestos inspection or good faith survey? The answer is: when “the owner or owner’s agent is reasonably certain that asbestos will not be disturbed” RCW 49.26.013(1). Mr. Ortis’s “negative exposure assessment” information that all work area asbestos and block had been removed, triggers inapplicability of WAC 296-62-07709(3)(a)(ii) and WAC 296-62-07709 (3)(c)(i).

## **2. The Duquesne Light Company OSHA Case**

In *Secretary of Labor v. Duquesne Light Company*, OSHRC Dkt. No. 79-1682, 11 BNA-OSHC 2033 (R.C. 1984), the Review Commission vacated OSHA citations because two asbestos standards based upon a threshold of the workplace being one

where asbestos fibers would not be “ordinarily” released from the work and where removal of asbestos insulation was unrelated to the contractor’s principal work. Such standards were viewed as inapplicable to a construction maintenance contractor performing turbine overhauls. Both “likely” and “ordinarily” operative terms for applying these asbestos standards depend upon the scope of work with a pre-job intent and focus.

Under the plain language of the pre-job regulations cited and the unlikely release of asbestos fibers in a work area represented as asbestos-free where all asbestos and block material has been removed, there is no “asbestos project.” With all citation Findings by the IAJ expressly premised on an “asbestos abatement project,” the regulations are inapplicable under these circumstances.

Like OSHA, the WISHA statute, RCW 49.17 is a notice statute. Regulations cannot be cited beyond their scope and must afford “fair notice” to employers of their obligations under the Act.

The “asbestos project” regulations cited are inapplicable under their plain language and the citations must be vacated.<sup>7</sup>

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<sup>7</sup> TransAlta and its asbestos abatement contractor, PAS, recognized this was not an asbestos project. Neither conducted the required good faith inspection documentation required of every building owner or agent before they even contract to have an asbestos project performed. See WAC 296-62-07721(2)(b).

**B. THERE IS NO STATUTORY REQUIRED FINDING OR  
SUBSTANTIAL EVIDENCE IN THIS RECORD OF EMPLOYER  
KNOWLEDGE OF ANY VIOLATIVE CONDITION**

**1. Hearing Officer Made No Findings Of Employer Knowledge,  
Or Reasonable Diligence Or Substantial Probability**

In the Board proceedings, no findings of fact or conclusions of law were rendered on the required Department burden-of-proof elements of management knowledge of the presence of asbestos or for any of the cited asbestos standards. Nor were any findings or conclusions made of the requisite “reasonable diligence” statutory APC and reasonable diligence efforts prior to any May 25, 2009 work by requiring an asbestos-free designated work area from the building owner and its 25-year, facility-designated asbestos expert, by conducting a joint JSA safety inspection of the area between preheaters 11 and 12 with performance abatement’s two certified asbestos workers, by daily training of its workers to recognize asbestos materials, and avoid any work or removal of any unidentifiable or suspected asbestos insulation material.

The Proposed Decision and Order below made no findings of any APC management or supervisory knowledge (actual or constructive) of the May 25, 2009 alleged violative condition of



presence of an **unknown, untested** material in an owner-designated asbestos-free work area. This is contrary to the express statutory prima facie Department burden-of-proof elements of the WISHA Act in RCW 49.17.180(6).

The Department's sole compliance officer, Mr. Gore, recognized that reasonable diligence could be contacting the owner's asbestos abatement contractor.

"Q. If they go to the owner's agent, the asbestos abatement contractor, and ask is this area clean of asbestos, or not, and the asbestos abatement contractor, the competent person says it is clean, does that satisfy the requirement?

A. That would satisfy our requirement, not for a good faith survey, but to say that this is asbestos. **Asbestos issue in this area has been addressed. There isn't any asbestos. Go ahead and do your job.**" (Emphasis added).

In relevant part, RCW 49.17.180(6) defines requirements for a "serious" violation:

"(6) For 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.”** (Emphasis added).

The IAJ did not make any findings of the RCW 49.17.180(6) three 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)

None of the IAJ’s Findings or Conclusions meet these requirements. Findings No. 3, 17, and 32 state generically that APC “permitted two workers, Mr. Vincent Fierro and Mr. Randall Johnson, to undertake a class I asbestos project” - - - but nothing could be further away from this record.

APC reasonably relied on the owner’s exclusive asbestos abatement contractor’s all-clear, all-remove no asbestos contract promise. They relied on the designation of areas as asbestos-free after inspecting the area with PAS’s Keith Ortis and Scott Gaffety. They additionally conducted a Job Safety Analysis of all hazards in

the planned work area and found no evidence of asbestos...which JSA was reviewed, signed, and verified by the site owner TransAlta's management representatives. They found no asbestos material in the walkthroughs or approved safety analysis.

They knew that all of the 5-inch white block type asbestos insulation between these preheaters previously was removed in an abatement procedure in 1999 when it was replaced with non-asbestos mineral wool insulation (also called rock wool). BR Mitchell 58-59, Ortis 11,12.

APC insisted upon asbestos-free, all-clear work areas. TransAlta and PAS representatives designated and assured APC that the area between preheaters 11 and 12 contained no asbestos. APC worked only in the designated "no-asbestos" area on May 25, 2009, between the 11 and 12 preheaters. The work area was inspected and walked before the job started by two PAS representatives and at least two APC representatives.

APC trained its experienced employees when they are hired that they were never to do any asbestos material removal or disturbance work of any kind; and if any unknown or suspicious material was encountered, they had to immediately stop work and

notify their supervisor immediately. APC never “permitted” any of its workers to violate these rules and work with asbestos.

The Department’s references to former employee Mr. Katzenberg who did not work on May 25, 2009 or with V. Fierro or R. Johnson in the area in-between the two preheaters (“they were alone”). BR Schreiner 66:21-22, are irrelevant, unsubstantiated and speculative. Mr. Katzenberg never saw any of the insulation removed by Mr. Fierro and Mr. Johnson in their 1-day work. There is no identification, testing or comparisons Mr. Katzenberg’s by the Department or TransAlta or its PAS asbestos abatement contractor. He could not identify which week he worked or how many days he worked prior to the May 25 week. BR Katzenberg 45, 48, 52. He couldn’t remember what person he talked to, or the insulation material dimensions.

APC’s Foreman, Ralph Mitchell personally observed the earlier project work of his employees and stated unequivocally that the insulation they removed was non-asbestos rock wool. BR Mitchell 59.

**2. There Is No Actual Knowledge That Any Asbestos Materials Were Removed**

No APC employee or manager knew there was any material buried underneath the sheet metal and underneath the non-asbestos rock wool material insulation. The 3 inch thick gray block material removed by Mr. Johnson and Mr. Fierro was never tested or identified as five-inch white asbestos block or as having any specific composition. There was no block material identified in the May 25<sup>th</sup> work area on the map drawn by Mr. Ortis.

None of APC's supervisors or managers had any knowledge that any unknown material might be encountered at the end of May 25<sup>th</sup> work shift. APC relied on multiple assurances that all asbestos and block material had been previously removed from APC's work area.

The Department's Brief has only 2 contentions of actual knowledge: a hand drawn map with east/west directions reversed and TransAlta's red/green labels for piping. The map confirms Mr. Ortis's statements and assurances of no asbestos existing in-between the preheaters and because it had been "removed in the area where the APC employees were going to work." Dept. Brief at pg. 6.

The Department's primary reliance on TransAlta's red and green pipe labeling system for the presence or absence of

asbestos is a red herring. According to TransAlta's own asbestos safety program, Ex. 3, second page, the only application listed "with red and/or green and blue tags" is "insulated pipng." It is nowhere referenced for any other listed types of insulation.

Moreover, it is undisputed that there are no pipes near preheaters 11 and 12. BR Ortis 9. Perhaps that's why no red or green labels ever appeared on any of the insulation or ducts in-between the preheaters, and why none were ever put on such ductwork or preheater area insulation as late as a year after May 25, 2009 when the Board hearing was held. BR Puderbaugh 42:15.

The Department claims that, since there was no red or green tag on the area, APC had to assume asbestos was there. That rule applies when there is no designated exclusive asbestos abater present to tell the workers whether asbestos is there or not. Mr. Ortis is the one who would put up the tags. When the APC foreman brought Mr. Ortis to the work station, and Mr. Ortis assured him it was asbestos free, that equals a green tag. APC did what it was supposed to do.

APC has successfully worked as a maintenance subcontractor at the Centralia steam for over 11e years. BR

Puderbaugh 33. From the Department's own research, APC has never been cited under the WISHA asbestos project or asbestos contractor standards; there is no evidence of any previous application of the asbestos abatement contractor standards to any of the APC years of boiler maintenance projects in the Department's WISHA inspections of APC.

### **3. There Was No Constructive Knowledge**

APC made reasonably diligent efforts to determine from TransAlta, the site owner, and from the owner's exclusive asbestos abatement contractor of 25 years that the planned work area was asbestos free, all clear, and safe to work in. APC did its own Job Safety Analysis, which the owner approved. Nothing identified any type of asbestos or any other suspicious or different material. The map showed it as clear. There is no evidence in this record of constructive knowledge.

*Reasonable Reliance:* Employees can rely on the assurances of another subcontractor, certainly a specialized one, that the other subcontractor will perform or is performing its work assignments. The employer need not duplicate safety efforts taken by the other subcontractor. See: *Sasser Electric and*

*Manufacturing Co.*, 11 BNA-OSHC 2133 (No. 82-178) (R.C. 1994).

In this case, APC received “no asbestos” assurances and a map of the safe and clean area in between preheaters 11 and 12. They even walked the area and had it “checked out” by the owner’s asbestos abatement specialists.

APC’s reliance on the assurances of the people who are required to know, and verification of an asbestos-free designated work area were both reasonable and diligent. None of the statutory requirements for a serious citation and penalty were met.

TransAlta has used a captive asbestos abatement contractor, Keith Ortis of PAS, at its Centralia plant, for the past 25 years, his work as competent asbestos person applies and transcends to all employers and employees on site. Mr. Ortis testified he is “**the only person**” who knows where asbestos insulation material is located, absent, or where it has been removed. He has been involved in the insulation and removal of insulation throughout the plant over the last 25 years.

*No Records:* At the steam plant there are no records kept of asbestos insulation locations or removal. At trial, Mr. Ortis disclosed that no records are kept of where asbestos or insulation exists in the TransAlta plant. He also testified no records are kept



of where asbestos is abated and replaced with insulation. This means that people who come to him for information on where asbestos is and is not, must rely on his memory.

The Department's Compliance Officer saw no problem with this. Mr. Gore testified:

"I am not aware of a record they are required to keep"  
and  
"I am not sure the asbestos contractor needs to keep those records." BR Gore 132.

WAC 296-62-87721 requires building owners and certified asbestos contractors to maintain and show all these types of written records to any subcontractor working onsite. He agreed that building owners are often the only and best source of asbestos information relating to their facility. BR Gore 128. Yet no citations were issued to TransAlta. BR Gore 145. Obviously the map was all that was available. Asking for any insulation location documents would have been useless because none were kept.

Mr. Ortis just went home and never took any asbestos abatement steps on May 25, 2009, although his PAS Company were solely in charge of asbestos. His May 25, 2009 lack of taking any asbestos steps at the scene is revealing: He didn't treat it as

an asbestos event. The Department did not cite PAS for not treating the event or scene as asbestos.

Finally, the Department's own Compliance Officer found no violation of the good faith survey requirement on building owner TransAlta here or of its asbestos abatement contractor. The WISHA regulation standard WAC 296-62-07721 requires building owners such as TransAlta and Department-certified asbestos abatement contractors such as Performance Abatement Services to communicate to all employers and employees on site "the presence, location, and quantity of ACM and/or PACM at the worksite."

*Only Two Dumpsters:* There were multiple contractors, subcontractors, and even asbestos abatement employees working at this same huge Centralia power plant on the same day shift. Throughout this outage period TransAlta's designated asbestos abatement contractor, PAS, had 25 insulation removal employees working under Mr. Ortis. His crew worked on May 26, 2009 on the 7<sup>th</sup> Floor preheater insulation.

Any of these hundreds and hundreds of maintenance workers on site could have removed or bagged and dumped materials into either or both of the two dumpsters. And only one of

the guesstimated 25 bags in the dumpsters containing insulation materials was even sampled, and then...only one piece.

That's a 1 in 25 chance of even finding the right bag.<sup>8</sup>

What was analyzed came from an unidentified source – a sugar cube bag taken from a dumpster used by the real asbestos abatement company (PAS) and retrieved by Mr. Ortis, an employee of that company. Both dumpsters were used by Mr. Ortis' company, and, he said, two dumpsters were not enough. TR of May 17, 2010, BR Ortis at page 20, lines 14-15. "The record is not clear about the contents of the bags Mr. Ortis found in each of the dumpsters." (IAJ's Proposed Decision at page 7, lines 29-30).

*No Chain Of Custody:* Chain of custody is a critically important requirement when two dumpsters fill up from multiple disposals, materials, contractors and garbage bags.<sup>9</sup> It has been a dispositive factor in WISHA asbestos cases in a WISHA dumpster sample case.

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<sup>8</sup> Since APC does no asbestos work, they could not have been the ones to throw asbestos containing materials in the dumpster. Of the 25 clear bags and no yellow asbestos bags it had to be from the work done by PAS on May 26, 2009 involving insulation in various areas on the 7<sup>th</sup> floor. All 25 bags were clear.

<sup>9</sup> Neither the Department's two cases cited on p. 22 discuss or have anything to do with chain of custody issues. Mowat 148 Wn. App. 920, 201 P.3d 407, was a noise earplug case.

IAJ Board Judge Wayne Araki presided in many WISHA asbestos standard citation appeals and wrote one which became a Significant Board Decision in the Board on the asbestos standard. In another of his early WISHA asbestos standard cases, Judge Araki took expert testimony and exhaustively reviewed the scientific, reliability, and citation validity and the need for a chain of custody to be established for suspected asbestos materials removed from a worksite. See *In re: Jeld-Wen of Everett, Inc.*, Dkt. No. 88 W144 (1990) (copy attached) in CP pg. 119-137.

“The Department has the burden of establishing all of the elements necessary to prove a violation of the cited standards. WAC 296-12-155(2)(b). In this case, they have been unable to sustain their burden of proof with regard to the serious violations were alleged. This failure occurs because of the problems with the evidence which they procured from the waste pile.

The crux of the Department’s argument is that the material found near the waste dumpster on the day of the inspection was the cement asbestos board that was removed in the lunchroom remodel project in December, 1991. The Department had been unable to convince me that this sample taken from the waste pile came from that wall. **There was no testimony with which this link could be made. Without that link the Department cannot show that the wall removed from the lunchroom contained asbestos and, therefore, their allegations in the serious violations are without merit.**

WISHA says it is not necessary for the Department to establish a chain of custody because “There is no evidence that any other subcontractor was removing insulation in the plant.”

But there was evidence. Mr. Ortis testified that “when I need additional people I call PCI and PAS and that’s how I get my employees, and I probably had 25 people at that time...because it was an outage” BR Ortis 15.

He did not know when APC employees began their work around the preheaters because “I was working other areas.” BR Ortis 13.

Mr. Ortis was in charge of taking off and putting on insulation, and he had 25 people working under him on the outage. Everything went into two dumpsters, BR Ortis 20. Mr. Ortis took a piece of insulation the size of a sugar cube out of one bag in one of those dumpsters and it tested positive for asbestos. The Department says we should draw the inference from this “circumstantial evidence” that the two APC employees, not one of the 25 insulation removal employees under Mr. Ortis, must have put it in the dumpster.

Circumstantial evidence can certainly be as good as direct evidence. But the circumstantial evidence has to show that APC

employees put bags in the dumpster and that no one else did. The Department has to exclude the other possibilities before it can say that those bags were full of insulation that APC removed. The two dumpsters contained 25 large bags of insulation – probably much more than the two APC employees could fill in the course of a shift. In addition, Mr. Ortis took possession of the piece on the welding machine and said it was first put into a clear plastic bag which has been lost.

The Department's Statement of the Issues: No. 1 admits the weakness of its "circumstantial evidence." It says, "the evidence shows that APC employees removed at least one 50-60 gallon garbage bag." "At least one" cannot be stretched to cover the 25 clear only plastic bags in two dumpsters used at the steam plant for all contractors that Mr. Ortis testified to, BR Ortis 24. So the rest of those bags must have come from Mr. Ortis' 25 asbestos abaters.

With just two common dumpsters and an asbestos abatement crew much larger than the few APC employees removing insulation, there can be no circumstantial evidence that the material tested was put there by APC.

The Department cites *Harrison v. Whitt*, Brief p. 9, saying that substantial evidence supports that APC's employees were

exposed to asbestos “because a reasonable inference exists that can be drawn from circumstantial facts.”<sup>10</sup>

The Appeals Court in *Harrison* then went on to examine the facts and exclude other explanations. It concluded that one crop duster caused the damage because the other crop duster could not have. Here the Department makes the bald statement that, “There is no evidence that any other subcontractor was removing insulation in the plant.” (Brief p. 23). The Department never asked its witness, Mr. Ortis, if other work was going on. Mr. Ortis did not testify that no other work was going on. The burden is on the Department to prove that no other insulation removal was going on, yet on May 26, 2009 PAS performed insulation removal obviously in clear plastic bags which were the only ones seen in both dumpsters. The presence of 25 asbestos abaters working for Mr. Ortis makes it clear that other insulation work was happening. Those 25 asbestos workers must not have used yellow asbestos bags for disposal on May 26, the very next day, as none were seen

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<sup>10</sup> The complete quote from the case says, “A verdict cannot be based on mere theory or speculation,...but it does not rest on speculation or conjecture where the verdict is based upon reasonable inferences drawn from circumstantial facts.”

in the dumpsters when Mr. Ortis crawled in on May 27 -- the date of the dumpster sample.

For any dumpster sample to be valid, it should have been taken by the technician. This sugar cube was allegedly taken from an unknown source bag in an unknown dumpster by Mr. Ortis who said he gave it to Karen Lewis. Interestingly in Ex. 9, the lab reports, Karen Lewis is never mentioned nor is Mr. Ortis. The one dumpster sample has a sample date of May 27<sup>th</sup>, 2009 by Jason Hardy, Ex. 15. Neither Karen or Jason testified. The sample was taken from one of PAS's asbestos material dumpsters. See P.D.&O. and it was taken a day after PAS did insulation removal. But the technician did not take the sample. Mr. Ortis climbed into the dumpster on May 27, 2009 and came out with a piece he handed to the technician. BR Ortis 22-23. If indeed he did get it out of a bag, there is no assurance that it was an APC bag. It could have come from anywhere.

There was one piece of insulation that might have settled the issue if it had been tested. That was the piece that Vince Fierro asked Mr. Ortis to look at. Mr. Fierro was standing in the center between preheaters 11 and 12. BR Fierro 15. The certified asbestos supervisor with Mr. Ortis or an unnamed PAS employee,



bagged it in a regular garbage bag and then claimed it was put into a second bag marked for asbestos but no one else saw this. BR Ortis 16. Then it disappeared. They never tested it. BR Puderbaugh 25:13-14; Gore 140; Ortis 41, and the place where Mr. Fierro stood – between the two preheaters as if he were frozen to the spot according to Mr. Ortis BR Ortis 15:22-23, – that is where Mr. Ortis said there was no asbestos.

*The Map:* APC got something better than a written narrative of where asbestos was and was not. It got a specific location map showing no asbestos where APC would be working. APC received an onsite assurance there was no asbestos there. They got this from the one person charged with knowledge. That is as good as any survey could be under the circumstances.

The Department argues at Brief pg. 17 that, if the APC citations are voided, asbestos contractors would “intentionally not become certified, so that they could remove asbestos from the job site without any possibility of receiving a WISHA citation.” The Department should be worried about certified asbestos contractors who ignore the regulations and provide assurances to companies and their employees who must rely on those assurances to work safely. If those Department-certified abatement contractors are

irresponsible, if they do not keep WISHA-required records, if they secretly depend on what the Department describes as “faulty memory” (Brief – p. 37), they endanger everyone who has to rely on them.

#### **4. Unknowns In This Record**

It is clear that the only tested material (the one-inch sized sugar cube selected somewhere from some bag) came from PAS wore and utilized dumpster #1. See the test report, Ex. 15, at page 229 – “out of dumpster #1.” Finding one small piece of asbestos in their own asbestos work dumpster # 1 is not substantial evidence of asbestos removal by APC. Where that sugar cube came from or when or by whom... all remains unknown.

The following evidence is missing from this record:

- a. What the composition of the untested, unpreserved, two to three inch thickness material Mr. Johnson and Mr. Fierro discovered on May 25, 2009, attached under the chicken wire and under the sheet metal and mineral wool;
- b. Where the sugar cube sized sample from a garbage bag, from an unknown dumpster, came from on May 27, 2009;

- c. Who or when the sugar cube sized sample was put in the dumpster; and
- d. Chain of custody for any material encountered by Mr. Fierro or Mr. Johnson on May 25, 2009, and the sugar cube sized dumpster sample

**5. APC Made Every Reasonably Diligent Effort to Require an Asbestos-Free Work Area Before Starting Any Work Between The Preheaters**

A dispositive issue, is whether APC exercised reasonable diligence in relying upon Mr. Ortis, along with APC's work area JSA with the building owner's approval of the absence of any asbestos hazards. *Secretary of Labor v. Duquesne Light Co.*,<sup>11</sup> describes that a mere telephone call to the contractor who had removed the asbestos insulation and installed the replacement insulation "would have sufficed." APC exercised much more diligence here.

APC contractually required an asbestos-free work area. They contractually obtained the owner's promise that all areas of asbestos were identified and did not include where APC was allowed to work. They performed a detailed Job Safety Analysis (JSA) to any hazards in the work area did not include asbestos.

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<sup>11</sup> 11 BNA OSHC 2033, at 2037.

They obtained TransAlta's agreement that all areas had to be all-clear and free of any asbestos materials. BR Puderbaugh 30-31. The area was walked with two certified asbestos abatement representatives from PAS, and they 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., BR Ortis, 8-13. APC 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. BR Ortis, 2-11, 22-24.

Mr. Ortis mapped and described (Exhibit 1) the only asbestos areas as from 11 preheater south and from 12 preheater North. There was no work done by APC employees Mr. Johnson Mr. Fierro in either asbestos area. Mr. Ortis' map did not identify "block" type material anywhere. Mr. Ortis identified the Centralia plant's historical asbestos insulation as five inches thick block. BR

Ortis, 10, lines 9-10.<sup>12</sup>

The inspector conceded that asbestos issues had been “addressed” satisfactory to WISHA by APC before starting this work. BR Gore, 134, 9-26.

### **C. ISOLATED EXPOSURE IS NOT A “SUBSTANTIAL” PROBABILITY OF SERIOUS INJURY**

#### **1. The One-Hour Or Less Alleged May 25, 2009 Exposure Did Not Create A Substantial Probability of Death Or Serious Physical Harm**

There is no substantial evidence that the untested material was asbestos. The gray block material described by APC employee, Randy Johnson, described as attached behind the behind the chicken wire, underneath the rock wool insulation, metal chicken wire on May 25, 2009, looked like the same composition as the (non-asbestos) rock wool replacement insulation they had been removing throughout that day. BR Johnson 91 (**“It was the same.”**)

In the OSHA asbestos insulation lead case, *Secretary of Labor v. Duquesne Light Co.*, industry expert and medical testimony in a rock wool turbine maintenance insulation case, the Commission

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<sup>12</sup> The only material briefly discovered by the APC works at the end of the first shift was only two to three inches thick. BR Fierro 66:6.

noted these characteristic differences: rock wool is wooly, grayish tan in color, whereas asbestos normally was white.

The test for a serious violation is whether the violation makes possible the occurrence of an event carrying exposure with a "substantial probability of death or serious physical harm. *Bethlehem Steel Corp. v. OSHRC*, 607 F.2d 1069, 1073 (3d Cir. 1979). The level and duration of exposure to asbestos is highly relevant to determining whether the "isolated event" i.e., the asbestos exposure that could occur and there must be finding in the record. See *Usery v. Hermitage Concrete Pipe Co.*, 584 F.2d 127, 131-33 (6<sup>th</sup> Cir. 1978) (rejecting the Secretary's proposed citation concept that, because silicosis is a serious disease, any exposure to silica dust exceeding permissible amounts is per se a serious violation); *Sec'y of Labor v. Duquesne Light Co.*, 11 BNA OSHC 2033 (O.S.H.R.C. 1984)<sup>13</sup> (holding that one-time isolated exposure to asbestos is not a serious violation unless the Secretary makes an additional showing that the particular isolated incidence of exposure

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<sup>13</sup> 11 BNA-OSHC 2033 (R.C. 1984) 2035.  
In OSHA, see 29 U.S.C. § 666(k); in WISHA, see RCW 49.17.180(6).

carried a substantial probability of causing disease).<sup>14</sup>

This was a 1 hour or less isolated exposure to the untested, unidentified material. The end of the day shift was 4:30p.m. At 4:00p.m. when the two employees questioned a piece of block material placed on top of a welding machine on the 7<sup>th</sup> floor to their foreman, Randy Mitchell, who immediately stopped all work of the two APC employees and called PAS' Keith Ortis and Kersandra Puderbaugh who came to the 7<sup>th</sup> floor area in the center between the two preheaters. BR Puderbaugh 25, Ortis 17:7-9. The two employees stopped work and as Mr. Johnson testified, never worked on or saw that gray insulation material ever again or before this May 25<sup>th</sup>, 2009 day. BR Johnson 89-90, Fierro 73:16-21.

APC's two managers red taped the area and Ms. Puderbaugh spoke directly with APC's night shift supervisor to assure no APC workers entered or worked in the tape barricaded area. None did. APC's policy, employee training and procedure worked. BR Puderbaugh 24, 44, 46

<sup>14</sup> The Department's compliance officer has been "serious" on the same rejected lack-of-seriousness. BR Gore 119:23-26.

carried a substantial probability of causing disease).<sup>14</sup>

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APC's two managers red taped the area and Ms. Puderbaugh spoke directly with APC's night shift supervisor to assure no APC workers entered or worked in the tape barricaded area. None did. APC's policy, employee training and procedures worked. BR Puderbaugh 24, 44, 48.

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<sup>14</sup> The Department's compliance officer based these citations as "serious" on the same rejected lack-of-evidence assumption: "asbestos is serious." BR Gore 119:23-26.



Under WISHA, the Board concluded that an isolated nine-hour duration over three days of potential asbestos exposure, without the use of respirators during the asbestos material removal by two employees could not create a substantial probability of death or serious physical harm or disease (Finding No. 11).

“From the limited exposure to a part-time employee of three hours a day for three consecutive days to the admitted asbestos material, removed without any PPE or WISHA asbestos removal standards being complied with, could not constitute a “serious” citation of the regulations.”

See *In Re: Properties 2001, Inc.*, BIIA Dkt. No. 97 – W566, 1999 WL 1489680 (1999)<sup>15</sup>

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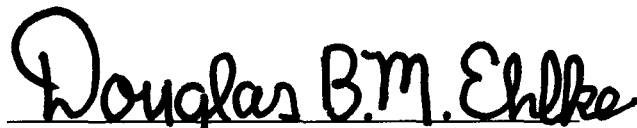
<sup>15</sup> (copy attached to Superior Court Opening Brief – Packet of Cases).

## VII. CONCLUSION

There is no substantial evidence in this record of any serious violation. The employer APC had no knowledge of any alleged violation. APC exercised the utmost reasonable diligence to avoid asbestos and there is no substantial probability of any exposure or harm here. Without these three statutory required burden-of-proof findings, the Board IAJ's Decision is invalid and contrary to the statute and case law. The Superior Court's Findings and Conclusions should be affirmed on these missing statutory requirements. Substantial evidence supports the Superior Court's Findings, Conclusion and Judgment. The invalid, inapplicable citations and penalties should all be vacated and dismissed.

RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of November, 2012.

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## **CERTIFICATE OF SERVICE**

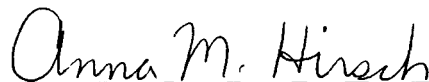
The undersigned paralegal for the Employer in this case certifies that on November 2, 2012, I caused to be served a copy of the foregoing Brief of Respondent to be delivered in the manner described below.

### **Via Same Day Legal Messenger to:**

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